
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' RESPONSE IN OPPOSITION TO APPELLEE BASSETT'S
MOTION FOR CASES TO BE HEARD TOGETHER [ECF NO. 80]**

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In March, Plaintiffs-Appellants Jonathan Roberts and Charles Vavruska filed their notice of appeal from an unfavorable judgment from the United States District Court for the Eastern District of New York. Around the same time, William Jacobson filed an appeal from an unfavorable judgment from the United States District Court for the Northern District of New York. The plaintiffs in each case listed the other in their pre-argument statement. *See Roberts v. Bassett*, 22-622, ECF No. 10-1 at 2 (2d Cir. filed Apr. 6, 2022); *Jacobson v. Bassett*, 22-692, ECF No. 6 at 2 (2d Cir. filed Apr. 12, 2022). This Court chose not to hear the cases in tandem. It instead notified the parties nearly two months ago that it was considering setting the cases before different panels. *Roberts v. Bassett*, 22-622, ECF No. 74 (2d Cir. July 25, 2022) (proposing to calendar the case before Panel A for the week of October 24); *Jacobson v. Bassett*, 22-692, ECF No. 55 (2d Cir. July 25, 2022) (proposing to calendar the case before Panel B for the week of October 24). This Court has now allotted 15 minutes per side for this case on the afternoon on October 25, 2022, and 10 minutes per side for the *Jacobson* case on the morning of October 25, 2022. Just over five weeks before argument, Defendant Bassett has moved this Court to hear the cases together before the same panel. *See Roberts v. Bassett*, 22-622, ECF No. 80 (2d Cir. filed Sept. 15, 2022). Her request should be denied.

First, hearing the cases in tandem would increase the risk of confusion. Although plaintiffs in both cases challenge the State of New York's racial

preferences in distributing COVID-19 treatments, the plaintiffs in this case also sued the City of New York for the City's race-based directives. *See Roberts*, 22-622, ECF No. 28, Appellants' Opening Br. at 10–11. Plaintiffs in this case also seek nominal damages, which are not sought by the plaintiff in *Jacobson*. *Id.* at 31. Similarly, the plaintiff in *Jacobson* raises claims that are not present in this case. *See Jacobson*, 22-692, ECF No. 26, Appellant's Opening Br. at 26–27 (contending that the state directive also violates Title VI and Section 1557 of the Affordable Care Act); *id.* at 11 (noting the district court denied Jacobson's class certification motion as moot). Elsewhere, the government acknowledges the significance of the differences. The State emphasized that nominal damages were proper only against the City, *see Roberts*, 22-622, ECF No. 55, State's Opening Br. at 31–32, and the City stressed that it was defending only the constitutionality of the City's directive. *See Roberts*, 22-622, ECF No. 53, City's Opening Br. at 39, n.10 (“We limit our discussion of the merits to the City health advisory and defer to the State Health Commissioner's brief on the constitutionality of the State guidance.”). Even with respect to the same arguments, the plaintiffs in both cases have chosen different advocates who have pressed their arguments in different ways. There is no need to exacerbate the possibility of confusion by hearing the cases in tandem here.

In addition, Defendant's case-in-chief involves an *unopposed* motion to hear cases in tandem. *See, e.g.*, Order, In re Grand Jury Subpoena Dated March 20, 2019,

No. 19-1891, ECF No. 174 (2d Cir. Mar. 3, 2021) (noting that the government did not oppose appellant's motion to hear the cases in tandem and that another appellant does not oppose so long as the appeal is not delayed). By contrast, both the plaintiff in *Jacobson* and the plaintiffs in this case oppose hearing the cases in tandem. Plaintiffs do not purport to speak for Mr. Jacobson and believe that they would be prejudiced by hearing the cases in tandem. *See supra* at 1 (discussing the possibility of confusion). For the foregoing reasons, Defendant Bassett's Motion [ECF No. 80] should be denied.

Dated: Sept. 19, 2022.

Respectfully submitted,

/s/ Wencong Fa

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CERTIFICATE OF COMPLIANCE

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Dated: Sept. 19, 2022.

/s/ Wencong Fa
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CERTIFICATE OF SERVICE

I hereby certify that on Sept. 19, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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/s/ Wencong Fa
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