No. 22-757

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

PETITIONERS' REPLY BRIEF

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The government responses in this case show their disturbing persistence to facilitate the race-based prioritization of scarce medical treatments. The City touts the CDC's emphasis on the "importance of ensuring that racial minorities receive access to testing, care, treatment, and, later, vaccines commensurate with the risks they face." Brief in Opposition for Respondent Dep't of Health and Mental Hygiene for the City of New York (City Opp.) at 4 & n.3. For its part, the State contends that beyond its race-based guidance, "[t]here is no race-neutral alternative that would account for" what it considers a "medically proven fact that non-white race or Hispanic ethnicity is an independent risk factor for developing severe COVID-19." Brief in Opposition for Respondent James V. McDonald (State Opp.) at 18.

These statements indicate that the City and State will coerce medical providers to consider race in distributing COVID-19 treatments as soon as they become scarce again. Neither the City nor the State has ever offered any other guidance for distributing COVID-19 treatments in times of scarcity besides those challenged in this case, and the State's guidance has not been superseded. Nor does the government contend that those times are behind us. *See* State Opp. at 4 ("COVID-19 remains an ongoing threat, given the periodic emergence and spread of variants of the virus."). Therefore, this Petition presents an excellent vehicle by which to consider one of the most pressing issues in the country: whether government can direct physicians to allocate scarce medical treatments on the basis of race. Because the Second Circuit's decision below departed from decisions of its sister

courts, as well as decisions of this Court in refusing to consider the merits, this Court should grant review.

Argument

I. The Petition Presents an Ideal Vehicle to Resolve a Recurring Issue of Nationwide Importance

The government defendants cannot dispute the extraordinary importance of the issues that Petitioners raise in this case.[1] *See* Pet. App. 9a (Judge Cabranes' observation that "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"). Defendants instead point to an assortment of vehicle problems that, in their views, caution the Court against resolving the important issues presented in this case. None is persuasive.

The City contends that this Petition presents a poor vehicle for review because "the shortage in treatments abated before petitioners even sued and has not recurred since." City Opp. at 11. Not so. For

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[1] To be sure, the City raises a purported distinction between the importance of the "standing questions" and "the supposed importance of the merits of their equal protection claim." City Opp. at 22. But a court cannot get to the merits of an equal protection challenge to a directive instructing providers to consider race in allocating scarce treatments if it, as the court did below, dismissed the case for want of standing at the pleadings stage. Further, although the City dismisses the issues presented in this case as "supposed[ly] importan[t]," *id.*, it elsewhere promotes the "importance of ensuring that racial minorities receive access to testing, care, treatment, and, later, vaccines commensurate with the risks they face." *Id.* at 4 & n.3.

instance, the City's contention that the shortage in treatments abated before Petitioners filed suit is both factually dubious and legally irrelevant. The City points to an advisory that purports to explain that "the treatments were widely available" a week before Petitioners filed suit. City Opp. at 11 (citing Pet. App. 87a). Yet the declaration on which the City relies for this contention was filed weeks *after* the Plaintiffs filed suit, *see* Pet. App. 87a, and the advisory to which the declaration refers notes that supplies remain limited. *See* Pet. App. 14a & n.4. In any event, the relevant legal question is whether Petitioners face an imminent injury in being unable to compete for scarce medical treatment on equal footing because of their race. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The City can hardly claim that the threat of a supply shortage evaporated just weeks after an unforeseen variant caused the "largest wave of reported cases yet during the pandemic." Pet. App. 81a.

Perhaps this is why the City turns to the fortuitous fact that "no similar shortage of the treatments has arisen in the year-plus since" Petitioners filed their complaint. City Opp. at 11. Yet Article III standing is not determined by hindsight, but by the facts that exist "at the time the complaint was filed." *See Friends of the Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc.*, 528 U.S. 167, 184 (2000).

Nor is the City correct in asserting that mootness—which did not form the basis for the decision below—obviates the need to review Petitioners' claims. At a minimum, this case falls within the mootness exception for cases that are

capable of repetition yet evade review. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007). The controversies in this case plainly evade review. The initial supply shortage lasted for less than two months—much shorter than the time it would take for any controversy to be fully ventilated in the federal courts. *See Turner v. Rogers*, 564 U.S. 431, 440 (2011) (noting that periods of 12 months, 18 months, and two years were sufficiently short for a controversy to evade review). This controversy is also capable of repetition in that there is a reasonable expectation that another supply shortage will trigger the government's race-based guidance back into action.

The City now contends that the State's acknowledgment that "supply chain shortages" can occur at any time is "'anything is possible' reasoning." City Opp. at 14. But the State does not retain guidance for everything that is remotely possible. In this case, the State informed the district court 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. Pet. App. 104a. There would be no reason for the State to insist on retaining its race-based guidance for allocating COVID-19 treatments during times of limited supply if there were no "reasonable expectation" that such times could recur. Therefore, even to the extent that mootness is an issue, this controversy is capable of repetition yet evades review.

The State accuses Petitioners of "graft[ing] this Court's 'traceability' jurisprudence" onto "its analysis of whether an injury is sufficiently 'concrete,

particularized, and actual or imminent' for standing purposes." State Opp. at 11. But as this Court has explained many times, facts can establish both injury and traceability in some cases or lack thereof in others. In *Clapper v. Amnesty Int'l USA*, for instance, the Court held that a "highly attenuated chain of possibilities" meant that the challengers failed to establish an impending injury and that any such injury was fairly traceable to the challenged statute. 568 U.S. 398, 410–11 (2013). Conversely, when this Court explained 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" in *City of Jacksonville*, 508 U.S. at 666, it "follow[ed] from definition of 'injury in fact' that petitioner [had] sufficiently alleged both" causation and redressability. *Id.* at 666 & n.5. *See also Arizona v. Mayorkas*, 600 F. Supp. 3d 994, 1005 (D. Ariz. 2022) ("[I]t *is* possible for a party seeking to challenge a government policy to establish standing by showing that the challenged policy will have a predictable effect on the decisions of third parties and that those decisions will, in turn, cause the challenger to suffer harm.") (emphasis in original).

The State also argues that there is a vehicle problem because there are supposedly "numerous alternative grounds for affirmance, [including] the absence of traceability and redressability, mootness, and petitioners' failure to state a claim on the merits." State Opp. at 11. But the Second Circuit's decision rested solely on its view that Petitioners failed to "satisfy the requirement that an injury in fact be actual or imminent." *See* Pet. App. 4a–7a.

In any event, none of the "numerous alternative grounds for affirmance" has merit. State Opp. at 2. The race-based barrier to treatments in times of scarcity is traceable to both government defendants. The City distributed its directive to roughly 75,000 individuals, including medical professionals, Pet. App. 84a, and the State distributed its directives to an untold number of "health care facilities and prescribing medical professionals in New York, including licensed physicians, nurse practitioners, and physicians' assistants." Pet. App. 102a. And Petitioners' injury is redressable despite a similar (but not identical) directive from the CDC. A "plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

II. The Second Circuit's Decision Is Irreconcilable with Decisions of Three Sister Courts

The Second Circuit's decision in this case suggests that Petitioners must show that they were denied COVID-19 treatments on the basis of race before they may press their claims in federal court. The reasoning in decisions from the D.C., Fifth, and Seventh Circuits, however, demonstrates that the Second Circuit panel would have reached a different conclusion if it were bound by precedent from any of those circuit courts.

The City, for instance, summarizes facts and holdings from the circuit court precedents cited by Petitioners. *See* City Opp. at 16–17. But it resorts to the conclusory statement that "[t]he various cases

yield no apples-to-apples comparison with the extreme facts presented here." *Id.* at 18. For instance, the City attempts to reconcile cases from other circuits by contending that the Second Circuit did not reject "the principle that standing can be established based on a 'predictable' course of events," but instead "simply recognized that the course of events required for petitioners' asserted injury to ripen was not a predictable one." *Id.* Yet the City fails to explain how contracting a disease during a pandemic marred by unexpected outbreaks and supply chain disruptions is any less predictable than the facts that any of the other circuits considered in cases in which they held that federal court jurisdiction was proper. *See* Pet. for Cert. at 14–16. For instance, the City fails to explain how an injury is imminent where the conduct sought to be enjoined had not occurred in over a decade, *Sierra Club v. Jewell*, 764 F.3d 1, 7–8 (D.C. Cir. 2014), but is not imminent where Petitioners are challenging race-based guidance documents to deal with a severe supply shortage of treatments and the largest outbreak of COVID-19 cases just 18 months ago.

The State's opposition suffers from nearly identical flaws. For instance, the State attempts to distinguish *Sierra Club* on the basis "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." State Opp. at 24. But the mining permits encompassing the site had existed for years and the D.C. Circuit did not rely on the movement of the mining operations as the basis for its decision. *Sierra Club v. Jewell*, 764 F.3d at 7. The State's point about expectations cuts against the government. The State

cannot plausibly contend both that its race-based directives have no effect and that they "serve[] the State's compelling interest in protecting public health and preventing severe illness and death from COVID-19." State's Br. at 41, *Roberts*, No. 22-622 (2d Cir. June 16, 2022). In all, the Second Circuit's decision below departed from decisions of three other circuit courts of appeals.

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

The decision below departs from this Court's holdings in several cases. As this Court explained in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), for instance, federal courts have jurisdiction to hear cases in "which third parties will likely react" to government action "in predictable ways." *Id.* at 2566. Here, the government directives were distributed precisely with the purpose of funneling scarce COVID-19 treatment in part on the basis of race. *See* City Opp. to Pltfs' Mot. for Prelim. Inj. at 12–13, *Roberts*, No. 22-710 (E.D.N.Y. Feb. 25, 2022), ECF No. 20 (City's trial court contention 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.").

The State attempts to distinguish *Department of Commerce* on grounds that "medical providers may freely exercise their independent medical judgment in rendering treatment to COVID patients." State Opp. at 14. But the injury in *Department of Commerce* was also tied to the independent judgment of third parties—noncitizens—who would have to choose "to violate their legal duty to respond to the census" for plaintiffs' injury to materialize. *Department of*

Commerce, 139 S. Ct. at 2565. The City suggests that this Court's decision in *Department of Commerce* rested upon the "statistically likely aggregate effect" of the government action. City Opp. at 21. But the same could be said here. The directives at issue—distributed to over 70,000 individuals—decreased the chances of Petitioners to receive medical treatments and increased the chances of harm. In other words, the government erected "a barrier . . . mak[ing] it more difficult for members of one group to obtain a benefit than [another]." *City of Jacksonville*, 508 U.S. at 666.

The decision below also flouts this Court's decision in *City of Jacksonville*. There, this Court held 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." *Id.* The government disputes Petitioners' framing and contends that the denial of COVID-19 treatments was only one nonessential link in the Second Circuit's chain. But six of the nine causal links listed by the Second Circuit suggest that a plaintiff must be denied COVID-19 treatments to have standing. *See* Pet. App. 6a. For example, it would make little sense for a person who "[sought] treatment . . . within the appropriate time of symptom onset" to challenge the race-based directives if that person had not also been *denied* the treatment sought. *Id.*

The government also attempts to distinguish this Court's holding in *City of Jacksonville* by pointing to "innumerable third parties" that would have to effectuate the government's race-based directives. But a centralized process has never been the *sine qua non* of an equal protection challenge in federal court. *See*

Department of Commerce, 139 S. Ct. at 2565 (standing rested on the prediction that some noncitizens would violate their legal duty to respond to the census); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989) (plaintiff had standing to challenge Richmond plan that required third-party "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises" or to request a waiver of the set-aside). The decision below cannot be reconciled with this Court's precedents.

Conclusion

The Petition for a writ of certiorari should be granted.

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Respectfully submitted,

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