22-692

United States Court of Appeals for the Second Circuit

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

v.

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

On Appeal from the United States District Court for the Northern District of New York, No. 22-cv-33

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Department's arguments depend almost entirely on this Court concluding that the Policy is "voluntary" and simply a "suggestion" that providers consider race when deciding who should receive oral antiviral treatments for COVID-19. But this is a nonstarter. The Department entirely ignores both the text of the Policy—which orders providers to "adhere" to its racial prioritization instructions—and New York law, which punishes providers who refuse to comply with the Department's orders. Indeed, there is not *a single sentence* in the Policy that informs providers that its prioritization criteria are voluntary. The Department cannot retroactively change the Policy through a declaration from a Department employee.

Stripped of this pretense, the Department's remaining arguments plainly fail. Plaintiff has demonstrated an Equal Protection injury because the Policy erects a barrier that makes it more difficult for him to obtain oral antiviral treatments because of his race and ethnicity. And the injury caused by the Policy is redressable by the relief Plaintiff seeks. Nor are Plaintiff's claims moot. The Policy is still in effect, COVID-19 rates have once again increased sharply, and the Department concedes that a new shortage can happen "at any time."

The Department's primary defense on the merits is, again, that the Policy is not mandatory but only a "suggestion" to providers. But the Policy imposes burdens and benefits on the basis of race and thus is subject to strict scrutiny. The Department hasn't come close to satisfying its heavy burden under strict scrutiny, and the remaining factors

weigh in Plaintiff's favor. Rather than remand for further proceedings, the Court should instruct the district court to enter a preliminary injunction enjoining the Department from enforcing the Policy. New York, like all other states, should allocate live-saving treatments to all its residents based on neutral, objective criteria regardless of their race or ethnicity.

ARGUMENT

I. Plaintiff has Article III standing

A. Plaintiff has a cognizable injury

Plaintiff's injury is straightforward. *See* Jacobson Br. 14-15. In the context of the Equal Protection Clause, a cognizable injury occurs "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Ne. Fla. Chapter of Ass. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) ("[O]ne form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff."). Here, the Policy is a government-erected barrier that makes it more difficult for non-Hispanic whites (like Plaintiff) to obtain a benefit (oral antiviral treatments) than it is for members of all other racial and ethnic groups. Specifically, under the Policy, non-whites and Hispanics/Latinos who test positive for COVID-19 *automatically* qualify for oral antiviral treatments, while identically situated non-Hispanic whites are ineligible unless they demonstrate a "medical condition" or "risk factor" that increases their risk for severe illness. JA22; *see also* Dep't Br. 30 (conceding that "[i]t is true that Plaintiff is

not automatically eligible for oral antiviral therapies under the [Policy]").

The Department argues that Plaintiff has no cognizable injury because the Policy is "voluntary guidance" that merely provides "nonbinding recommendations to providers." Dep't Br. 22. But neither the text of the Policy nor anything in New York law supports the Department's assertion. Jacobson Br. 8. The Policy itself says it is mandatory: It directs providers to "*adhere* to the prioritization" factors it outlines, JA21 (emphasis added), and it never even hints that its prioritization instructions are merely advisory or optional, *see* JA21-25. Nor would providers feel free to ignore the Policy's commands. Jacobson Br. 8. Under New York law, any provider "who violates, disobeys, or disregards … any lawful notice, order, or regulation" published by the Department is subject to thousands of dollars in civil penalties for each infraction. N.Y. Pub. Health Law §12(1)(a).

The only evidence the Department cites to the contrary is a declaration from Eugene Heslin, an employee of the Department who "support[s] the Commissioner of Health" in her duties. JA36, ¶1. In his declaration, Mr. Heslin claims that the Policy is "simply a suggestion to help focus the thoughts of practitioners," and he promises that the Department "will not take enforcement actions against practitioners or hospitals in relation to it." JA44-45, ¶¶25, 27. But nothing in the actual text of the challenged policy contains those purported limitations. And Mr. Heslin—an employee of the Department—has no authority to bind the Department to his promise not to enforce the Policy. Regardless, this Court cannot "uphold an unconstitutional [state action]

merely because the Government promise[s]" not to "bring a prosecution" to enforce its terms. *United States v. Stevens*, 559 U.S. 460, 480 (2010); *see N. Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999) (without judicial relief the plaintiff is left "with nothing more than the State's promise" that it will not "bring its interpretation more in line with the [law's] plain language").[1]

Like the district court, the Department believes that Plaintiff's injuries are "speculative" and depend upon a "series of events" that must all occur. Dep't Br. 19-20. But each of the identified events is either certain to occur or irrelevant to the Article III analysis. *See* Jacobson Br. 16-19. Plaintiff is "highly likely to contract COVID-19," Jacobson Br. 16-18; JA33-34, ¶¶4-7, which the Department never disputes. And Plaintiff will seek oral antiviral treatment when he contracts COVID-19, *see* JA9; JA34, ¶¶7, 9; Jacobson Br. 15-16, which the Department also never disputes. An injury is not speculative when the events causing the injury are certain or highly likely to occur. *See*

[1] In any event, courts have long prohibited governments from "suggesting" this type of voluntary racial discrimination. *See, e.g., Baldwin v. Morgan*, 287 F.2d 750, 753-54 (5th Cir. 1961) (a railroad terminal could not post signs designating segregated waiting rooms even though the signs were "merely intended [to be] an invitation to each of the races to occupy these facilities" and the "segregated use or occupancy of such waiting rooms [was not] coercively compelled"); *Lewis v. Greyhound Corp.*, 199 F. Supp. 210, 214 (M.D. Ala. 1961) (Alabama bus carrier could not "maintain separate facilities in their terminals for the white and Negro races and [post] signs . . . in the terminals indicating which facilities are for the use of each race," even though the carriers were "not enforcing segregation in the separate facilities which they maintain or utilize").

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (an "allegation of future injury" is sufficient when there is a "substantial risk that the harm will occur").[2]

The remaining "events" the Department identifies are irrelevant to the standing analysis. That Plaintiff might not obtain oral antiviral treatments for non-discriminatory reasons—because he lacks "mild to moderate symptoms" or a physician determines it is not clinically appropriate, *see* Dep't Br. 19-20—is of no moment. *See* Jacobson Br. 18-19. The injury under the Equal Protection Clause is the "imposition of the barrier" on account of race—"not the ultimate inability to obtain the benefit." *City of Jacksonville*, 508 U.S. at 666. The injury to Plaintiff "cannot be defeated by showing that, as a practical matter, [Plaintiff] would never [get the oral antiviral treatments] anyway." *Comer v. Cisneros*, 37 F.3d 775, 794 (2d Cir. 1994). The injury is not the failure to obtain the oral antiviral treatments; it is "the missed opportunity to compete for [them] on an equal footing with" other New Yorkers. *Id.* And it is irrelevant that oral antiviral treatments—as of right now—are not "in such short supply that the physician would

[2] *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) is inapposite. *Clapper* involved a "highly attenuated chain of possibilities." *See id.* at 410. The plaintiffs' theory of harm "rest[ed] on their highly speculative fear" that (1) the government would target the communications of non-citizens with whom the plaintiffs communicate; (2) in doing so, the government would invoke its authority under 50 U.S.C. §1881a instead of using some other procedure; (3) an Article III judge would conclude that the proposed surveillance procedures satisfied §1881a's many safeguards and were consistent with the Fourth Amendment; (4) the government would successfully intercept the communications of the targeted non-citizens; and (5) the plaintiffs would be parties to the particular communications that the government intercepts. *Id.* Nothing remotely similar is happening here. Plaintiff's injuries are directly caused by the Policy and highly likely to occur. *See* Jacobson Br. 16-19.

have to prioritize treatments" based on race. Dep't Br. 20. As explained (without any response from the Department), this argument "confuses injury in fact with questions of mootness." Jacobson Br. 19. And this dispute is not moot because the Policy remains in effect and has not been repealed or withdrawn. *Infra* 12-13.[3]

Nor does Plaintiff need to show that he was "denied access to antiviral therapies while a similarly situated non-white or Hispanic person receives such treatment." Dep't Br. 20. Again, Plaintiff's injury comes from the "imposition of a barrier," not "an ultimate inability to obtain the benefit." *City of Jacksonville*, 508 U.S. at 666. Plaintiff has shown a cognizable injury because there is a "substantial risk that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158; *see, e.g., Gratz v. Bollinger*, 539 U.S. 244, 262 (2003).

MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy, 861 F.3d 40 (2d Cir. 2017), is not to the contrary. There, the plaintiff (a developer of casinos) alleged that a Connecticut law creating a "pathway" for Native American tribes to build casinos "place[d] [the plaintiff] at a competitive disadvantage in the state's commercial industry." *Id.* at 43. The Court found the developer's injuries "too speculative to support Article III standing" because the developer had not "allege[d] any specific plans to develop a casino in Connecticut." *Id.* Here, Plaintiff has "specific plans" to seek oral

[3] That Plaintiff "received treatment when he contracted COVID-19 in May 2022" does not "undermine[] his claim of injury." Dep't Br. 21. Plaintiff received therapeutic treatments when he was away from home in *Massachusetts*—a State that (unlike New York) does not allocate treatments based on race—and there remains a substantial risk that he will be infected again. *See* Jacobson Br. 17 n.4.

antiviral treatments when he contracts COVID-19. JA34, ¶¶7, 9. Unlike the developer in *MGM Resorts*, there is nothing else for Plaintiff to do to show that he is "ready to participate" in the competitive process to receive oral antiviral treatments. *MGM Resorts*, 861 F.3d at 48.

Though it tries, the Department cannot meaningfully distinguish *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003). As explained, Jacobson Br. 19-21, *Baur* is not limited to "'food and drug safety'" or to allegations of "'an unreasonable exposure' to known environmental risks," Dep't Br. 26. This Court has recognized increased-risk injuries as cognizable in an array of other contexts. Jacobson Br. 21-22; *see, e.g., McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295, 303 (2d Cir. 2021) (an "increased risk of identity theft or fraud" constitutes Article III injury); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) (an increased "risk of being assessed a [tax] penalty" constitutes Article III injury); *United States v. Evseroff,* 528 Fed. Appx. 75, 77 (2d Cir. 2013) (an increased "likelihood that the Government will seize" personal assets constitutes Article III injury).

Relying on *Maddox v. Bank of New York Mellon Trust Co., N.A.*, 19 F.4th 58 (2d Cir. 2021), the Department claims that Plaintiff's emotional and psychological harms are merely "'perfunctory allegation[s] of emotional distress.'" Dep't Br. 27 (quoting *Maddox*, 19 F.4th at 66). But Plaintiff's injuries are nothing like those alleged in *Maddox*. There, this Court found "no reason why the delayed recordation [of a mortgage] would cause 'great stress, mental anguish, anxiety, and distress.'" *Maddox*, 19 F.4th at 66. Here,

by contrast, Plaintiff's emotional and psychological injuries are not "wholly incommensurate with" the Policy. *Id.* Unlike emotional injuries purportedly connected to recording a mortgage, it is entirely reasonable that Plaintiff would have emotional and psychological injuries due to a heightened risk of health harms and even death. *See* JA34, ¶10; Jacobson Br. 22-23.

B. Plaintiff's injuries are traceable to the Department's actions

The Department argues, for the first time on appeal, that Plaintiff's injuries are not traceable to the Policy. That is wrong. An injury is traceable when there is a "causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, the Policy is causing Plaintiff's injuries—specifically, the Policy "erects a barrier that makes it more difficult for [Plaintiff] to obtain a benefit than it is for members" of other racial and ethnic groups. *City of Jacksonville*, 508 U.S. at 666; *see, e.g., Vitolo v. Guzman*, 999 F.3d 353, 356, 359 (6th Cir. 2021) (the plaintiff's Equal Protection injuries were caused by a government program "allocat[ing] limited coronavirus relief funds based on the race and sex of the applicants").

The Department again asserts that Plaintiff's injuries are not traceable to the Policy because the Policy is "nonbinding." Dep't Br. 29. But the Policy *does* impose binding obligations on providers, as explained above, because it is written in mandatory terms and includes none of the qualifications that the Department sought to add only after being sued. *Supra* 3-4; Jacobson Br. 8. The Department also insists that "there is

no mechanism for enforcing" the Policy. Dep't Br. 29. That too is wrong. *See* N.Y. Pub. Health Law §12(1)(a). The Department's only evidence to the contrary is the declaration from Eugene Heslin, an agency employee who promises that the Department "will not take enforcement actions against practitioners or hospitals." JA45, ¶27. As explained, Mr. Heslin has no authority to bind the Department and, even if he could, such a post hoc declaration would not cure the injury caused by the Policy. *Supra* 3-4.

The Department also argues that Plaintiff's emotional and psychological injuries are not traceable to the Policy because "physicians must independently determine whether those drugs are clinically appropriate for an individual patient" and so Plaintiff's injuries are "traceable to these independent actors, not to [the Policy]." Dep't Br. 30. But Plaintiff fears contracting COVID-19 while "not automatically [being] eligible for life-saving treatments . . . because of [his] race and ethnicity." JA34, ¶10. It is the Policy's *heightened barriers* based on race that are causing Plaintiff's injuries. Those injuries stem directly from the Policy, not independent actors. *See* Jacobson Br. 22-23.

C. Plaintiff's injuries are redressable by a favorable decision

The Department argues—again for the first time on appeal—that Plaintiff's injuries are not redressable. Not so. An injury is redressable if there is a "non-speculative likelihood that the injury can be remedied by the requested relief." *Coal. of Watershed Towns v. U.S. Envtl. Prot. Agency*, 552 F.3d 216, 218 (2d Cir. 2008). Here, if the Court declares the Policy unlawful and enjoins the Department from enforcing it, that will redress Plaintiff's injuries. Plaintiff would be able to access oral antiviral treatments on

an equal basis regardless of his race or ethnicity. *See, e.g., Vitolo*, 999 F.3d at 359 (plaintiff's Equal Protection injuries were "redressable by a decision ordering the government not to grant priority consideration based on the race of applicants").

The Department contends that Plaintiff's injuries are not redressable because FDA orders would still prohibit Plaintiff from receiving the treatments. Dep't Br. 31. According to the Department, the FDA has approved these treatments only for patients "who are at high risk for progression to severe COVID-19" and the FDA's "criteria for high risk are the same as those contained in the [Policy]." Dep't Br. 31. That is wrong. Although the FDA's authorizations state that patients are eligible if they are at "high risk," the FDA has *not* adopted the Department's rigid racial prioritization criteria—one in which all racial minorities and all Hispanics/Latinos are automatically eligible to receive these treatments regardless of any race-neutral risk factors. *See* JA129-30. Indeed, the Department's only evidence to support this assertion is a citation of the Policy itself. *See* Dep't Br. 31 (citing JA50); *see also* Jacobson Br. 6 & n.3 (noting that "[n]early every state in the country has allocated these treatments using race-neutral criteria such as advanced age, obesity, or a compromised immune system").

The term "high risk" in the authorizations "can be interpreted a number of different ways." Natalie Wallington, *Can Everyone Who Tests Positive for COVID Get Paxlovid Medication? We Asked a KU Doctor*, The Kansas City Star, (June 16, 2022), https://bit.ly/39XlqMt. The Maryland Department of Health, for example, tells providers that "[e]ligibility and indications for Paxlovid are broad. Use your clinical

judgment and discretion to identify patients that are in need of Paxlovid prescriptions." *COVID-19 Therapeutics* at 3, Maryland Primary Care Program, https://bit.ly/3yw5dau. Simply put, nothing in the FDA's orders would require a provider to impose the same racial hierarchy and barriers that the Department has imposed here.

Finally, the Department contends that Plaintiff's injuries are not redressable because Plaintiff "has not shown that health care providers would make different treatment decisions if the [Policy] were invalidated" because "health care providers may [still] consider race and ethnicity" when deciding whether to prescribe oral antiviral treatments to Plaintiff. Dep't Br. 32. But an injury is not unredressable simply because a third party *might* impose another injury in the future. *See Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 285 (4th Cir. 2018) ("NPS cannot simply hypothesize as to possible future harm to overcome the fact that a favorable ruling would redress Petitioners' only injury at this time."); *Bishop v. Smith*, 760 F.3d 1070, 1077 (10th Cir. 2014) ("Redressability is satisfied when a favorable decision relieves an injury, but a decision does not need to relieve every injury.") (cleaned up). Nor could Plaintiff's standing be defeated "by showing that, as a practical matter, [Plaintiff] would never [get the oral antiviral treatments] anyway." *Comer*, 37 F.3d at 794. The injury here derives from the Policy, and granting Plaintiff the relief he seeks would redress that injury.[4]

[4] *Town of Babylon v. Federal Housing Finance Agency*, 699 F.3d 221 (2d Cir. 2012), is clearly distinguishable. This Court found no redressable injury because "[n]othing in the OCC Bulletin compelled national banks to take any action" and the Bulletin was

II. Plaintiff's claims are not moot

The Department argues that Plaintiff's claims are moot due to "changed circumstances"—namely, that the "treatments at issue are now widely available" and so the Policy's racial prioritization criteria no longer apply. Dep't Br. 33-34. This change in supplies does not render Plaintiff's claims moot.

A case becomes moot only when "events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur." *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998). Here, the current supply of oral antiviral treatments has not "eradicated the effects" of the Policy. *Id.* As the Department concedes, the Policy is *still in effect*. *See* Dep't Br. 33 (the Policy's racial prioritization criteria "appl[y] . . . during a supply shortage"); *see also* Jacobson Br. 11. Nor does the Department even suggest that a new shortage of treatments will not occur in the future. *Irish Lesbian & Gay Org.*, 143 F.3d at 647. To the contrary, the Department has warned that another shortage "can happen at any time." JA45, ¶28; *see also* Jacobson Br. 11 (documenting rising COVID-19 rates).

Even if this dispute were moot—which it is not—an exception would apply. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The Department "'bears the

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"couched in entirely permissive language." *Id.* at 230. The Policy here, by contrast, is mandatory and "compel[s] [providers] to take action." *Id.*; *see supra* 3-4.

formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (citation omitted). Here, the Department has chosen not to enforce the Policy only because "there are no *current* shortages in supply." Dep't Br., Addendum (emphasis added). Because a new shortage "can happen at any time," JA45, ¶28, the Department cannot satisfy its "formidable burden" of showing that it will not enforce the Policy's racial prioritization criteria again, *Trinity Lutheran*, 137 S. Ct. at 2019 n.1.

The Department assures the Court that "Plaintiff will have ample opportunity" to challenge the Policy again when "[f]uture supply shortages" occur. Dep't Br. 35. That is baffling. Oral antiviral "[t]reatment is most effective when given as *soon as possible* and *no more than 5 days* after symptom onset." JA30 (emphasis added). A narrow window of five days—while Plaintiff is suffering from a serious disease and in need of immediate treatment—is the definition of "too short" for a claim "to be fully litigated to its cessation or expiration." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990). Plaintiff's claims are not moot.

III. This Court should order the district court to preliminarily enjoin enforcement of the Policy pending further proceedings

Although the Department urges the Court to not determine whether a preliminary injunction is appropriate, it doesn't deny that courts can and have done just that in similar circumstances. Dep't Br. 36-37. When an appellate court finds that a plaintiff has standing and the merits can only be resolved one way, it is entirely

appropriate for the court to remand with instructions to enter an injunction. *See* Jacobson Br. 23; *e.g., McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021); *Scott v. Roberts*, 612 F.3d 1279, 1298 (11th Cir. 2010). Because Plaintiff has standing and will prevail on the merits, this Court should remand with instructions for the district court to enjoin the Policy.

A. Plaintiff is likely to succeed on the merits of his claims

Plaintiff is not just likely but certain to prevail on the merits of his claims that the Policy violates the Equal Protection Clause, Title VI, and section 1557 of the Affordable Care Act.[5] The Department contends that the Policy is not subject to strict scrutiny because it is simply a "recommend[ation]" and thus "does not confer a benefit or impose a burden based on a racial classification." Dep't Br. 41-42. Again, that is wrong; the Policy is mandatory, not voluntary. *Supra* 3-4; Jacobson Br. 8. The Policy confers a benefit on some, but not all racial groups, by making them automatically eligible for oral antiviral treatments and it imposes a burden on non-Hispanic whites by imposing a hurdle they must clear to receive these treatments. JA22. This is a paradigmatic racial classification that must survive strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (2000) ("[A]ll racial classifications, imposed

[5] The Department concedes that if the Policy violates the Equal Protection Clause, it also violates Title VI and section 1557 of the Affordable Care Act. *See* Dep't Br. 39 n.12. Because the Policy violates the Equal Protection Clause, it necessarily violates both civil rights laws as well. *See* Jacobson Br. 26-27.

by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

The Policy cannot withstand this "searching examination." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 309 (2013). Even " 'assum[ing] 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,' " Dep't Br. 34 (quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 310 (1978) (Powell, J.)), there is "virtually no evidence in the record indicating that [the Policy] is either needed or geared to promote that goal," *Bakke*, 438 U.S. at 310; *see Fisher*, 570 U.S. at 310. The only evidence the Department provides is a law review article "'explor[ing] possible racial connections with diseases and treatments'" and a handful of documents showing "racial and ethnic *disparities* in COVID-19 *outcomes*." Dep't Br. 44-45 (emphasis added). That is woefully insufficient to justify racial classifications, which are "by their very nature odious to a free people." *Fisher*, 570 U.S. at 309; *see* Jacobson Br. 25.

The Department also cannot show that the Policy is narrowly tailored. The Department simply asserts—without citing any evidence—that no race-neutral alternative exists. Dep't Br. 46. That is demonstrably wrong. *See* Jacobson Br. 25-26. Indeed, the Department fails to identify *even one* race-neutral alternative that it tried—such as prioritizing treatment based on objective, race-neutral risk factors—before resorting to racial classifications and categorical racial preferences. *See Parents Involved*, 551 U.S. at 704 (no narrow tailoring when the government never "considered methods

other than explicit racial classifications to achieve [its] stated goals"). Nor is it *Plaintiff's* burden (as the Department argues, *see* Dep't Br. 46) to provide evidence disproving a causal connection between race and a heightened risk of COVID-19. Under strict scrutiny, "the government has the burden of proving that racial classifications are 'narrowly tailored measures that further compelling governmental interests.'" *Johnson v. California*, 543 U.S. 499, 505 (2005). The Department cannot satisfy this heavy burden.

B. Plaintiff satisfies the remaining preliminary injunction factors

Irreparable Harm. The Department insists that Plaintiff will suffer no irreparable harm because "there are no *current* shortages of any of the COVID-19 treatments at issue" and so Plaintiff "is not threatened by any actual or imminent injury that requires extraordinary injunctive relief." Dep't. Br. 39 (emphasis in original). But that analysis ignores that this is a *constitutional* violation. Plaintiff is "not required to establish irreparable harm independent of showing [an Equal Protection] violation because a 'presumption of irreparable injury flows from a violation of constitutional rights.'" *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)). If the Court agrees that Plaintiff is likely to prevail on the merits of his Equal Protection claim, then he has shown irreparable injury. *See* Jacobson Br. 27-28.

In any event, Plaintiff can show irreparable harm even putting aside the Equal Protection violation. COVID-19 cases have been sharply rising again, *see* Jacobson Br. 5, and another shortage "can happen at any time," JA45, ¶28. Because this case involves

the potential "difference between life and death," this Court should act now, rather than subjecting Plaintiff to "weeks, if not months" of additional irreparable harm while waiting for a further ruling from the district court on remand. *United States v. Williams-Bethea*, 464 F. Supp. 3d 562, 566 (S.D.N.Y. 2020).

Balance of Harms and the Public Interest. The Department doesn't deny that it is "'always in the public interest to prevent the violation of a party's constitutional rights,'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), and that "[n]o public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal," *Agudath Israel of Am.*, 983 F.3d at 636. Hence, the Department's interest in "issuing guidance" about "risk factors for severe COVID-19," Dep't Br. 47, can never justify violating an individual constitutional rights. Regardless, the Department—like myriad other federal and state agencies—would remain free to issue any guidance so long as it does not deprive individuals of their constitutional rights.

CONCLUSION

This Court should reverse the district court's dismissal of Plaintiff's complaint and order the district court to enter a preliminary injunction barring enforcement of the Policy pending final disposition on the merits.

Dated: July 5, 2022

Respectfully submitted,

/s/ J. Michael Connolly

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 4,658 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: July 5, 2022 */s/ J. Michael Connolly*

CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will email everyone requiring notice.

Dated: July 5, 2022 */s/ J. Michael Connolly*