No. 22-757

IN THE
Supreme Court of the United States

JONATHAN ROBERTS, et al.,
Petitioners,

v.

JAMES V. MCDONALD, Commissioner,
New York State Department of Health, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT JAMES V. MCDONALD

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ESTER MURDUKHAYEVA
Deputy Solicitor General
ANDREA W. TRENTO
Assistant Solicitor General

28 Liberty Street
New York, New York 10005
(212) 416-8016
barbara.underwood@ag.ny.gov
**Counsel of Record*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether petitioners' risk of injury is sufficiently imminent to confer standing when it depends on a highly attenuated chain of events that may never occur.

2. Whether petitioners have suffered an injury in fact for purposes of an equal protection claim where no barrier based on race or ethnicity has been imposed against them.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Laws

Miscellaneous Authorities*

*All websites last visited April 27, 2023

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

INTRODUCTION

In December 2021, the U.S. Food and Drug Administration issued emergency use authorizations for three COVID-19 treatments that were shown to dramatically reduce the likelihood of progression to severe disease if taken in the first five days of illness. Shortly thereafter, the New York State Department of Health issued nonbinding guidance to health care providers describing the new treatments and recommending criteria providers could use to prioritize the administration of treatments to those most likely to develop severe illness given the limited supply available at the time. The guidance stated, consistent with available scientific data, that one of the risk factors associated with development of severe COVID-19-related illness is non-white race and Hispanic ethnicity. Ten weeks later, after initial supply shortages abated, the State issued updated guidance stating that the treatments should be prescribed without concern for availability.

In February 2022, petitioners—two non-Hispanic white individuals—sued to challenge the State Guidance as well as parallel guidance issued by New York City as purportedly violative of the Equal Protection Clause and moved for a preliminary injunction seeking to enjoin defendants from considering race or ethnicity in connection with the allocation of COVID-19 treatments. The U.S. District Court for the Eastern District of New York (Garaufis, J.) dismissed all claims for lack of Article III standing (Pet. App. 10a-34a), and the Second Circuit affirmed (Pet. App. 1a-9a.) Petitioners now seek certiorari. The petition should be denied.

Petitioners seek review on the questions of whether (a) injury "is imminent where it flows from a predict-

able course of events that results from the defendant's conduct," and (b) injury for purposes of equal protection claims arises from "the denial of equal treatment resulting from the imposition of the [race-based] barrier, not the ultimate inability to obtain the [government] benefit." (Pet. i.) The case is a poor vehicle for addressing those questions for several reasons. First, petitioners' framing of the questions misconstrues the ruling below and is based on unsupported factual assumptions. Second, the decision below may be supported on numerous alternative grounds including lack of traceability and redressability, mootness, and failure to state a claim.

In any event, the court of appeals' ruling is consistent with this Court's precedents and does not create a split in authority among the circuits requiring this Court's intervention. Specifically, the conclusion that a "highly attenuated chain of possibilities" is insufficient to confer standing accords with this Court's rulings in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), and with *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), where this Court found a "predictable" future injury, *id.* at 2566, that is wholly absent from the record here. The court of appeals' ruling is also consistent with *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), where this Court held that a plaintiff who challenges a "barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group" must show that it is "able and ready" to seek the benefit but that "a discriminatory policy prevents

it from doing so on an equal basis." *City of Jacksonville*, 508 U.S. at 666. Here, the widespread availability of the subject treatments means that there is no discriminatory policy that prevents petitioners from accessing the relevant care. And even if a shortage should arise in the future, the guidance is directed to independent third parties (i.e. treating physicians or nurse practitioners) who are under no compulsion to follow it.

STATEMENT

A. Legal Background

The New York State Department of Health (NYSDOH) is a state agency empowered by the legislature to "supervise the reporting and control of disease" and "to promote education in the prevention and control of disease." N.Y. Pub. Health L. § 201(1)(c), (g). The NYSDOH Commissioner is charged with "exercis[ing] the functions, powers and duties of the department prescribed by law," and is empowered to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health," *id*. § 206(1)(a), (d).

B. Factual and Procedural Background

1. COVID-19 is a highly infectious and potentially deadly respiratory illness that spreads easily from person to person. In the United States alone, COVID-19 has infected more than 104 million people and claimed

more than 1.1 million lives.[1] The State of New York has reported over 6.6 million cases[2] and over 79,000[3] deaths attributable to COVID-19. Despite these figures, current COVID-19 trends have allowed the U.S. Department of Health and Human Services (HHS) to announce that the federal Public Health Emergency, which is set to expire at the end of the day on May 11, 2023, will not be renewed.[4] Nevertheless, COVID-19 remains an ongoing threat, given the periodic emergence and spread of variants of the virus.

COVID-19 presents demonstrably greater medical risks for persons of color. According to the U.S. Centers for Disease Control and Prevention (CDC), Black Americans are equally likely to contract COVID-19 as non-Hispanic whites, but are 2.5 times more likely to be hospitalized, and are 1.7 times more likely to die of the disease. Similarly, Hispanic Americans are 1.5 times as likely to contract COVID-19 as non-Hispanic whites, 2.4 times as likely to be hospitalized, and 1.9 times as likely to die of the disease. (Pet. App. 96a.) Such disparities persist even after controlling for medical comorbidities and level of educational attainment. (Pet. App. 95a; CA2 J.A. 210-220, 221-230). The CDC has hypothesized that one of the factors driving dispa-

---

[1] U.S. Ctrs. for Disease Control & Prevention, *COVID Data Tracker* (as of Apr. 26, 2023). (For sources available on the internet, URLs appear in the Table of Authorities.)

[2] N.Y. State Dep't of Health, *COVID-19 Testing Tracker* (as of Apr. 27, 2023).

[3] *See* N.Y. State Dep't of Health, *COVID-19 Fatalities Tracker* (as of Apr. 27, 2023).

[4] *See* U.S. Dep't of Health & Human Servs., Fact Sheet: COVID-19 Public Health Emergency Transition Roadmap (last revised Feb. 22, 2023).

rate COVID-19-related outcomes between non-Hispanic whites and persons of color may be disparate access to available treatments. (*See* Pet. App. 94a n.3 (citing CDC research).)

2. In December 2021, the FDA issued an emergency use authorization (EUA) for an antiviral drug called Paxlovid for use by adults and certain pediatric patients with mild-to-moderate COVID-19 who are at high risk for progression to severe COVID-19. (Pet. App. 49a, 91a.) Paxlovid showed promising results in clinical testing, in which it reduced severe outcomes (i.e., hospitalization or death) by 88 percent as compared to placebo. (Pet. App. 49a.) Paxlovid was "in very limited supply" upon its introduction and the CDC advised that "use should be prioritized for higher risk populations."[5] In a Clinical Implementation Guide published around the time of Paxlovid's emergency authorization by the FDA, the CDC stated that, in addition to underlying medical conditions, factors such as race or ethnicity may "also place individual patients at high risk for progression to severe COVID-19." (Pet. App. 93a; *see also* CA2 J.A. 135.)

In December 2021, the FDA also issued EUAs for two other therapeutic treatments for patients with onset of mild to moderate COVID-19 symptoms: Molnupiravir, an antiviral therapeutic found to reduce severe COVID-19 outcomes by 30 percent; and Strovimab, a monoclonal antibody product. (Pet. App. 49a, 91a.)

---

[5] U.S. Ctrs. for Disease Control & Prevention, *Using Therapeutics to Prevent and Treat COVID-19* (Dec. 31, 2021).

3. On December 27, 2021, NYSDOH issued two guidance documents to health care providers and facilities regarding the newly approved COVID-19 treatments (together, the "State Guidance"). (Pet. App. 48a-49a, 57a.) The purpose of the State Guidance was to make providers and hospitals aware of the treatments and to identify factors for providers to consider when administering treatments given severely limited supply. (Pet. App. 48a-49a, 57a.) Neither document contained a mechanism for enforcement of the terms and neither document purported to supplant the clinical judgment of health care providers.

The State Guidance suggests a framework for sorting COVID-19 patients into five "risk groups" based on a patient's age, immunocompromised status, vaccination status, residency in a long-term care facility environment, and the presence of any "risk factors for severe illness" including various comorbidities specified by the CDC. (Pet. App. 59a-60a.) The framework further suggests prioritization within each group based on age and, where pertinent, the number of risk factors, whether the patient has received a vaccination booster, and the time elapsed since the patient's last vaccination. (Pet. App. 59a-60a.) The State Guidance specifies that "[n]on-white race or Hispanic/Latino ethnicity should be considered a risk factor, as long-standing systemic health and social inequities have contributed to an increased risk of severe illness and death from COVID-19." (Pet. App. 61a.) CDC documents cited and hyperlinked by the State Guidance likewise include non-white or Hispanic/Latino ethnicity as risk factors for or associations with severe COVID-

19.[6] Finally, the State Guidance recommends that practitioners "[a]dhere to" the "guidance on prioritization of high-risk patients for anti-SARS-CoV-2 therapies during this time of severe resource limitations." (Pet. App. 49a.)

By February 2022, supply shortages for the newly approved treatments had begun to abate. (Pet. App. 105a.) On March 4, 2022, NYSDOH issued an updated guidance advising providers that "treatment options are now widely available and there are no current shortages in supply." (Pet. App. 106a.) Providers were encouraged "to evaluate all treatment options as early as possible." (Pet. App. 106a.) Recent data from the federal Department of Health and Human Services confirms that the treatments remain widely available in New York State.[7]

4. On February 8, 2022, petitioners Jonathan Roberts and Charles Vavruska commenced this action in the U.S. District Court for the Eastern District of New York, naming as defendants then–New York State Health Commissioner Mary Bassett[8] and New York City's Department of Health and Mental Hygiene. (Pet. App. 35a.) Mr. Roberts alleged that he was 61

---

[6] CA2 J.A. 38 (linking U.S. Ctrs. for Disease Control & Prevention, *Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19: Information for Healthcare Professionals* (last updated Feb. 9, 2023)); *see also* Pet. App. 61a.

[7] *See* Admin. for Strategic Preparedness & Response, U.S. Dep't of Health & Hum. Servs., *COVID-19 Therapeutics Locator* (n.d.).

[8] James V. McDonald is the current Acting Commissioner of Health of the State of New York. Pursuant to Supreme Court Rule 35.3, Dr. McDonald was substituted as a party to this action for Dr. Bassett. (*See* Pet. ii.)

years old, was vaccinated against COVID-19, and had no known risk factors for the development of severe COVID-19. (Pet. App. 38a.) Mr. Vavruska alleged that he was 55 years old, was vaccinated against COVID-19, and had at least one risk factor for the development of severe illness that could result from COVID-19. (Pet. App. 39a.) Neither petitioner alleged that he sought and was denied any of the treatments at issue in this case. Nevertheless, petitioners asserted that the State Guidance (and similar guidance issued by New York City) harmed them by erecting a "barrier" to obtaining a benefit that is available to similarly situated persons of color, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Pet. App. 45a-48a.)

On February 18, 2022, petitioners moved for a preliminary injunction seeking to enjoin the State from considering race in the allocation of COVID-19 treatments. (CA2 J.A. 8.) On March 15, 2022, the district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(h)(3) on the ground that petitioners failed to establish Article III standing. (Pet. App. 10a.) The court "decline[d] to consider" the preliminary injunction motion in the absence of subject matter jurisdiction. (Pet. App. 10a-11a.)

First, the court explained that petitioners could not show a concrete or particularized injury in fact because the State Guidance did not operate as a "barrier" to the petitioners' receipt of any COVID-19 treatment on account of their race or ethnicity. (Pet. App. 24a-25a.) The court also concluded that petitioners could not show actual or imminent injury because the challenged guidance applied during an initial period of limited supply, and petitioners' concerns

about future supply shortages were speculative. (Pet. App. 26a-28a.)

Second, the court held that petitioners could not show that any injury in fact would be traceable to the State Guidance because the "nonbinding guidance has no 'determinative or coercive effect' on" health care providers making treatment decisions. (Pet. App. 31a.) Finally, and for similar reasons, the court found that petitioners failed to establish redressability because any order against the state and city defendants would not bind medical providers making individual treatment decisions. (Pet. App. 33a.) In addition, the court noted that the CDC considers race and ethnicity as risk factors for severe COVID-19 illness and concluded that any order against the state and the city would not bind the CDC or preclude providers from referencing CDC guidance in making treatment decisions. (Pet. App. 33a-34a.)

Petitioners appealed and the court of appeals affirmed in a summary order, holding that petitioners lacked standing because they failed to demonstrate an imminent injury in fact.[9] (Pet. App. 4a.) The court concluded that petitioners "suffered no actual injury because a provider neither delayed nor denied their COVID-19 treatment because of the guidance, which operated during the supply shortage." (Pet. App. 5a.) And the court concluded that petitioners failed to plead a "threatened injury," because whether they would be

---

[9] The court of appeals heard argument in this appeal together with a similar appeal brought by a separate plaintiff, *Jacobson v. Bassett*, No. 22-692-cv (2d Cir.), and decided the appeals together. (Pet. App. 2a.) The plaintiff in *Jacobson* has not petitioned for certiorari in this Court.

injured depended on a "highly attenuated chain of possibilities" that, under this Court's jurisprudence, did not rise to the level of a "certainly impending" or "substantial risk" of injury sufficient to confer standing in the absence of actual injury. (Pet. App. 5a-6a (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)).) Specifically, the court observed that, in order to suffer cognizable harm, petitioners must:

> (1) test positive for COVID-19 (2) while there is a shortage of treatments specified by the guidance, (3) experience mild to moderate symptoms, (4) seek treatment, (5) within the appropriate time of symptom onset, (6) from a health-care provider (7) who adheres to the guidance and (8) resultingly declines or delays a specified treatment (9) because of Plaintiffs' race or ethnicity.

(Pet. App. 6a.) The court of appeals concluded that this future injury was not sufficiently "impending" to confer standing "given the undisputed widespread availability of the specified treatments."[10] (Pet. App. 6a.)

---

[10] The court also declined to find that petitioners had demonstrated an injury in fact based on their alleged increased risk of developing severe COVID-19 due to restricted access to the subject treatments. (Pet. App. 6a-7a.) Petitioners do not advance this theory of injury in this petition.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE TO ADDRESS THE QUESTIONS PRESENTED BY PETITIONERS.

Petitioners frame the issues in this case as whether their injury (a) "is imminent where it flows from a predictable course of events that results from the defendant's conduct," and (b) arises from "the denial of equal treatment resulting from the imposition of the [race-based] barrier, not the ultimate inability to obtain the [government] benefit." (Pet. i.)

This case is a poor vehicle to address petitioners' questions because it presumes facts that are contrary to the lower courts' findings. In addition, there are numerous alternative grounds for affirmance, including the absence of traceability and redressability, mootness, and petitioners' failure to state a claim on the merits. Any one of these vehicle problems warrants denial of the petition.

1. Petitioners direct this Court to consider whether their injury "is imminent where it flows from a predictable course of events that results from the defendant's conduct." (Pet. i.) In so doing, they attempt to graft this Court's "traceability" jurisprudence—which provides that standing to sue the government may be premised on "the predictable effect of Government action on the decisions of third parties" causing injury to the plaintiff, *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)—onto its analysis of whether an injury is sufficiently "concrete, particularized, and actual or imminent" for standing purposes, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted).

Even if petitioners' framing of the injury-in-fact inquiry were appropriate (and it is not),[11] their question assumes a "predictable effect" where the circumstances show—and the court below held—that petitioners had alleged nothing but "conjectural," "highly attenuated," or "speculative" harm. (Pet. App. 6a-7a (citing *Lujan*, 504 U.S. at 560, and *Clapper*, 568 U.S. at 410).) Specifically, petitioners' future injury relies on sheer conjecture that (among other things) there will again be a shortage in available treatments that triggers the applicability of the prioritization scheme recommended by the State Guidance, that the petitioners will contract COVID-19 and seek treatment within five days of the onset of symptoms, and that providers will deny them treatment *because* of the State Guidance (as opposed to identical CDC guidance or the underlying medical evidence supporting the State Guidance itself, or for some other reason entirely). That makes this case a

---

[11] An injury is "imminent" for Article III standing purposes when it is "certainly impending" or where there is a "substantial risk that the harm will occur." *Clapper*, 568 U.S. at 409; *see id.* at 414 n.5. Traceability, by contrast, speaks to the "causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Petitioners contend that this Court's opinion in *Clapper* "suggests that there is overlap between the traceability requirement and the requirement of an imminent injury." (Pet. 18 n.7 (citing *Clapper*, 565 U.S. at 414).) But this Court affirmed in *Clapper* that they are distinct inquiries. *See Clapper*, 565 U.S. at 414 n.5 (noting that plaintiffs must show *both* that "substantial risk" of injury does not depend on an "attenuated chain of inferences," *and* that the "defendant's actual action"—as opposed to the "unfettered choices made by independent actors not before the court"—"has caused the substantial risk of harm" (quotation marks omitted)). In any event, for the reasons expressed below, traceability also poses an independent bar to standing in this case. See *infra* at 13-14.

poor vehicle for this Court to assess whether a "predictable course of events" can be considered "imminent" for purposes of determining whether an Article III injury is present.

So, too, with petitioners' second question presented, which asks whether the court of appeals' ruling conflicts with this Court's prior holdings that the "injury in fact" in a racial discrimination case "is the denial of equal treatment resulting from the imposition of the [challenged] barrier, not the ultimate inability to obtain the benefit." (Pet. i (quoting *Northeastern Fla. Ch. of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).) Petitioners' question presumes a factual predicate without support—the existence of a barrier to access. As the court of appeals correctly stated, even in cases where injury arises from the "denial of equal treatment resulting from the imposition of the [race-based] barrier" and "not the ultimate inability to obtain the benefit," any injury must be "actual or imminent, not conjectural or hypothetical." (Pet. App. 4a-5a (quotation marks omitted).) Here, however, the challenged guidance (and any race-based criteria in the prioritization schedule) cannot cause any injury given the availability of treatments.

2. Petitioners' questions focus solely on the injury-in-fact element of the standing inquiry but, as respondents argued below, petitioners also fail to allege traceability and redressability. These alternative grounds to affirm the lower courts' ruling on Article III standing make the petition a poor vehicle for addressing petitioners' presented questions.

An injury is "traceable" to the challenged conduct where it bears a causal relationship to that conduct, and is not the result of the "independent action of some

third party not before the court." *Lujan*, 504 U.S. at 560. Accordingly, traceability is "substantially more difficult to establish" where the alleged injury is directly visited on the plaintiff by third parties. *Id.* at 562 (quotation marks omitted). This case is no exception. Here, the nonbinding State Guidance has no "determinative or coercive effect" on treating physicians. (Pet. App. 31a.) *Cf. Bennett v. Spear*, 520 U.S. 154, 169, 170 (1997) (advisory opinion had "powerful coercive effect" where it established conditions that could result in "substantial civil and criminal penalties, including imprisonment"). There are no penalties for a health care provider's choice to deviate from the guidance's prioritization scheme, nor is there any enforcement mechanism for ensuring that providers adhere to the recommendations. Nor is it the case that providers "will likely react in predictable ways" to the State Guidance. *See Department of Commerce*, 139 S. Ct. at 2566. Instead, medical providers may freely exercise their independent medical judgment in rendering treatment to COVID patients, and exactly how they would do so amounts to little more than "speculation" at this stage. *See California v. Texas*, 141 S. Ct. 2104, 2119 (2021) (holding that state plaintiffs lacked standing premised on injury arising from insurance enrollment decisions of third party citizens in response to ACA's unenforceable insurance mandate).

Nor is the alleged injury "redressable" by the judicial relief requested—that is, it is not "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotation marks omitted). The State Guidance was not only nonbinding, but it also paralleled guidance from the CDC and relied on independent medical literature, both of which identify race and ethnicity as

risk factors for developing serious COVID-19. (*See* Pet. App. 91a, 94a-96a.) *See* CDC, *Using Therapeutics to Prevent and Treat COVID-19*, *supra*. Even in the absence of the State Guidance, providers may well consider race and ethnicity as risk factors based on federal guidance and overwhelming medical evidence of disparities in COVID-19 outcomes for members of racial and ethnic minority groups. Accordingly, an injunction against the enforcement of the State Guidance would not remedy petitioners' alleged injury. *See Lujan*, 504 U.S. at 568.

3. The petition is a poor vehicle for the additional reason that petitioners' underlying claims are moot. The challenged guidelines apply only during supply shortages, which have been nonexistent for over a year. (*See* Pet. App. 106a.) Moreover, this case is not one of the "exceptional situations" where the "capable of repetition, yet evading review" doctrine applies. *See Spencer v. Kemna*, 523 U.S. 1, 17 (1998). Nothing in the record points to any "reasonable expectation" that the supply shortages are likely to recur. *See id.* (quotation marks omitted). Nor is the challenged action "in its duration too short to be fully litigated prior to cessation or expiration" if supply shortages were to recur, *id*. (quotation marks omitted), because the State would need to advise providers of the shortage and of the resulting recommendation to adhere to the prioritization schedule.[12]

---

[12] Petitioners' request for nominal damages does not rescue their claims against Commissioner McDonald , because claims for money damages against state officials in their official capacities are barred by Eleventh Amendment sovereign immunity. *See Papasan v. Allain*, 478 U.S. 265, 277-78 (1986).

4. Finally, the petition is a poor vehicle because plaintiffs failed to state an equal protection claim on the merits.

A racial classification that does not subject a person to unequal treatment is not subject to heightened scrutiny. *See, e.g.*, *Raso v. Lago*, 135 F.3d 11, 17 (1st Cir. 1998) (HUD requirement that certain apartments, otherwise made available on a race-blind basis, "be publicized in minority communities"); *see also Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (redesign of neutrally administered police officer exam to improve scores of African American applicants). Here, the State Guidance does not confer a benefit or impose a burden based on a racial classification; indeed, it does not require that any action be taken with respect to any individual based on their race or ethnicity. As the Third Circuit has noted in another context, "the mere awareness or consideration of race should not be mistaken for racially discriminatory intent or for proof of an equal protection violation." *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011). Similarly, "[i]n every case in which the Court has applied strict scrutiny to a 'racial classification,' a racial preference or classification appeared on the face of the government decision *and* required that action be taken with respect to an individual based on the classification." *Lewis v. Ascension Par. Sch. Bd.*, 662 F.3d 343, 361 (5th Cir. 2011) (King, J., concurring in part & dissenting in part). Accordingly, petitioners' challenge is subject to rational basis review, a standard that respondents easily meet.

The State Guidance would survive strict scrutiny review in any event. This Court has acknowledged that "in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to

support the use of a suspect classification."[13] *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 310 (1978). Likewise the Ninth Circuit has recognized that "[i]t is not difficult to imagine the existence of a compelling justification [to consider race] in the context of medical treatment." *Mitchell v. Washington*, 818 F.3d 436, 446 (9th Cir. 2016). This situation is one.

The State Guidance serves the State's compelling interest in protecting public health and preventing severe illness and death from COVID-19. It provides accurate information about multiple known risk factors for severe COVID-19 illness to encourage providers to consider whether their patients are at a high risk of developing severe illness or dying from COVID-19 when determining treatment options during periods of limited supply.

The State Guidance is also narrowly tailored. "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), but it requires consideration of "the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context," *id.* at 327. Far from imposing an unconsidered "mechanical preference" (Pet. 21), the guidance references race and ethni-

---

[13] Indeed, there is significant, peer-reviewed medical research that "explore[s] possible racial connections with diseases and treatments." Erik Lilliquist & Charles A. Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 Harv. C.R.-C.L.L. Rev. 391, 393 (2004); *see also* Scarlett S. Lin & Jennifer L. Kelsey, *Use of Race and Ethnicity in Epidemiologic Research: Concepts, Methodological Issues, and Suggestions for Research*, 22 Epidemiologic Revs. 187, 191-92 (2000).

city as part of an overall clinical assessment aimed at evaluating a patient's risk for developing severe COVID-19. And the evidence on which the State Guidance relied showed that ethnic disparities in COVID-19 outcomes persist even after controlling for non-suspect factors such as medical comorbidities and educational attainment. (Pet. App. 93a-96a; CA2 J.A 210-220 (comorbidities), 221-230 (educational attainment).[14]) There is no race-neutral alternative (*see* Pet. 22) that would account for the medically proven fact that non-white race or Hispanic ethnicity is an independent risk factor for developing severe COVID-19.

Nor do the less restrictive approaches taken by two other States (*see* Pet. 22 (citing guidance issued by Utah and Washington)) compel the conclusion that New York has failed to adopt the least restrictive means here. "States are not necessarily required to follow the less restrictive practices of other States in a kind of race to the top (or bottom)." *Ramirez v. Collier*, 142 S. Ct. 1264, 1288 n.2 (2022) (Kavanaugh, J., concurring). And petitioners offer no evidence to suggest that the policies in those States were at least as effective as the temporary New York policy in preventing the development of severe COVID-19 among its residents.

---

[14] As one of these studies found, "[n]early all racial and ethnic minority subgroups . . . experienced higher mortality . . . than their non-Hispanic White counterparts." (CA2 J.A. 224-225.) Petitioners' Amici suggest that these discrepancies are "more about correlation than causation" (Br. *Amicus Curiae* of Center for Equal Opportunity et al. 11), but even if that were so, amici do not explain why it would preclude policymakers from using such evidence to allocate scarce resources.

II. THE COURT OF APPEALS' RULING CORRECTLY APPLIES WELL-SETTLED LAW AND PRESENTS NO CONFLICT REQUIRING THIS COURT'S REVIEW.

This Court has long held that the risk of future injury "may suffice" to confer Article III standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Department of Commerce*, 139 S. Ct. at 2565 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)); *see Clapper*, 568 U.S. at 410; *Lujan*, 504 U.S. at 564 n.2. The court of appeals' ruling that the petitioners failed to plead injury under this standard is consistent with these precedents and does not present a conflict of authority. This Court's review is not warranted.

1. In *Lujan*, this Court explained that although "imminence is . . . a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." 504 U.S. at 564 n.2 (quotation marks omitted). The plaintiff organizations in that case challenged a federal regulation interpreting certain provisions of the Endangered Species Act to apply only to actions within the United States. *Id.* at 557-58. They alleged they were injured by the regulation because several of their members "intended" to travel overseas to observe certain endangered species in their respective habitats, which would be impacted by United States–funded projects no longer subject to the relevant provisions of the Endangered Species Act. *Id.* at 563-64. This Court concluded that the plaintiffs had failed to establish an "imminent" injury, because "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent'

injury that our cases required." *Id.* at 564. When "the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control," this Court has "insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.* at 564 n.2.

This Court reiterated these principles in *Clapper*, where it rejected standing in a challenge to section 702 of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a, which authorized government surveillance of non–"United States persons" reasonably believed to be located outside the United States. 568 U.S. at 401, 414. Because the plaintiffs in that case had failed to show "that the communications of their foreign contacts will be targeted" under this provision, their allegations were "necessarily conjectural," and thus any injury was insufficiently "imminent" under Article III. *Id.* at 412. In fact, the plaintiffs' standing depended on "a highly attenuated chain of possibilities" that required not only that the government target plaintiffs' contacts with surveillance, but that it do so pursuant to § 1881a (as opposed to some other legal authority), and with the approval of the Foreign Intelligence Surveillance Court. In addition, plaintiffs in that case failed to show a high likelihood that they would be parties to any particular communications intercepted. *Id.* at 410.

2. The court of appeals' ruling in this case accords with these precedents. As in *Clapper*, the court below found that the petitioners' future injury was dependent on a "highly attenuated chain of possibilities," several links of which were far from certain to occur. (Pet. App. 6a.) For example, petitioners' testing positive for COVID-19 is not "certainly impending"; nor is the

return of medication shortages that would require invocation of the State Guidance's prioritization recommendation. *Cf. Clapper*, 568 U.S. at 411-12 (holding that respondents could only speculate that their foreign contacts would be targeted by the federal government). As in *Lujan*, the petitioners' injury here is "partly within [their] own control," 504 U.S. at 564 n.2, because in order to be candidates for the use of the medication at issue they must seek treatment within a specific period of time upon the onset of symptoms. (Pet. App. 6a.) As in *Clapper*, where the plaintiffs' hypothetical future injury could have arisen due to the operation of some other (unchallenged) statute authorizing surveillance of their foreign contacts, 568 U.S. at 412-14, here the petitioners' hypothetical denial of treatment could also be driven by factors other than the challenged guidance (such as CDC guidance or the underlying medical evidence itself), or even by factors having nothing to do with their race or ethnicity.

The circumstances here evince none of the certainty associated with the imminent injury in *Department of Commerce*, where the evidence established that a census undercount of immigrant households would inflict a "concrete and imminent injury" on the state plaintiffs, and that inclusion of the citizenship question on the census form would "likely" cause such an undercount given the historical evidence. 139 S. Ct. at 2565, 2566. Here, there is nothing "predictable" about how (or even whether) an individual practitioner would respond to the State Guidance, given that it is voluntary and given the existence of federal guidance and independent medical evidence on which the practitioner may alternatively rely. And there is certainly nothing "imminent" or "predictable" about the onset of a treatment shortage that would necessitate a return

to the prioritization schedule in the State Guidance (even if a practitioner were inclined to adhere to it), or about the petitioners contracting COVID-19 during such a period of shortage.

This Court's rulings in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (*see* Pet. 19-21), do not alter the analysis. The petitioners here lack standing under a straightforward application of these precedents, because they are not "able and ready" to compete with others for scarce treatments in a race-based system. *See Carney v. Adams*, 141 S. Ct. 493, 503 (2020). The treatments are not scarce. Accordingly, petitioners are not "prevent[ed]" from seeking access to any of the treatments "on an equal basis" with any other individual of any other race. *See City of Jacksonville*, 508 U.S. at 666.

The system is not race-based for the additional reason that the prioritization schedule applies to independent third parties who are under no compulsion to follow it. In *City of Jacksonville* and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), all government contract bidders were subject to a system in which "set asides" or other advantages for minority-owned business were built into a bidding process where the awards would be made by the government itself. *See City of Jacksonville*, 508 U.S. at 658-59; *Adarand*, 515 U.S. at 205-09. Even in *Parents Involved*, where race was used as a "tie-breaker" in the allocation of some students to schools in two separate school districts, *see* 551 U.S. at 711-12, 716-17, and race might not have factored in the determination as to any individual student, race nevertheless played an inevi-

table part in centralized allocation processes that were required to be followed. Here, by contrast, the determinations at issue are made by independent third parties who are under no compulsion to follow the State Guidance.

3. For the same reasons, there is no split in appellate authority regarding the issues presented in this case. Petitioners contend that the Second Circuit's ruling reflected a divergence from its sister circuits on the issue of what constitutes an "imminent injury" because it "required Petitioners to actually be denied treatment on the basis of race before bringing suit." (Pet. 14.) But the court did no such thing. It acknowledged that "'[a]n allegation of future injury may suffice if the threatened injury is "certainly impending," or there is a "substantial risk" that the harm will occur" (Pet. 5a (quoting *Susan B. Anthony List*, 573 U.S. at 158)), and then concluded that, here, petitioners could muster only a "highly attenuated chain of possibilities" that they might be harmed (Pet. 6a (quotation marks omitted)). Of course, one of the links in the "chain of possibilities" that the court proceeded to recite was that the petitioners are ultimately denied treatment because of their race or ethnicity. (Pet. 6a.) But that is not the same as *holding* that petitioners would need to be denied treatment before they had standing to sue.

Properly understood, the Second Circuit's ruling in this case is consistent with the rulings of its sister circuits identified by petitioners. For example, the D.C. Circuit held in *Attias v. CareFirst, Inc.* that plaintiffs had standing to sue based on a data breach in which their credit card numbers, social security numbers, and medical identity information were stolen. 865 F.3d 620, 628 (D.C. Cir. 2017). The Seventh Circuit reached a similar result in *Remijas v. Neiman Marcus Group,*

LLC, 794 F.3d 688, 693 (7th Cir. 2015). In both of these cases, unlike here, "[n]o long sequence of uncertain contingencies involving multiple independent actors ha[d] to occur before the plaintiffs . . . [would] suffer any harm." *Attias*, 865 F.3d at 629; *see Remijas*, 793 F.3d at 693-94.

In *Sierra Club v. Jewell*, the D.C. Circuit held that plaintiff organizations who sought to preserve the inclusion of a historic battlefield in the National Register of Historic Places had standing to bring their action because the imminent injury they alleged—that the delisting of the site would open it up to mining operations—had a "substantial probability" of occurring, given that mining permits encompassing the site had already been obtained, actual mining operations were taking place near the site and moving closer, and the mining companies themselves stated that they expected to mine the site. 764 F.3d 1, 7 (D.C. Cir. 2014). Likewise, in *McCardell v. United States Department of Housing and Urban Development*, the Fifth Circuit held that a resident of a community in which a specific housing development was planned had standing to sue to enjoin that development, where she claimed that the development would "deprive her of the social and economic effects of diversity." 794 F.3d 510, 520 (5th Cir. 2015). Although her injury depended on (a) the planned development actually being built, and (b) the planned development actually reducing the diversity of the neighborhood, the court held that these contingencies "involve[d] fewer steps" than in *Clapper* "and no 'unfounded assumptions.'" *Id.* Here, by contrast, any court would have to speculate with regard to several of the links in the "highly attenuated chain of possibilities" found by the court below before it can find that petitioners would be injured by the State Guidance.

Nor does *MGM Resorts International Global Gaming Development, LLC v. Malloy*, 861 F.3d 40 (2d Cir. 2017), indicate that the law of the Second Circuit conflicts with that of other circuits, or with the law of this Court, as petitioners suggest. (Pet. 13-14.) In *MGM Resorts*, the Second Circuit found that a plaintiff challenging a Connecticut statute that established a framework for Connecticut's two federally recognized Indian tribes to apply to build commercial casinos on non-reservation land had alleged a "concrete harm"—that is, that it had been "denied the ability 'to compete on an equal footing in the bidding process'" with the tribes. 861 F.3d at 47 (quoting *City of Jacksonville*, 508 U.S. at 666). But the court nevertheless found that the plaintiff lacked standing because it had failed to show that this harm was "imminent," distinguishing the plaintiff's mere "interest" in exploring casino development opportunities in Connecticut with the showings by the plaintiffs in *City of Jacksonville* and *Adarand* that they respectively "would" or "will" bid on the government contracts subject to the race-based processes in those case. *Id.*

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ESTER MURDUKHAYEVA
Deputy Solicitor General
ANDREA W. TRENTO
Assistant Solicitor General
barbara.underwood@ag.ny.gov

April 2023

* *Counsel of Record*