

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 22-622 Caption [use short title]

Motion for: this matter and for Jacobson v. Bassett, No. 22-692, to be heard together before the same panel.

Set forth below precise, complete statement of relief sought: An order setting the instant matter (No. 22-622) and Jacobson v. Bassett, No. 22-692, for argument before the same panel. Both cases are currently scheduled for argument on October 25, 2022, but at different times and before different panels.

Roberts et al. v. Bassett et al.

MOVING PARTY: Mary T. Bassett OPPOSING PARTY: Jonthan Roberts and Charles Vavruska

Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Andrea W. Trento OPPOSING ATTORNEY: Wencong Fa

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Court- Judge/ Agency appealed from: US District Court for the Eastern District of New York (Garaufis, J.)

Please check appropriate boxes: Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL: Has this request for relief been made below? Yes No Has this relief been previously sought in this court? Yes No Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted) Has argument date of appeal been set? Yes No If yes, enter date: October 25, 2022

Signature of Moving Attorney: /s/ Andrea W. Trento Date: 9/15/22 Service by: CM/ECF Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JONATHAN ROBERTS and CHARLES
VAVRUSKA,

No. 22-622

Plaintiffs-Appellants,

-against-

MARY T. BASSETT, in her official capacity as
Acting Commissioner of the New York
Department of Health, and NEW YORK CITY
DEPARTMENT OF HEALTH AND MENTAL
HYGIENE,

**DECLARATION
IN SUPPORT OF
MOTION FOR
CASES TO BE
HEARD
TOGETHER**

Defendants-Appellees.

I, ANDREA W. TRENTO, declare under penalty of perjury, pursuant to
28 U.S.C. § 1746, that the following is true and correct:

1. I am an Assistant Solicitor General in the Office of Letitia
James, Attorney General of the State of New York. I represent defendant-
appellee Mary T. Bassett in this appeal.

2. I submit this declaration in support of defendant-appellee's
motion to have both this case and a related case, *Jacobson v. Bassett* (No.
22-692), heard by the same panel. I have been informed by the respective
counsel for the other parties that defendant-appellee the New York City

Department of Health and Mental Hygiene does not oppose this relief, while the plaintiffs-appellants do oppose this relief.

3. Presently, this case is scheduled to be heard on October 25, 2022, at 1:00 p.m. The related case, *Jacobson*, is scheduled to be heard on the same day but by a different panel, at 10:00 a.m.

4. Both this case and *Jacobson* involve a constitutional challenge to guidance issued by the New York State Department of Health (NYSDOH) on December 27, 2021. This guidance recommended criteria by which health care providers could prioritize the administration of COVID-19 treatments during an initial period of limited supply. Specifically, the guidance advised providers to allocate the treatments to those most likely to develop severe illness associated with COVID-19 and noted that one of the many risk factors associated with development of severe illness is non-white race and Hispanic ethnicity.¹

5. Plaintiffs in both cases are non-Hispanic white individuals who brought equal protection and related statutory claims based on the theory that the guidance takes improper account of race, and they moved

¹ This case also involves a challenge to similar guidance issued by the New York City Department of Health.

for a preliminary injunction seeking to enjoin NYSDOH from enforcing it. The District Court for the Eastern District of New York (Garaufis, J.) denied plaintiffs' motion and dismissed their claims for lack of standing.² Likewise, in *Jacobson*, the District Court for the Northern District of New York (D'Agostino, J.) denied the preliminary injunction motion and dismissed the plaintiff's claims for lack of standing.

6. Thus, this appeal and *Jacobson* present similar issues: (1) whether the district court correctly dismissed the complaint for lack of subject matter jurisdiction because the challenged guidance was in effect only during an initial period of short supply and plaintiffs' claims of injury are speculative; and (2) if this Court reinstates the complaint, whether it should decline to grant preliminary injunctive relief.

7. The two appeals should be heard by the same panel, a step this Court has often taken when the issues overlap. *See, e.g.*, Order, *In re Grand Jury Subpoena Dated March 20, 2019*, No. 19-1891, ECF 174 (2d Cir. Mar. 3, 2021) (granting motion for related, but separate, appeals "to

² Any differences between the State and City guidances at issue in this case were not pertinent to the district court's denial of the plaintiffs' motion and dismissal of their claims.

be heard in tandem”); *Nnebe v. Daus*, 931 F.3d 66, 79 n.16 (2d Cir. 2019) (separate cases “which raise[d] substantially identical issues ... were heard in tandem”); Order, *Belfiore v. Procter & Gamble Co.*, No. 17-1861, ECF 3 (2d Cir. June 14, 2017) (directing separate, but related appeals from same District Court opinion to “be heard in tandem with” one another); *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 224 (2d Cir. 2012) (Court “heard the appeals in tandem because of the similarity of the issues raised”); *Besser v. Walsh*, 601 F.3d 163, 169 (2d Cir. 2010) (“five appeals present[ing] substantially similar or overlapping issues” heard together), *vacated in part on other grounds on reh’g en banc sub nom. Portalatin v. Graham*, 624 F.3d 69 (2d Cir. 2010).

8. There are at least two good reasons for scheduling the appeals to be argued together before the same panel. First, doing so would conserve judicial resources. In addition, given the substantial overlap in issues, it is likely that one panel’s decision in either this case or *Jacobson* would control the outcome in the other appeal. *See Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) (a panel of the Court is bound by a decision of a prior panel). Submitting these appeals to the same panel would ensure that parties are not bound by a ruling

rendered in a related case in which they did not participate. There would be no prejudice to the plaintiffs in these cases from having a single panel decide both appeals.

9. Accordingly, this Court should order that this appeal and *Jacobson* be heard by the same panel.

Dated: New York, New York
September 15, 2022

/s/ Andrea W. Trento
ANDREA W. TRENTO
Assistant Solicitor General