No. ________

In The

Supreme Court of the United States

Jonathan Roberts and Charles Vavruska,

Petitioners,

v.

James V. McDonald, in his official capacity as Commissioner for New York State Department of Health; New York City Department of Health and Mental Hygiene,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

During the COVID-19 pandemic, the U.S. Food and Drug Administration granted emergency approval for lifesaving oral antiviral treatments. Facing a severe shortage of these treatments, the State of New York and New York City issued directives instructing medical providers to prioritize treatments to individuals on the basis of race. Petitioners are New York City residents who are disadvantaged by the directives' racial criteria.

The Second Circuit held that being disadvantaged for lifesaving treatments on account of race was not an "actual or imminent" injury. It required Petitioners to show they were denied treatment on the basis of race. Because the oral antiviral treatments must be taken within five days of symptom onset, the lower court's decision effectively shields the government's race-based directives from judicial review.

The questions presented are:

1. Whether plaintiffs' injury is imminent where it flows from a predictable course of events that results from the defendant's conduct.

2. Whether the Second Circuit's ruling conflicts with *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993), which holds that the "injury in fact in an equal protection case" involving racial discrimination "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."

Parties to the Proceedings

Petitioners are Jonathan Roberts and Charles Vavruska.

Respondents are James V. McDonald, in his official capacity as Commissioner, New York State Department of Health; and the Department of Health and Mental Hygiene of the City of New York. Pursuant to Supreme Court Rule 35.3, James V. McDonald is substituted for former Commissioner Mary T. Bassett, who was a Defendant-Appellee in the court below.

Related Proceedings

United States Court of Appeals for the Second Circuit: *Roberts v. Bassett*, 22-622, 2022 WL 16936210 (Nov. 15, 2022).

United States District Court for the Eastern District of New York: *Roberts v. Bassett*, 22-cv-710, 2022 WL 785167 (Mar. 15, 2022).

Table of Contents

Questions Presented i
Parties to the Proceedings ii
Related Proceedings ii
Table of Authorities vi
Petition for a Writ of Certiorari 1
Opinions Below 1
Statement of Jurisdiction 1
Constitutional Provision and Directives At Issue 1
Introduction 1
Statement of the Case 4
A. The Government's Race-Based Directives for Allocating COVID-19 Treatments 4
i. The Omicron Variant and Severe Shortage of COVID-19 Treatments 4
ii. Respondents' Race-Based Directives for Allocating COVID-19 Treatments 6
B. Petitioners Jonathan Roberts and Charles Vavruska 8
C. Proceedings Below 9
Reasons for Granting the Petition 13
I. The Second Circuit Diverges From Three Other Circuits on Whether a Plaintiff's Injury Is Imminent Where It Flows From a Predictable Course of Events That Results From Defendant's Conduct 13
II. The Second Circuit's Decision Is Inconsistent with This Court's Precedents 17

A. Plaintiffs Suffer an Imminent Injury Where the Injury Follows from a Predictable Chain of Events 17

B. Plaintiffs Are Injured by the Imposition of a Race-Based Barrier and Not the Ultimate Denial of a Benefit 19

III. This Case Presents a Recurring Issue of Nationwide Importance 21

Conclusion 24

Appendix

Opinion of Court of Appeals (Nov. 15, 2022) 1a

Order of District Court (Mar. 15, 2022) 10a

Complaint for Declaratory and Injunctive Relief (dated Feb. 8, 2022) 35a

Exhibit A to Complaint (COVID-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Antiviral and Monoclonal Antibody Treatment Products, Dec. 27, 2021) 48a

Exhibit B to Complaint (Prioritization of Anti-SARS-CoV-2 Monoclonal Antibodies and Oral Antivirals for the Treatment of COVID-19 During Times of Resource Limitations) 57a

Exhibit C to Complaint (COVID-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Antiviral and Monoclonal Antibody Treatment Products, Dec. 27, 2021, HAN #39) 61a

Declaration of Jonathan Roberts in support of Plaintiffs' Motion for Preliminary Injunction (signed Feb. 18, 2022).. 71a

Declaration of Charles Vavruska in support of Plaintiffs' Motion for Preliminary Injunction (signed Feb. 17, 2022) 74a

Declaration of Michelle Morse in opposition to Plaintiffs' Motion for Preliminary Injunction (dated Feb. 25, 2022) 77a

Declaration of Eugene Heslin in opposition to Plaintiffs' Motion for Preliminary Injunction (dated Feb. 25, 2022) 88a

Defendant Bassett's Letter to Court (dated Mar. 4, 2022) 101a

Defendant Bassett's Letter to Court (dated Mar. 7, 2022) 103a

Table of Authorities

Page(s)

Cases

Attias v. CareFirst, Inc.,
199 F. Supp. 3d 193 (D.D.C. 2016),
reversed by 865 F.3d 620 (D.C. Cir. 2017) 15

Attias v. CareFirst, Inc.,
865 F.3d 620 (D.C. Cir. 2017) 15, 17

Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289 (1979) 19

Baur v. Veneman,
352 F.3d 625 (2d Cir. 2003)...............................11

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 3, 14–18

Department of Commerce v. New York,
139 S. Ct. 2551 (2019) 3, 17, 18

FEC v. Wisconsin Right to Life,
551 U.S. 449 (2007) 19

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.,
528 U.S. 167 (2000) 19

Gratz v. Bollinger,
539 U.S. 244 (2003) 21

Grutter v. Bollinger,
539 U.S. 306 (2003) 12, 22

Hershell Gill Engineers, Inc. v. Miami-Dade County, 333 F. Supp. 2d 1305
(S.D. Fla. 2004)...21

Jacobson v. Bassett,
22-cv-692 (N.D.N.Y. Apr. 1, 2022) 12

League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 23

McCardell v. U.S. Dep't of Housing and Urban Development,
794 F.3d 510 (5th Cir. 2015) 16

MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy, 861 F.3d 40 (2d Cir. 2017).......... 13, 14

Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656 (1993) 19, 20

Parents Involved in Community Schools v. Seattle School District No. 1,
551 U.S. 701 (2007) 20, 21

Remijas v. Neiman Marcus Group,
794 F.3d 688 (7th Cir. 2015) 15, 16, 18

Sierra Club v. Jewell,
764 F.3d 1 (D.C. Cir. 2014) 14, 15

Sierra Club v. Salazar,
894 F. Supp. 2d 97 (D.D.C. 2012),
reversed by Sierra Club v. Jewell,
764 F.3d 1 (D.C. Cir. 2014) 14

Susan B. Anthony List v. Dreihaus,
573 U.S. 149 (2014) 1, 17, 19, 24

Statutes

28 U.S.C. § 1254(1) 1

Constitution

U.S. Const. amend. XIV, § 1 1

Other Authorities

Centers for Disease Control, *Potential Rapid Increase of Omicron Variant Infections in the United States* (updated Dec. 20, 2021), *available at* https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html....................................5

Emmanuel, E.J., et al., *Fair Allocation of Scarce Medical Resources in the Time of COVID-19*, 2020 N. Engl. J. Med. 2049 (Mar. 23, 2020), https://www.nejm.org/doi/full/10.1056/nejmsb2005114........................22

Galewitz, Phil, *Vermont to Give Minority Residents Preference for COVID Vaccines*, Scientific American (Apr. 6, 2021) 23

NYC Health, 2022 Health Advisory #28: Prescribe COVID-19 Therapeutics to Prevent Severe Disease, Hospitalization, and Death This Winter (Nov. 4. 2022), https://www.nyc.gov/assets/doh/downloa ds/pdf/han/ advisory/2022/prescribe-covid-19-therapeutics-this-winter.pdf 23

NYC Health, *COVID-19 Data: Trends and Tools, Long-term Trends, cases by day*, *available at* https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page (last visited Feb. 7, 2023) 5

NYC Health, *Omicron Variant: NYC Report for January 13, 2022*, *available at* https://www1.nyc.gov/assets/doh/downloads/pdf/covid/omicronvariant-report-jan-13-22.pdf 5

Utah Dep't of Health, *UDOH announces changes to risk assessment process for accessing scarce COVID-19 treatments* (Jan. 21, 2022) 22

Wash. Dep't of Health, *Interim-DOH Guidance on Prioritization for Use of AntiSARS-CoV-2 Monoclonal Antibodies* (Apr. 18, 2022) 22

Petition for a Writ of Certiorari

Petitioners Jonathan Roberts and Charles Vavruska respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The unpublished decision of the court of appeals is included in Petitioners' Appendix (App.) at 1a. The unpublished decision of the district court is included in App. 10a.

Statement of Jurisdiction

The judgment of the court of appeals was entered on November 15, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provision and Directives At Issue

The Fourteenth Amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The relevant state and city directives are reproduced in the Petitioners' Appendix. *See* App. at 48a–71a.

Introduction

Federal courts have a "virtually unflagging" duty to hear and decide cases properly before them—and that duty can hardly be more important than when it concerns access to lifesaving medical treatment. *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 167 (2014). Here, both the City and State of New York

believe that restricting access to COVID-19 treatment on the basis of race is necessary to ensure proper allocation of the drugs' supply. Yet the lower court's ruling prevents plaintiffs from challenging that restriction until they first contract COVID-19, are denied treatment because of the government's race-based criteria, and return to court in the five-day interval in which the treatments must be taken. Of course, during that narrow window, someone may have recovered, fallen extremely ill, or even died. That cannot be what Article III requires.

Respondents issued the directives during an unforeseen explosion of reported COVID-19 cases in December 2021—the largest during the pandemic. That is when the FDA granted Emergency Use Authorization for two highly promising oral antivirals (Paxlovid and Molnupiravir) that must be taken within five days of symptom onset. The directives note a severe shortage in the antiviral treatments and instruct medical providers to use racial preferences to prioritize patients. Medical providers adhering to the directives allocate treatment based on the number of risk factors each patient possesses. As relevant here, non-white race or Hispanic/Latino ethnicity is considered its own independent risk factor so that individuals who are non-white or Hispanic/Latino receive a preference for treatment over otherwise identically situated individuals who, like Petitioners, are white and non-Hispanic/Latino.

Faced with burgeoning COVID-19 cases, an acknowledged supply shortage of effective oral antiviral treatments, a compressed timeline for taking the treatments, and the facially discriminatory criteria contained in the directives, Petitioners filed

suit in federal court. The district court dismissed the case for lack of jurisdiction, and the Second Circuit affirmed solely on its belief that Petitioners' injury was not "actual or imminent" for purposes of Article III standing. The Second Circuit suggested that Petitioners must await a host of other events—including being denied COVID-19 treatments by a provider who is doing so in adherence to the directives—before their injury would become imminent. Judge Cabranes separately indicated his view that the "government 'guidance' effectively directing health-care providers to prioritize the treatment of patients based on race or ethnicity may indeed present portentous legal issues if challenged by plaintiffs with standing." *See* App. 9a.

The Second Circuit's decision in this case clashes with decisions from the D.C. Circuit, the Fifth Circuit, and the Seventh Circuit. Those circuit courts have opened courthouse doors to plaintiffs suffering injuries that are imminent because they may arise from a predictable chain of events. The Second Circuit in this case reached the opposite conclusion.

The Second Circuit's decision departs from this Court's precedents. This Court has held that plaintiffs do not have standing where their injuries stem from a long and extremely *speculative* chain of contingent events. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410–15 (2013). Yet the mere existence of contingent events does not make an injury any less imminent—particularly where, as here, third parties are coerced by government directive. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). The Second Circuit's decision also undermines this Court's precedents requiring federal courts to

hear cases involving race-based barriers that prevent individuals from competing on equal footing. The decision below effectively eliminates that test by requiring plaintiffs to make an additional showing that they have been denied a benefit because of their race.

Finally, the issues presented in the case could hardly be more important. Petitioners challenge directives that dictate which individuals can obtain lifesaving treatments and which individuals cannot. The directives' mechanical use of race—as a risk factor for *every* non-white or Hispanic person in New York—is patently unconstitutional under this Court's precedents. Yet the decision below effectively forecloses challenges to the unconstitutional directives by placing insurmountable barriers to judicial review. This Court should make plain that, to the extent the government wishes to dictate the allocation of scarce and lifesaving medical treatment, it cannot do so by flouting the promise of equality before the law.

The Court should grant the petition for a writ of certiorari.

Statement of the Case

A. The Government's Race-Based Directives for Allocating COVID-19 Treatments

i. The Omicron Variant and Severe Shortage of COVID-19 Treatments

The COVID-19 pandemic took root in America in March 2020. The initial crisis was followed by unpredictable fluctuations in cases and deaths over the next year. In April 2021, vaccines became widely

available, leading to a decline in cases over the following months. The number of cases fell from more than 8,000 per day in New York City in January 2021 to fewer than 200 per day in June of the same year. *See* NYC Health, *COVID-19 Data: Trends and Tools, Long-term Trends, cases by day*.[1] In Fall 2021, the pandemic appeared to be behind us.

Then came the Omicron variant. In December 2021, the Centers for Disease Control and Prevention warned that the variant's "increased transmissibility and ability" to "evade immunity conferred by past infection or vaccination" threatened a "rapid increase in infections." *Potential Rapid Increase of Omicron Variant Infections in the United States* (updated Dec. 20, 2021).[2] The number of cases in New York City skyrocketed—from fewer than 2,000 in November to over 40,000 per day in early January 2022—marking the "largest wave of reported cases yet during the pandemic." App. 81a; NYC Health, *Omicron Variant: NYC Report for January 13, 2022* at 2.[3]

Around the same time, the United States Food and Drug Administration granted Emergency Use Authorizations for highly effective oral antiviral treatments: Paxlovid and Molnupiravir. App. 49a. The New York State Department of Health touted both treatments to health care providers, noting that "Paxlovid and molnupiravir reduce the risk of

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[1] *Available at* https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page (last visited Feb. 7, 2023).
[2] *Available at* https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html.
[3] *Available at* https://www1.nyc.gov/assets/doh/downloads/pdf/covid/omicronvariant-report-jan-13-22.pdf.

hospitalization and death by 88% and 30% respectively, in patients at high-risk for severe COVID-19 when started early after symptom onset." *Id.* Yet, as was the case across the nation, New York faced "severe supply shortages for all COVID-19 outpatient therapeutics." App. 40a. Paxlovid—the most effective antiviral to combat the Omicron outbreak—was "out of stock frequently." *Id.*

ii. Respondents' Race-Based Directives for Allocating COVID-19 Treatments

On December 27, 2021, the State published a document entitled "COVID-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Antiviral and Monoclonal Antibody Treatment Products" on its website and distributed it to "health care facilities and prescribing medical professionals in New York, including licensed physicians, nurse practitioners, and physicians' assistants." App. 102a. The document apprised providers of the limited supply of the antivirals, established eligibility criteria for patients to receive such treatments, and directed providers to follow a separate set of guidelines in prioritizing the scarce treatments. App. 48a.

The State's directive informed providers that the treatments were suitable for most New York residents. Persons experiencing mild to moderate symptoms from COVID-19 may take Paxlovid if they are at least 12 years old and weigh at least 88 pounds, and may take molnupiravir if they are at least 18 years old. App. 52a. An eligible patient cannot already be hospitalized due to severe or critical COVID-19, but must have a medical condition or other factors that increase his or her risk for severe illness. *Id.* Finally,

a person seeking an oral antiviral must be able to start treatment within five days of symptom onset. *Id.*

The State's directive expressly notes that "non-white race or Hispanic/Latino ethnicity should be considered a risk factor." *Id.* The directive also instructs health care professionals to "adhere to" separate State guidance on "prioritization of anti-SARS-CoV-2 therapies" and "prioritize therapies for people of any eligible age who are moderately to severely immunocompromised regardless of vaccination status or who are age 65 and older and not fully vaccinated with at least one risk factor for severe illness." App. 50a.

The State's prioritization guidance reiterates that "[n]on-white race or Hispanic/Latino ethnicity should be considered a risk factor, as longstanding systemic health and social inequities have contributed to an increased risk of severe illness and death from COVID-19." App. 61a. The guidance instructs providers to prioritize COVID-19 antivirals by assigning a person seeking treatment to one of five risk groups and preferencing individuals in the higher risk groups. The guidance further directs providers to "prioritize patients" within the same risk group by age or "number of risk factors." *See* 59a–60a. The prioritization guidance does not enumerate possible risk factors except for race. *See* 60a–61a. The guidance instead refers to a CDC website that lists several risk factors, including cancer, chronic kidney disease, obesity, and heart conditions. *See* App. 43a.

By mechanically treating a person's race and ethnicity as an independent risk factor, New York made race a determinative factor in its prioritization guidelines in two ways. First, because the guidance

requires providers to prioritize treatment within a risk group based on the number of risk factors, individuals who are white and non-Hispanic or Latino are automatically disadvantaged. Second, because a person's risk group depends on the number of risk factors he or she possesses, a person's race or ethnicity sometimes determines his or her risk group. As a result, in times where treatments are in short supply, a provider may deny a patient potentially lifesaving treatments because of the patient's race.

New York City coordinated with the State and published Health Advisory #39, entitled "COVID-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Antiviral and Monoclonal Antibody Treatment Products" on December 27, 2021. To avoid "unnecessary confusion for prescribing physicians within New York City," City Opp. to Pltfs' Mot. for Prelim. Inj., No. 22-710, ECF No. 20, at 15–16 (E.D.N.Y. filed Feb. 25, 2022), the City's directive instructed providers to "[a]dhere to" the State's prioritization guidelines. App. 62a. The City distributed its directive to roughly 75,000 individuals, aimed at medical professionals and other registered individuals. App. 84a.

B. Petitioners Jonathan Roberts and Charles Vavruska

Petitioners are longtime New York City residents who seek equal access to the potentially lifesaving COVID-19 antivirals at issue. *See* App. 37a–39a. Born in New York to a Hungarian immigrant, Jonathan Roberts now lives in Manhattan with his wife of over 30 years. App. 37a. Because Roberts is 61 years old, white and not Hispanic, and fully vaccinated against COVID-19 with no known risk factors for severe

illness from COVID-19, he does not qualify for inclusion in any tier of the risk groups established by the State or City for prioritization of COVID-19 treatments—and would therefore not receive the antiviral treatments if he were competing for them with any individual who falls within any of the risk tiers. App. 38a–39a. If he were any race but white or if he were Hispanic, he would qualify for the last tier (1E) of risk groups.

A lifelong New York City resident, Charles Vavruska is 55 years old and vaccinated against COVID-19. App. 39a. In March 2020, Vavruska contracted the disease and was hospitalized for 10 days. *Id.* Vavruska has at least one risk factor (overweight and obesity). *Id.* He therefore qualifies for the last tier of risk groups for prioritization of COVID-19 treatments. *Id.* The prioritization guidance instructs providers to prioritize patients within that risk tier, in part, based on the number of risk factors they possess. Because non-white race or Hispanic/Latino ethnicity is its own independent risk factor, Vavruska is disadvantaged compared to others who are identical to him in every way except for race and ethnicity.

C. Proceedings Below

Petitioners filed their complaint in the United States District Court for the Eastern District of New York on February 8, 2022. *See* App. 48a. Petitioners sued Mary T. Bassett, in her official capacity as Commissioner for the New York State Department of Health (the State),[4] and the Department of Health

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[4] As noted above, James V. McDonald has replaced Mary T. Bassett in that role.

and Mental Hygiene of the City of New York (the City). Petitioners sought declaratory relief, injunctive relief, and nominal damages in their complaint and moved the district court for a preliminary injunction.

Each Respondent filed a separate opposition. Both claimed that Petitioners lacked standing and submitted declarations disavowing any punitive measures against physicians who chose not to follow their official directives. *See* App. 87a. At the same time, each Respondent vigorously defended the racial component of the directives at every stage of litigation. The State claimed a strong "scientific basis for [the] inclusion of race and ethnicity as a known independent risk factor of severe COVID-19," *Roberts*, State Opp. to Pltfs' Mot. for Prelim. Inj., No. 22-710, ECF No. 22, at 4 (E.D.N.Y. filed Feb. 25, 2022), and insisted that the directive "serves the State's compelling interest in protecting the public health of its citizens and preventing severe illness and death from COVID-19." *Roberts*, 22-622, State's Br. at 5 (2d Cir. filed June 16, 2022). For its part, the City asserted 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." *Roberts*, City Opp. to Pltfs' Mot. for Prelim. Inj., No. 22-710, ECF No. 20, at 12–13 (E.D.N.Y. filed Feb. 25, 2022).

Following the preliminary injunction hearing, the State represented that it "plan[ned] to imminently issue updated guidance . . . to inform health care facilities, providers, and practitioners that there is currently no shortage of the COVID-19 therapies at issue in this case." App. 102a. In response to an additional inquiry from the district court, the State

noted that “[t]he March 4, 2022 Guidance does not supersede the December 2021 Guidance but acts an update to it, informing practitioners that there is currently no shortage of supplies constraining their ability to prescribe the antiviral” treatments. App. 104a. In other words, the racial component of the directive continues today to guide providers in “times of resource limitations.” *Id.*; *see also Roberts*, 22-622, State’s Br. at 5 (2d Cir. filed June 16, 2022) (“COVID-19 remains an ongoing threat, given the periodic emergence and spread of different variants of the virus.”); App. 100a (government declarant noting that “supply chain disruptions can happen at any time”).

The district court dismissed the case. *See* App. 10a; Fed. R. Civ. P. 12(h)(3). As for Petitioners’ request for prospective relief, the district court agreed that “it is impractical to wait until a person has tested positive for COVID-19 to file suit challenging the guidance.” App. 26a. Nevertheless, the district court concluded that Petitioners failed to allege an imminent injury given the then-surplus of COVID-19 treatments. App. 25a–28a. The district court also rejected Petitioners’ request against New York City for nominal damages, which was premised on the increased risk of illness to Petitioners in the months in which New York faced a severe shortage of treatments. *See Baur v. Veneman*, 352 F.3d 625, 628, 641 (2d Cir. 2003) (noting that the “relevant ‘injury’ for standing purposes may be exposure to a sufficiently serious risk of medical harm—not the anticipated medical harm itself”). The district court held that Petitioners lacked standing for their nominal damages claim because they did not contract COVID-19 and seek antiviral treatment from

a provider that relied on the directives to deny the treatment. *See* App. 28a.[5]

The Second Circuit affirmed the judgment of the district court in a summary order.[6] The Second Circuit's affirmance rested entirely on its view that Petitioners failed to "satisfy the requirement that an injury in fact be actual or imminent." *See* App. 4a–7a. As for Petitioners' claim for prospective relief, the court viewed Petitioners' injury as speculative because it believed that Petitioners must test positive for COVID-19, seek the antivirals at issue, and be denied treatments by providers adhering to the race-based directives before their claims could be heard in federal court. App. 6a. The Second Circuit also held that Petitioners failed to establish their entitlement to nominal damages because they were not denied the treatments by a provider.

Judge Cabranes joined the court's judgment, but stated his view that "government 'guidance' effectively directing health-care providers to prioritize the treatment of patients based on race or ethnicity

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[5] The district court also provided alternative reasons for dismissing on jurisdictional grounds, but none was adopted by the panel and one judge suggested that he disagreed with parts of the district court's analysis. Compare App. 30a–31a (district court's holding that Petitioners lacked standing because they challenge "nonbinding guidance"), with App. 9a (Second Circuit judge's suggestion that other individuals have standing to challenge the guidance). *See Grutter v. Bollinger*, 539 U.S. 306, 319 (2003) (evaluating admissions program in which an applicant's race may be a determinative factor in some cases, but "play[s] no role" in others).

[6] This case was heard in tandem with the appeal in another challenge to the State's directive, which was dismissed by the United States District Court for the Northern District of New York. *See Jacobson v. Bassett*, 22-cv-692 (N.D.N.Y. Apr. 1, 2022).

may indeed present portentous legal issues if challenged by plaintiffs with standing." *See* App. 9a.

Reasons for Granting the Petition

I. The Second Circuit Diverges From Three Other Circuits on Whether a Plaintiff's Injury Is Imminent Where It Flows From a Predictable Course of Events That Results From Defendant's Conduct

The Second Circuit differs from three other circuit courts on the question presented: whether a plaintiff's injury is imminent where the anticipated harm follows from a predictable course of events resulting from a defendant's conduct. This is not the first time the Second Circuit has parted ways with its sister circuits on this question. In *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 45–49 (2d Cir. 2017), the Second Circuit considered a casino developer's challenge to a state law that advantaged two federally recognized Indian tribes in applications to build commercial casinos on non-Indian land in Connecticut. *Id.* at 43. The Second Circuit recognized that the "injury-in-fact" in an equal protection case involving racial discrimination is the inability "to compete on an equal footing in the bidding process." Nonetheless, the Second Circuit affirmed the district court's dismissal on jurisdictional grounds. *MGM*, 861 F.3d at 46–49. The Second Circuit held that MGM's equal protection injury was not imminent merely because there were additional steps it still needed to take to enter into the racially discriminatory bidding process. *See id.* at 48 (requiring MGM to list a specific project it wants to bid on, locate a municipal partner, and secure financing to bid on a project).

Like the panel in *MGM*, the Second Circuit panel in this case held that Petitioners could not satisfy the requirement of an imminent injury. The Second Circuit required Petitioners to actually be denied treatment on the basis of race before bringing suit, even though the challenged directives were specifically intended to allocate scarce COVID-19 treatments to individuals that, in the government's view, were most at risk of suffering severe illness or dying as a result of COVID-19. App. 6a.

Three other circuit courts differ with the Second Circuit on the "imminence" requirement—and consider the predictable effects of a defendant's actions. The **D.C. Circuit's** decision in *Sierra Club v. Jewell*, 764 F.3d 1, 7–8 (D.C. Cir. 2014), is illustrative. There, several organizations sued over the delisting of Blair Mountain Battlefield, the site of the largest armed labor conflict in American history, from the National Register of Historic Places. The organizations sought to maintain the listing of the battlefield to minimize the "adverse impacts from surface mining." *Id.* at 3. The district court ruled that the plaintiffs failed to establish an imminent injury because it rested on the actions of third-party coal companies, which had permits to mine the battlefield, but had not done so for over a decade. *See Sierra Club v. Salazar*, 894 F. Supp. 2d 97, 109–11 (D.D.C. 2012), *reversed by Sierra Club v. Jewell*, 764 F.3d 1 (D.C. Cir. 2014).

The D.C. Circuit reversed. Citing the standard that this Court articulated in *Clapper*, the D.C. Circuit held that the facts demonstrate a "substantial probability" of an injury because the companies noted

that they expected to someday use their permits. *See Sierra Club*, 761 F.3d at 7.

The D.C. Circuit's opinion in *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017), also clashes with the reasoning of the decision below. That case involved a class action lawsuit brought by customers of a health insurer that suffered a cyberattack in which their personal information was allegedly stolen. The district court dismissed the lawsuit because it believed that there were a "series of assumptions" that made plaintiffs' injury "too speculative" to satisfy *Clapper*. *Attias v. CareFirst, Inc.*, 199 F. Supp. 3d 193, 200 (D.D.C. 2016), *reversed by* 865 F.3d 620 (D.C. Cir. 2017) (plaintiffs' injury depended on the ability and intent of third parties to commit criminal acts by misusing plaintiffs' personal information). The D.C. Circuit reversed. The court explained that it was at least plausible to *infer* that the unauthorized party had "both the intent and the ability to use that data for ill." *Id.* at 628. The plaintiffs therefore satisfied the requirement of an imminent injury-in-fact. *Id.* at 629.

The **Seventh Circuit's** decision in *Remijas v. Neiman Marcus Group*, 794 F.3d 688, 693 (7th Cir. 2015), is similar. There, hackers attacked a luxury department store's servers and stole credit card numbers. *Id.* at 689. The attack left 350,000 accounts potentially exposed, but only 9,200 of those were known to have been used fraudulently. *Id.* at 690. The district court dismissed and the Seventh Circuit reversed. *Id.* The Seventh Circuit explained that *Clapper* did not jettison the "substantial risk" standard for imminent injury, and noted that *Clapper* itself renounced any requirement for "plaintiffs to demonstrate that it is literally certain that the harms

they identify will come about." *Id.* at 693 (quoting *Clapper*, 568 U.S. at 414 n.5). The Seventh Circuit allowed the plaintiffs to push past the pleadings stage because it was "plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach." *Id.* (noting that the *purpose* of a hack is to make fraudulent charges or assume consumer identities).

The **Fifth Circuit's** opinion in *McCardell v. U.S. Dep't of Housing and Urban Development*, 794 F.3d 510 (5th Cir. 2015), also splits from the Second Circuit. That case involved a plan to replace over 500 public housing units destroyed by a hurricane. *See id.* at 513. McCardell sought to enjoin defendants from implementing the plan, arguing that the proposed redevelopment on former public housing sites would injure her by adding to the segregation in her neighborhood. *See id.* at 514–15. The Fifth Circuit held that McCardell had adequately alleged a threatened injury that is "certainly impending." *Id.* at 521. The court explained that the anticipated injuries emanating from future redevelopment is "inescapably 'speculative' in the sense that it is not yet felt," but the injury was nonetheless imminent because it would follow from "the logical course of probable events flowing from an unfavorable decision by this court." *Id.* at 520 (distinguishing *Clapper* on grounds that chain of events in *McCardell* involved fewer steps and no "unfounded assumptions").

II. The Second Circuit's Decision Is Inconsistent with This Court's Precedents

A. Plaintiffs Suffer an Imminent Injury Where the Injury Follows from a Predictable Chain of Events

Federal courts have a "virtually unflagging" obligation to hear and decide cases within their jurisdiction. *Susan B. Anthony List*, 573 U.S. at 167. This Court has held that the imminent-injury requirement does not require plaintiffs to show that "it is literally certain that the harms they identify would come about," but instead a "substantial risk" that the harm will occur. *Clapper*, 568 U.S. at 414 n.5. The principal question at the pleading stage is "whether the plaintiffs have plausibly alleged a risk of future injury that is substantial enough to create Article III standing." *Attias*, 865 F.3d at 626.

This Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), is instructive. In that case, a host of plaintiffs including states and non-governmental organizations challenged the Secretary of Commerce's decision to reinstate a question about citizenship on the 2020 census questionnaire. *Id.* at 2562–63. Plaintiffs' injuries did not stem directly from the secretary's decision, but "turn[ed] on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count." *Id.* at 2565. The Department of Commerce disagreed, arguing that the plaintiffs' "harm depends on the independent action of third parties choosing to violate their legal duty to

respond to the census." *Id.* at 2565–66.[7] This Court was unpersuaded. It held that plaintiffs "have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the [Federal] Government keep individual answers confidential." *Id.* at 2566.

So too here. Throughout this case, the government has insisted that its directives "serve[] the State's compelling interest in protecting public health and preventing severe illness and death from COVID-19." *Roberts*, No. 22-622, State's Br. at 41 (2d Cir. filed June 16, 2022). In New York City's view, 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." *Roberts*, City Opp. to Pltfs' Mot. for Prelim. Inj., No. 22-710, ECF No. 20, at 12–13 (E.D.N.Y. filed Feb. 25, 2022). "Why else" would the City distribute the directives to roughly 75,000 email addresses aimed at medical providers during a period of severe supply constraints? *Remijas*, 794 F.3d at 693; *see also* App. 102a (State distributed directive to health care facilities and prescribing medical professionals in New York, including licensed physicians, nurse practitioners, and physicians'

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[7] The Department of Commerce argued that the plaintiffs' injury was not fairly traceable to the Department in light of these independent actions by third parties. *See Department of Commerce*, 139 S. Ct. at 2565. This Court's opinion in *Clapper* suggests that there is overlap between the traceability requirement and the requirement of an imminent injury. *See Clapper*, 568 U.S. at 414 (noting that a speculative chain of possibilities did not establish that the future injuries asserted by plaintiffs were certainly impending or fairly traceable).

assistants). At a minimum, the government sought to "encourage providers" to follow the directives' dictates "when determining treatment options during periods of limited supply." *Roberts*, No. 22-622, State's Br. at 41 (2d Cir. filed June 16, 2022).[8]

Even today, the State represents that its race-based directive has not been superseded. App. 104a–105a; *See Susan B. Anthony List*, 573 U.S. at 165 (noting that the government has "not disavowed enforcement if petitioners make similar statements in the future"). It strains credulity that the government would insist on keeping the directive if the risk that would put its provisions back into effect were "imaginary or wholly speculative." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979).[9]

B. Plaintiffs Are Injured by the Imposition of a Race-Based Barrier and Not the Ultimate Denial of a Benefit

In *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), this

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[8] Nor can Respondents shield their directives from review by pointing to the current supply of antiviral treatments. *See* App. 6a. Supplies remained limited at the moment which Petitioners filed their complaint. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (standing is assessed at the time that the complaint is filed). Even after the initial supply shortage abated, Respondents averred that supply chain disruptions can occur at any time, App. 100a, and that community transmission remains an ongoing public health concern. App. 80a–81a.

[9] Because there is a continuing controversy between the parties, Petitioners' request for prospective relief is not moot. In any event, it comfortably fits within the mootness exception for controversies that are capable of repetition yet evade review. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007).

Court held that the injury-in-fact in an equal protection case is the existence of the race-based barrier rather than the ultimate denial of a benefit. *Id.* at 666. That case centered around a Jacksonville ordinance that required the city to set aside 10 percent of city contracts for minority-owned businesses. *See id.* at 658. This Court held that, to establish standing, the Association needed only to demonstrate that "it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* at 666. The Association made such a showing with uncontested allegations that "its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able." *Id.* at 668–69.

Contravening this Court's decision in *City of Jacksonville*, the Second Circuit put Petitioners to the task of demonstrating that they were denied the actual benefit—lifesaving antivirals—because of their race. In so doing, the Second Circuit effectively discarded the rule that this Court set forth in *City of Jacksonville*, 508 U.S. at 666.[10]

The decision below also thwarts judicial review of racially discriminatory government action in other contexts. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), this Court examined two admissions policies that used

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[10] Had the Second Circuit applied its reasoning to the fact *in City of Jacksonville*, it would have held that the Association could not show its injury was imminent until its members (1) submitted a bid (2) on a specific project (3) reviewed by the chief purchasing officer (4) who, pursuant to the city ordinance, (5) rejected the bid (6) because of the race of the company's owner.

race in assigning students to schools. The Court held that both policies violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 711. The fact that it was "possible that children of group members will not be denied admission to a school based on their race" did not eliminate the injury. *Id.* at 718–19; *see also id.* at 718 (organization had standing because it had members whose elementary and middle school children may be denied admission in the future). In all, the Second Circuit's decision threatens to undermine this Court's precedents, and close federal courthouse doors to plaintiffs seeking to enjoin government-sanctioned racial discrimination in education, public contracting, medicine, and beyond.[11]

III. This Case Presents a Recurring Issue of Nationwide Importance

This Court should grant the petition because this case presents important and recurring issues involving state-sponsored racial discrimination in medicine. The merits are not a close call. The directives in this case instruct providers to use race and ethnicity as a risk factor for every patient seeking antiviral treatments. App. 61a. Yet this Court has invalidated government policies that grant the same mechanical preference for every individual in a racial or ethnic group. *Gratz v. Bollinger*, 539 U.S. 244, 271–

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[11] The Second Circuit compounded this mistake in denying Petitioners' request for nominal damages for their increased risk of illness during the acknowledged period of a severe shortage of COVID-19 treatments. *See, e.g.*, *Hershell Gill Engineers, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1342 (S.D. Fla. 2004) (awarding plaintiffs nominal damages in equal protection case for the violation of their constitutional rights).

72 (2003) (invalidating admissions policy that awarded "20 points to every single applicant from an 'underrepresented minority' group").

This Court has demanded that the government use race, if at all, only as a last resort. The government must engage in "serious, good faith consideration of workable race-neutral alternatives" that would allow it to achieve its interests just as well. *Grutter*, 539 U.S. at 339. The fact that other states have either rescinded race-based directives or issued directives that did not consider race in the first place shows that ample race-neutral alternatives are readily available. *See, e.g.*, Wash. Dep't of Health, *Interim-DOH Guidance on Prioritization for Use of AntiSARS-CoV-2 Monoclonal Antibodies* (Apr. 18, 2022) (omitting racial considerations in prioritization of COVID-19 treatments); Utah Dep't of Health, *UDOH announces changes to risk assessment process for accessing scarce COVID-19 treatments* (Jan. 21, 2022) (reversing course on the use of race in COVID-19 treatments). New York defends its idiosyncratic response to the severe shortage of COVID-19 treatments—proclaiming that the decisions of other states not to use race "does not preclude New York from making an independent judgment on the issue." *Roberts*, 22-622, State's Br. at 43 (2d Cir. filed June 16, 2022). But the Fourteenth Amendment prohibits states from experimenting with racial discrimination.

States across the country have adopted guidelines regarding the distribution of COVID-19 treatments, thereby underscoring significant nationwide importance of this case. The issue of scarce medical treatments is a common medical problem. *See, e.g.*, E.J. Emmanuel et al., *Fair Allocation of Scarce*

Medical Resources in the Time of COVID-19, 2020 N. Engl. J. Med. 2049 (Mar. 23, 2020) (noting shortages across the world in hospital beds, intensive care beds, ventilators, and high-filtration N-19 masks).[12] With alarming frequency, government has attempted to address these problems by resorting to race. *See, e.g.*, Phil Galewitz, *Vermont to Give Minority Residents Preference for COVID Vaccines*, Scientific American (Apr. 6, 2021). Even in the court below, New York City boasted that it issued *another* "informational" advisory to providers, stating that "race and ethnicity and other social risk factors should be considered when assessing risk of adverse outcomes from COVID-19." *See Roberts*, No. 22-622, Doc. 103, City's Post-Argument Letter to the Court (2d Cir. filed Nov. 4, 2022) (citing NYC Dep't of Health, 2022 Health Advisory #28: Prescribe COVID-19 Therapeutics to Prevent Severe Disease, Hospitalization, and Death This Winter (Nov. 4, 2022)).[13]

The Constitution counsels the government to disengage from the "sordid business" of "divvying us by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part). Yet the decision below would shield even plainly unconstitutional government action from judicial review. That is particularly egregious here, where, as the district court recognized, "it is impractical to wait until a person has tested positive for COVID-19 to file suit," App. 26a.

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[12] https://www.nejm.org/doi/full/10.1056/nejmsb2005114
[13] https://www.nyc.gov/assets/doh/downloads/pdf/han/advisory/2022/prescribe-covid-19-therapeutics-this-winter.pdf

The issues are cleanly presented in this case. The Second Circuit's decision rested solely on its mistaken belief that "Plaintiffs fail to satisfy the requirement that an injury in fact be actual or imminent." *See* App. 4a–6a. This Court should reverse the Second Circuit's decision. *See Susan B. Anthony List*, 573 U.S. at 168. As Judge Cabranes observed below, government directives instructing providers to prioritize treatments to patients on the basis of race or ethnicity raise "portentous legal issues." App. 9a. Federal courts are precisely where such portentous legal issues should be resolved.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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