

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

William A. Jacobson, on behalf of
himself and others similarly situated,

Plaintiff,

v.

Mary T. Bassett, in her official capacity
as Acting Commissioner of the New
York Department of Health,

Defendant.

Case No. 3:22-cv-00033-MAD-ML

**PLAINTIFF’S NOTICE OF MOTION FOR CLASS
CERTIFICATION**

PLEASE TAKE NOTICE that, pursuant to the schedule ordered by this Court and upon the annexed memorandum of law, declaration, and all other pleadings and proceedings, Plaintiff William A. Jacobson respectfully moves this Court under Rule 23(b)(2) of the Federal Rules of Civil Procedure for an order:

1. Certifying the proposed class consisting of all individuals in New York State who do not qualify as “[n]on-white race or Hispanic/Latino ethnicity” under the New York Department of Health’s guidelines for distributing COVID-19 treatments; and

2. Appointing Plaintiff William A. Jacobson as class representative.

Respectfully submitted.

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Dated: February 4, 2022

CERTIFICATE OF SERVICE

I certify that on February 4, 2022, I electronically filed this document with the clerk of court using the CM/ECF System, which will automatically send e-mail notification to all counsel of record.

/s/ Jonathan F. Mitchell
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BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Table of contents i

Table of authorities ii

I. The Court should certify the proposed class under Rule 23(b)(2)..... 1

 A. The proposed classes are so numerous that joinder of all members
 is impractical 1

 B. There are questions of law or fact common to the members of the
 class..... 1

 C. Mr. Jacobson’s claims are typical of the claims of the class..... 2

 D. Mr. Jacobson will fairly and adequately protect the interests of the
 class..... 3

 E. The proposed class satisfies Rule 23(b)(2)..... 4

Conclusion 5

Certificate of service 6

TABLE OF AUTHORITIES

Cases

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 3

In re Nat’l Football League Players Concussion Injury Litig.,
821 F.3d 410 (3d Cir. 2016) 1

M.D. v. Perry, 675 F.3d 832 (5th Cir. 2012)..... 2

Marisol A. v. Giuliani, 126 F.3d 372 (2d Cir. 1997)..... 2

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) 2, 3, 4

Rules

Fed. R. Civ. P. 23(b)(2) 4

The plaintiff respectfully moves to certify a class under Rule 23(b)(2). The proposed class will be represented by plaintiff William A. Jacobson, and it consists of all individuals in New York State who do not qualify as “[n]on-white race or Hispanic/Latino ethnicity” under the New York Department of Health’s guidelines for distributing oral antiviral COVID-19 treatments.

I. THE COURT SHOULD CERTIFY THE PROPOSED CLASS UNDER RULE 23(b)(2)

A party that moves for class certification must satisfy each requirement of Rule 23(a) and at least one subdivision in Rule 23(b). The proposed classes meet each of these requirements.

A. The Proposed Classes Are So Numerous That Joinder Of All Members Is Impractical

The number of New York residents who are facing discrimination from the Department of Health on account of their race and ethnicity easily exceeds the numerosity threshold. *See In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 426 (3d Cir. 2016) (“[N]umerosity is generally satisfied if there are more than 40 class members.”). According to the 2020 census, New York state has 20,201,249 residents, and 55.2% of that total (approximately 11.15 million) is “white alone.” *See New York: 2020 Census*, U.S. Census Bureau (Aug. 25, 2021), <https://bit.ly/3glpdCM>. And only 19.5% of New York’s population (approximately 3.94 million) reported Hispanic or Latino ethnicity. *See id.* Thus, at a minimum, there are more than 7.2 million people in New York who are white and not of Hispanic or Latino ethnicity, which is well in excess of the numerosity threshold.

B. There Are Questions Of Law Or Fact Common To The Members Of The Class

Mr. Jacobson seeks to litigate three questions of law common to each member of the class:

1. Whether the New York Department of Health is violating the Equal Protection Clause by rationing lifesaving COVID-19 medications on the basis of race and ethnicity.
2. Whether the New York Department of Health is violating Title VI by rationing lifesaving COVID-19 medications on the basis of race and ethnicity.
3. Whether the New York Department of Health is violating section 1557 of the Affordable Care Act by rationing lifesaving COVID-19 medications on the basis of race and ethnicity.

These questions affect all class members because each of them is subject to discrimination on account of their race and ethnicity, as each of them is excluded from the Department-preferred category of “[n]on-white race or Hispanic/Latino ethnicity.” Each class member will “suffer the same injury,” and that is all that needed to satisfy Rule 23(a)(2)’s commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)); *see also id.* at 360 (“[E]ven a single [common] question will do.” (citation and internal quotation marks omitted)). And a ruling on these issues “will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* at 350.

C. Mr. Jacobson’s Claims Are Typical Of The Claims Of The Class

Mr. Jacobson’s claims are more than typical: they are precisely the same as those from all members of the proposed class. The New York Department of Health has implemented a program that actively discriminates against *all* of the class members based on their race or ethnicity. Each class member’s claim arises from the same course of events—the Department of Health’s decision to establish and enforce racially discriminatory criteria for distributing COVID-19 medications. And each class member is making the same legal arguments to prove the defendant’s liability. *See Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (“Typicality . . . requires that the claims of the class representatives be typical of those of the class, and is satisfied when each

class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” (citation and internal quotation marks omitted); *see also Wal-Mart*, 564 U.S. at 350 n.5 (“[T]he commonality and typicality requirements of Rule 23(a) tend to merge.” (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157–58 n.13 (1982))).

D. Mr. Jacobson Will Fairly and Adequately Protect the Interests of The Class

Mr. Jacobson will fairly and adequately represent the interests of his fellow class members, and there are no conflicts of interest between the plaintiff and the other members of this class.

The class consists of “all individuals in New York State who do not qualify as ‘[n]on-white race or Hispanic/Latino ethnicity’ under the New York Department of Health’s guidelines for distributing COVID-19 treatments.” There is no conceivable conflict of interest that could arise from the plaintiff’s efforts to prevent the Department discriminating against members of the class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (“The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.”). A classwide injunction will serve only to protect the class members’ constitutional rights, as well as rights guaranteed under the Civil Rights Act of 1964 and section 1557 of the Affordable Care Act. Mr. Jacobson is an appropriate class representative because he has a vested interest in ensuring the success of this litigation and preventing Commissioner Bassett from discriminating against anyone because of their race or ethnicity. And the interests of Mr. Jacobson are aligned with those of the class, as each class member benefits from a ruling that prevents the Department of Health from discriminating against them because of their race or ethnicity.

E. The Proposed Class Satisfies Rule 23(b)(2)

The final criterion for class certification under Rule 23(b)(2) is that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The Supreme Court has held that this requirement is satisfied “when a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart*, 564 U.S. at 360; *see also id.* at 361–62 (“[T]he relief sought must perforce affect the entire class at once”). That is precisely what the plaintiff requests: a single injunction that stops Commissioner Bassett from discriminating against any of the class members because of their race or ethnicity. No one is seeking individualized relief for any class member or for any subset of the class. The plaintiff requests a simple, classwide injunction that prevents the class members from being discriminated against because of their race or ethnicity.

In addition, Commissioner Bassett is “act[ing] . . . on grounds that apply generally to the class.” Fed. R. Civ. P. 23(b)(2). With respect to the class, the Commissioner has expressly rationed and prioritized the distribution of COVID-19 treatments on account of race and ethnicity. Because this discriminates against all class members, it makes “final injunctive relief or corresponding declaratory relief . . . appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2); *see also Wal-Mart*, 564 U.S. at 360 (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.”).

CONCLUSION

The motion for class certification should be granted.

Respectfully submitted.

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pro hac vice application pending

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/s/ Jonathan F. Mitchell
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*Counsel for Plaintiff and
the Proposed Class*

**IN THE UNITED STATES DISTRICT COURT
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WILLIAM A. JACOBSON, on behalf of
himself and others similarly situated,
Plaintiff,

Case No. 3:22-cv-00033-MAD-ML

v.

MARY T. BASSETT, in her official capacity as
Acting Commissioner of the New York
Department of Health,

Defendant.

DECLARATION OF WILLIAM A. JACOBSON

1. I am a United States citizen and resident of Tompkins County, New York.
2. I am over the age of eighteen and under no mental disability or impairment. I have personal knowledge of the following facts and, if called as a witness, I would competently testify to them.
3. I am of East European ancestry and not “non-white” and not of Hispanic/Latino ethnicity. I am 62 years old.
4. I am a Clinical Professor of Law at Cornell University. The university recently had a severe outbreak of COVID-19 despite its extensive COVID protocols. More than 1,300 people on campus were infected in just one week according to reported statistics. *See Anil Oza, How the Omicron Variant and the End of the Semester Created a ‘Perfect Storm’ for Cornell’s COVID Outbreak*, The Cornell Sun, (Dec. 17, 2021), <https://bit.ly/32a0sGc>.
5. As of February 3, 2022, there have been over 75 million reported cases of COVID-19 in the United States according to reported statistics. *See COVID Data Tracker*, Centers for Disease Control & Prevention, <https://bit.ly/3J4SWfB>.

6. According to federal officials, “most people are going to get covid.” Aaron Blake, *Most People Are Going to Get Covid: A Momentous Warning at a Senate Hearing*, Washington Post (Jan. 11, 2022), <https://wapo.st/3fqyxVt>

7. When I inevitably contract COVID-19, I want to immediately access oral antiviral treatments to reduce my risk of serious illness or death.

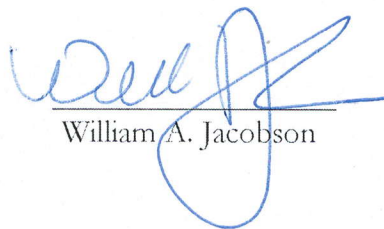
8. In New York, however, I am not automatically eligible to receive these treatments because I am not non-white and not of “Hispanic/Latino ethnicity.” I can only obtain these treatments if I demonstrate “a medical condition or other factors that increase [my] risk for severe illness.”

9. Like New Yorkers of other races and ethnicity, I want to be eligible for and obtain these treatments without having to demonstrate a “medical condition or other factors that increase [my] risk for severe illness.”

10. I have a heightened concern when I go about my daily activities because I know that I am not automatically eligible for life-saving treatments under New York State guidelines solely because of my race and ethnicity.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 3rd day of February, 2022



William A. Jacobson

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**[PROPOSED] ORDER GRANTING
MOTION FOR CLASS CERTIFICATION**

Before the court is the plaintiff's motion for class certification, filed February 4, 2022. Having considered the motion, case file, and applicable law,

IT IS ORDERED that Plaintiff's motion is **GRANTED**.

The Court certifies the following class under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class consists of:

All individuals in New York State who do not qualify as "[n]on-white race or Hispanic/Latino ethnicity" under the New York Department of Health's guidelines for distributing COVID-19 treatments.

William A. Jacobson is appointed class representative. Jonathan F. Mitchell, Adam K. Mortara, Jeffrey Harris, Michael Connolly, James Hasson, Gene P. Hamilton, James P. Trainor are appointed class counsel under FRCP 23(g). The class claims are:

1. Whether the New York Department of Health is violating the Equal Protection Clause by rationing lifesaving COVID-19 medications on the basis of race and ethnicity.
2. Whether the New York Department of Health is violating Title VI by rationing lifesaving COVID-19 medications on the basis of race and ethnicity.

3. Whether the New York Department of Health is violating section 1557 of the Affordable Care Act by rationing lifesaving COVID-19 medications on the basis of race and ethnicity.

Dated: _____, 2022

MAE A. D'AGOSTINO
UNITED STATES DISTRICT JUDGE