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

OPENING BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

The New York Department of Health recently announced that it will give automatic priority to "non-white" and "Hispanic/Latino" individuals in distributing lifesaving COVID-19 treatments (the "Policy"). Under the Policy, non-Hispanic whites who test positive for COVID-19 are ineligible for oral antiviral treatments unless they demonstrate "a medical condition or other factors that increase their risk for severe illness." But non-whites and Hispanics/Latinos who test positive for COVID-19 are automatically eligible for these life-saving antiviral treatments—regardless of the individual's medical situation. The Department adopted the Policy because it claims that one's status as a racial or ethnic minority is itself a "risk factor" for severe illness from COVID-19, even if the individual has no medical condition that would make him more susceptible to harm from COVID-19. In the words of the Department: "Non-white race or Hispanic/Latino ethnicity should be considered a risk factor, as longstanding systemic health and social inequities have contributed to an increased risk of severe illness and death from COVID-19."

The Policy is patently unconstitutional. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 309 (2013) (cleaned up). The Policy serves no compelling state interest and there are obvious race-neutral alternatives available.

Yet the district court never reached the merits of this critically important claim because it held that Plaintiff—a white, non-Hispanic/Latino individual at risk of contracting COVID-19 who brought suit on behalf of himself and a class of similarly situated individuals—lacked standing. According to the district court, Plaintiff's injuries were "speculative" because he had not yet contracted COVID-19 or sought to obtain oral antiviral treatments at the time he filed this suit. But Article III doesn't require Plaintiff to wait to file suit or seek injunctive relief until he actually has COVID-19 and needs the treatments at issue. Indeed, such a standard would mean that the Department's policy will *never* be challenged. That is because oral antiviral treatments must be "given *as soon as possible* and no more than 5 days after symptom onset." JA23 (emphasis added). No plaintiff could prepare and file a lawsuit, and obtain effective relief, within that extremely narrow window to obtain and benefit from these life-saving treatments.

Article III does not require these absurd results and the district court erred by concluding otherwise. The complaint and the declarations filed in support of Plaintiff's motion for preliminary injunction show that he has established an injury in fact. It is undisputed that Plaintiff, like all New Yorkers, is highly likely to contract COVID-19. It is also undisputed that Plaintiff, who is white and not Hispanic, is not automatically eligible to receive oral antiviral treatments under the Policy, solely because of his race. And Plaintiff has declared that "[w]hen I inevitably contract COVID-19, I want to immediately access oral antiviral treatments to reduce my risk of serious illness or

death." JA34, ¶7. Plaintiff thus has standing to challenge the Policy because the Department has "erect[ed] a barrier that makes it more difficult for [him] to obtain a benefit than it is for members of [other racial] group[s]." *Ne. Fla. Chapter of Ass. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). This Court should reverse the district court's dismissal of the complaint, order the entry of a preliminary injunction, and remand for further proceedings.

JURISDICTIONAL STATEMENT

The district court had jurisdiction because Plaintiff alleges that the Department violated the Fourteenth Amendment and federal civil-rights laws. 28 U.S.C. §1331; §1343. This Court has jurisdiction because Plaintiff appeals from a final order issued by the district court. *Id.* §1291. The district court entered that order on March 25, 2022, and Plaintiff appealed on March 31, 2022. JA211-13.

STATEMENT OF THE ISSUES

I. The New York Department of Health adopted a policy that makes "non-white" and "Hispanic/Latino" individuals automatically eligible to receive lifesaving COVID-19 treatments. Non-Hispanic whites, by contrast, are ineligible for these treatments unless they demonstrate "a medical condition or other factors that increase their risk for severe illness." Plaintiff is white and not Hispanic, is highly likely to contract COVID-19, and intends to seek oral antiviral treatments when he contracts the disease. Did the district court err in holding that Plaintiff lacks Article III standing to challenge the Policy?

II. The Policy explicitly prioritizes COVID-19 patients for oral antiviral treatments based on their race, making it more difficult for Plaintiff to obtain this treatment solely because of his skin color. Given the odious nature of racial classifications, the severe harm to individuals who are denied care based on their race, and the many race-neutral alternatives the Department could have pursued, is Plaintiff entitled to a preliminary injunction prohibiting the Department from enforcing the Policy pending a final determination on the merits?

STATEMENT OF THE CASE

I. The COVID-19 Pandemic

The impact of the coronavirus is well-known. Since March 2020, the virus has infected tens of millions of people and killed more than one million Americans. *COVID Data Tracker*, Centers for Disease Control & Prevention, https://bit.ly/3J4SWfB (accessed on May 15, 2022). In late November 2021, the World Health Organization announced the discovery of the highly contagious "Omicron" variant. World Health Organization, *Update on Omicron*, (Nov. 28, 2021), https://bit.ly/3ftaViX. Omicron is far more contagious than other strains of COVID and can evade the immunity provided by prior infection or vaccination. Shirin Ali, *New Study Finds Omicron Variant Better at Evading Immunity*, The Hill (Jan. 3, 2022), https://bit.ly/3I9yXvD. Almost no one will be spared from contracting COVID-19. As the FDA Commissioner recently testified, "most people are going to get covid." JA16 (citing 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).

While COVID-19 rates began to fall after peaking in early 2022, they have predictably begun to rise again as new variants have emerged. *See* R. Haridy, *More Infectious Omicron Subvariant BA.2.12.1 Rapidly Spreading Across the U.S.*, New Atlas (May 5, 2022), https://bit.ly/3M0ASVQ. In the past seven days alone, more than 614,000 new cases have been reported to the CDC. *COVID Data Tracker*, Centers for Disease Control & Prevention, https://bit.ly/3J4SWfB (accessed May 15, 2022).[1] New York State and Tompkins County (where Plaintiff resides) are no exception. New York has been averaging more than 13,000 new COVID cases per day in the last week, and Tompkins County, with a population of just over 100,000, has been averaging more than 70 cases per day. *Positive Tests Over Time, by Region and County*, New York Department of Health, https://on.ny.gov/3vM2p7t (accessed May 15, 2022). And all these numbers are likely significant underestimates given the increasing use of at-home test kits whose results may not be included in official data. *See* Sophie Kasakove, *As At-Home Tests Surge, Doubts About Accuracy of Public COVID Counts*, N.Y. Times, (Dec. 20, 2021), https://nyti.ms/38Cbl6d. As of May 15, 2022, more than 82 million cases of COVID-19 have been reported in the United States. *COVID Data Tracker*, *supra*.

II. The Department's Restrictions on Oral Antiviral Treatments by Race

Fortunately, the nation's ability to treat people with COVID-19 has improved dramatically since the pandemic began. In late December 2021, the Food and Drug

[1] Although the recent rise in COVID-19 cases post-dates the district court's decision, the Court can take judicial notice of COVID data from state and federal public health authorities. *United States v. Bari*, 599 F.3d 176, 179 (2d Cir. 2010).

Administration granted emergency use authorization for two COVID-19 oral antiviral therapies: Paxlovid and Molnupiravir. JA22. These antiviral therapies significantly reduce the risk of hospitalization and death from COVID-19. JA22; JA38, ¶10. For these treatments to be effective, they must be "given as soon as possible and no more than 5 days after symptom onset." JA23; *see* JA133, 135, 151.[2]

These treatments, however, have been in short supply. States across the country thus soon issued guidelines for distributing these treatments to those most in need. *See* R. Robins, *Lifesaving Covid Treatments Face Rationing as Virus Surges Again*, N.Y. Times (Jan. 6, 2022), https://nyti.ms/3P6Br2k. Nearly every state in the country has allocated these treatments using race-neutral criteria such as advanced age, obesity, or a compromised immune system.[3]

New York, however, announced that "race and ethnicity" would be a factor in determining who is eligible for these treatments. On December 27, 2021, the New York Department of Health issued a memorandum to healthcare providers and healthcare

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[2] For example, when Vice President Kamala Harris (age 57) tested positive for COVID-19 on April 26, 2022, her doctors treated her with Paxlovid the very same day, before she showed any symptoms. Justin Sink, *Vice President Harris Taking Pfizer's Paxlovid to Treat COVID*, Bloomberg, (Apr. 26, 2022), https://bloom.bg/3sgzh6m.

[3] Two other states initially adopted race-based policies similar to New York's, but both states quickly rescinded them. *See* Jeremy Olson, *Minnesota Removes Race as Factor in Rationing COVID-19 Antibody Treatment*, The Star Tribune, (Jan. 13, 2022), http://strib.mn/3tw9DvG; *UDOH Announces Changes to Risk Assessment Process for Accessing Scarce COVID-19 Treatments*, Utah Dep't of Health (Jan. 21, 2022), https://bit.ly/3HqVVP0.

facilities entitled "COVID-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Antiviral and Monoclonal Antibody Treatment Products." *See* JA21-28. The Department warned that New York faced a "severe shortage of oral antiviral and monoclonal antibody treatment products." JA21. "While the availability of oral antivirals for treatment of COVID-19 is an important milestone, it comes at a time of a significant surge in cases and reduced effectiveness of existing therapeutics due to the omicron variant, which is now the predominant variant nationally and estimated by the [CDC] to account for over 90% of cases in New York." JA21.

Given these "severe resource limitations," the Department instructed healthcare providers and healthcare facilities to "prioritize treatment for patients at highest risk for severe COVID-19 until more product becomes available." JA21. The Policy then defines a patient's "eligibility" for these oral antiviral treatments. JA22. Under the Policy, oral antiviral treatments are authorized only "for patients who meet all the following criteria":

- Age 12 years and older weighing at least 40 kg (88 pounds) for Paxlovid, or 18 years and older for molnupiravir
- Test positive for SARS-CoV-2 on a nucleic acid amplification test or antigen test; results from an FDA-authorized home-test kit should be validated through video or photo but, if not possible, patient attestation is adequate
- Have mild to moderate COVID-19 symptoms
    - Patient cannot be hospitalized due to severe or critical COVID-19
- Able to start treatment within 5 days of symptom onset

- *Have a medical condition or other factors* that increase their risk for severe illness.
    - *Non-white race or Hispanic/Latino ethnicity should be considered a risk factor*, as longstanding systemic health and social inequities have contributed to an increased risk of severe illness and death from COVID-19

JA22 (emphasis added).

The Policy tells healthcare providers and facilities in New York that they must "adhere" to the Department's "prioritization" instructions because of the "severe shortage of oral antiviral and monoclonal antibody treatment products." JA21. The Policy is binding on healthcare providers. *See* N.Y. Pub. Health Law §12(1)(a) ("[A]ny person who violates, disobeys, or disregards any term . . . of any lawful notice, order, or regulation" issued by the Department of Health is subject to civil penalties).

Thus, under the Policy, there is a racial hierarchy in the distribution of lifesaving COVID-19 medication. Non-whites and Hispanics/Latinos who test positive for COVID-19 automatically qualify for treatment, while *identically situated* non-Hispanic whites are ineligible unless they demonstrate a "medical condition" or "risk factor" that increases their risk for severe illness. For example, a healthy 62-year-old African American would be automatically eligible for these treatments while an otherwise identical 62-year-old non-Hispanic white person would be ineligible for the treatment.

III. Plaintiff William A. Jacobson

Plaintiff William A. Jacobson is a 62-year-old resident of Tompkins County, New York. JA33, ¶¶1, 3. Like all residents of New York, Plaintiff is likely to contract COVID-19 due to its prevalence in New York and throughout the country. *See* JA15-

16, ¶¶11-14; JA33-34, ¶¶4-7. Plaintiff, however, is especially at risk for contracting COVID-19 because he teaches in person at Cornell University and frequently interacts with students. JA33, ¶4. Indeed, Cornell recently had a severe COVID-19 outbreak despite its extensive safety protocols (including a 97% vaccination rate among the campus community and compulsory indoor mask wearing). JA33, ¶4 (citing 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).

Plaintiff is aware that he is highly likely to contract COVID-19 and "want[s] to immediately access oral antiviral treatments to reduce [his] risk of serious illness or death" when that occurs. JA34, ¶¶7, 9. Yet because Plaintiff is neither "non-white" nor "Hispanic/Latino," he is not automatically eligible under the Policy to receive these life-saving treatments unless he can show some additional risk factor. JA33-34, ¶¶3, 10. Like New Yorkers of other races, Plaintiff "want[s] to be eligible for and obtain these treatments without having to demonstrate a 'medical condition or other factors that increase [his] risk for severe illness.'" JA34, ¶9. Plaintiff also has "a heightened concern when [he] go[es] about [his] daily activities because [he] know[s] that [he is] not automatically eligible for life-saving treatments under New York State guidelines solely because of [his] race and ethnicity." JA34, ¶10.

IV. Proceedings Below

On January 16, 2022, Plaintiff filed a class-action lawsuit against the Commissioner of the New York Department of Health in the U.S. District Court for

the Northern District of New York, alleging that the Policy violates the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and Section 1557 of the Affordable Care Act. *See* JA12-20. Soon thereafter, Plaintiff moved for a preliminary injunction, asking the district court to enjoin the Department from implementing and enforcing the racial preferences in the Policy. *See* Dkt. 34. Plaintiff argued that the Policy fails strict scrutiny because the Department has no compelling interest in allocating healthcare treatments by race and the Department has race-neutral alternatives that could achieve any legitimate interests in ensuring that scarce treatments are allocated to those who need them the most. In support of the motion, Plaintiff submitted a declaration confirming his intent to seek oral antiviral treatments immediately after he contracts COVID-19. *See* JA33-34, ¶¶5-7, 9. Plaintiff also filed a motion to certify the class, seeking to represent all individuals in New York State who do not qualify as "[n]on-white" or "Hispanic/Latino" under the Policy. Dkt. 33.

The Department opposed Plaintiff's motions and moved to dismiss under Rule 12(b)(1) for lack of standing and under Rule 12(b)(6) for failure to state a claim. *See* Dkt. 42-10. The Department argued that Plaintiff lacked standing because he didn't have COVID-19 yet, that Plaintiff's claims were moot because the State no longer had a shortage of oral antiviral treatments, and that the Policy's racial classifications could withstand strict scrutiny. *Id.*

On March 4, after briefing was finished, the Department issued another memorandum to healthcare providers. *See Roberts v. Bassett*, No. 1:22-cv-701, Dkt. 31-1

(E.D.N.Y. 2022); *see also id.* No. 22-622 (2d Cir.) (appeal pending). The memorandum said that there were "no current shortages" of oral antiviral treatments and so it encouraged providers to "evaluate all treatment options as early as possible." *Id.* In a letter to the district court in a related case, however, the Department made clear that its policy of allocating antivirals by race in the event of a shortage was still in effect. *Id.*, Dkt. 31 at 1. The new memorandum "does not supersede the December 2021 [Policy] but acts [as] an update to it, informing practitioners that there is *currently* no shortage of supplies constraining their ability to prescribe" oral antiviral treatments. *Id.* (emphasis added). The Department did not withdraw the Policy because it believes its racial classifications are constitutional and the Policy's allocation rules will be needed when the next shortage arises. *See* JA45, ¶28 ("Even though there is not currently a shortage of oral antiviral treatments, the pandemic has taught us that supply chain disruptions can happen at any time.").

The district court (Judge Mae D'Agostino) granted the Department's motion to dismiss for lack of standing and denied Plaintiff's preliminary-injunction and class-certification motions as moot. *See* JA209. The district court held that Plaintiff lacked standing because "the complaint does not allege any action taken by Plaintiff that supports his claim that he would seek oral antiviral treatment in the event that he contracts COVID-19." JA206-07. The district court never considered Plaintiff's declaration in its standing analysis. *Id.* Although the court recognized that "exposure to 'enhanced risk generally qualifies as sufficient injury to confer standing,'" JA207

(quoting *Baur v. Veneman*, 353 F.3d 625 (2d Cir. 2003)), it held that Plaintiff's injury was "speculative" because it depended on "a series of events" that may not occur, JA207. Plaintiff timely appealed. *See* JA211-13.

SUMMARY OF ARGUMENT

Plaintiff has standing to challenge the Policy because the Department has "erect[ed] a barrier that makes it more difficult for [him] to obtain a benefit than it is for members of [other racial] group[s]." *City of Jacksonville*, 508 U.S. at 666. Under the Department's 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.

That is a quintessential Article III injury. The fact that Plaintiff had not yet contracted COVID-19 at the time he filed this suit is of no moment. If the district court were correct that individuals cannot challenge the Policy until they contract COVID-19—triggering a five-day window to obtain relief before oral antiviral treatments become ineffective—then the Department would have free rein to enact racially discriminatory and unconstitutional rules without fear of judicial intervention. That is not the law, and the district court's holding to the contrary flouts a long line of precedent from this Court and the Supreme Court finding standing in similar circumstances. To establish Article III injury, Plaintiff need only show that the challenged classification puts him at *increased risk of future injury*—a test readily satisfied

here given the undisputed prevalence of COVID-19 throughout New York and the United States.

If this Court reverses the dismissal of Plaintiff's complaint, it should also preliminarily enjoin the Department from enforcing the Policy pending further proceedings. The Policy's explicit racial preferences fail any level of constitutional scrutiny as there are numerous race-neutral alternatives that would ensure scarce treatments are reserved for those individuals most likely to benefit from them. Those who are denied such treatments on account of their race will self-evidently suffer irreparable harm. And there is no countervailing harm on the other side, as Plaintiff simply seeks a ruling that *all* individuals, regardless of their race, should be evaluated under the same neutral criteria in determining their eligibility for antiviral treatments. Given the ever-evolving nature of the pandemic and the serious risks resulting from additional delay, this Court should order entry of a preliminary injunction pending further proceedings on remand.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a case for lack of standing under Rule 12(b)(1), "'construing the complaint in Plaintiff's favor and accepting as true all material factual allegations contained therein.'" *Katz v. Donna Karan Col., LLC*, 872 F.3d 114, 118 (2d Cir. 2017). The Court also can consider declarations and other materials "outside the Complaint that were presented to the district court." *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106, 121 (2d Cir. 2020).

To obtain a preliminary injunction, a plaintiff must show (1) "a likelihood of success on the merits"; (2) that he is "likely to suffer irreparable injury in the absence of an injunction"; (3) that "the balance of hardships tips in [his] favor"; and (4) that "the public interest would not be disserved by the issuance of a preliminary injunction." *Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010) (cleaned up). This Court reviews the denial of a preliminary injunction for abuse of discretion, but "[a] district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law." *North American Soccer League, LLC v. U.S. Soccer Federation, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018).

ARGUMENT

I. The district court erroneously held that Plaintiff lacks standing to challenge the Policy.

Plaintiff has Article III standing if he can show injury in fact, a causal relationship between the injury and the challenged conduct, and a likelihood that the injury will be redressed by a favorable decision. *City of Jacksonville*, 508 U.S. at 666. In the context of the Equal Protection Clause, an 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." *Id.* Importantly, "a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* The "injury in fact" is "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* Thus, "to show Article III standing for constitutionally-

protected equal protection claims," a plaintiff need only "allege that (1) there exists a reasonable likelihood that the plaintiff is in the disadvantaged group, (2) there exists a government-erected barrier, and (3) the barrier causes members of one group to be treated differently from members of the other group." *Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994).

Plaintiff made that showing here. Plaintiff is white and not Hispanic, and the Policy is a government-erected barrier that "makes it more difficult" for him "to obtain a benefit"—oral antiviral treatments—"than it is for members of [all other racial and ethnic] group[s]." *City of Jacksonville*, 508 U.S. at 666. 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. JA30. This is a classic equal protection injury.

The district court nonetheless found no injury in fact because "the complaint does not allege any action taken by Plaintiff that supports his claim that he would seek oral antiviral treatment in the event that he contracts COVID-19." JA206. As an initial matter, this is a needlessly blinkered reading of the complaint and disregards the rules of notice pleading. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he pleading standard Rule 8 announces does not require detailed factual allegations."); *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358 (2d Cir. 2010) ("Notice pleading supported by facially plausible factual allegations is all that is required—nothing

more, nothing less."). The whole point of Plaintiff's lawsuit is to ensure that Plaintiff can "obtain oral antiviral treatments in New York when [he] contract[s] COVID-19." JA16, ¶15.

In any event, Plaintiff made his intentions pellucidly clear in a declaration submitted in support of his motion for preliminary injunction. He stated: "When I inevitably contract COVID-19, I want to immediately access oral antiviral treatments to reduce my risk of serious illness or death." JA34, ¶7. He further stated: "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.'" JA34, ¶9. Even if the complaint were ambiguous on this point—and it was not—the district court erred in refusing to consider this declaration. *See Libertarian Party of Erie Cty.*, 970 F.3d at 121; *see also Ctr. for Biological Diversity v. U.S. Int'l Dev. Fin. Corp.*, --- F. Supp. 3d. ---, 2022 WL 424966, at *4 (D.D.C. Feb. 11, 2022) ("[I]t is well established that the Court may look to materials beyond the pleadings when considering a 12(b)(1) motion to assure itself of jurisdiction, including additional declarations or affidavits provided by a plaintiff to support standing.") (listing cases).

The district court also found Plaintiff's injury to be "'speculative'" because it depended on a "series of events" that might not occur. JA208-09. Not so. Plaintiff's injury is straightforward. As alleged in the complaint and substantiated in his declaration, Plaintiff is highly likely to contract COVID-19. *See* JA16, ¶¶12, 14; JA33-

34, ¶¶4-7. And, when he does, he wants the same opportunity to obtain oral antiviral treatments as individuals of other races and ethnicities. JA34, ¶9. Accordingly, because Plaintiff has "demonstrate[d] an intent … to pursue the benefit" of oral antiviral treatments, he has standing to challenge the policy's "'barrier that makes it more difficult for [him] to obtain [that benefit].'" *Martinez v. Malloy*, 350 F. Supp. 3d 74, 85 (D. Conn. 2018) (quoting *City of Jacksonville*, 508 U.S. at 666). Plaintiff need not show that the harm is *certain* to occur to have standing to challenge a race-based obstacle or impediment. Plaintiff need only allege a "substantial risk that the harm will occur," which he plainly has. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).[4]

Importantly, the district court never disputed that Plaintiff is likely to contract COVID-19. Nor did the Department. To the contrary, the State of New York has repeatedly—and recently—warned of the imminent dangers of COVID-19 to all New Yorkers. *See, e.g.,* N.Y. Executive Order 11.3, (Feb. 22, 2022), https://on.ny.gov/33DDmZh (declaring a "state disaster emergency" because the "Omicron variant has been shown to be highly transmissible and may cause exponential

[4] Indeed, events since the district court issued its opinion have confirmed this substantial risk. In May 2022, Plaintiff contracted COVID-19 while in Rhode Island. After Plaintiff began experiencing symptoms, he consulted a doctor and received therapeutic treatment in Massachusetts. None of this undermines Plaintiff's standing, as there remains a substantial risk that he will be infected again, *see* Juliet Pulliam, et al., *Increased Risk of SARS-CoV-2 Reinfection Associated With Emergence of Omicron in South Africa*, Science (Mar. 15, 2022), https://bit.ly/3wsD5CV ("[T]he Omicron variant is associated with a marked ability to evade immunity from prior infection."), and face an impediment to receiving treatment in New York due to the Policy's racial-allocation scheme.

spread" and "current vaccinations do not appear to be as effective against Omicron infection"). That Plaintiff is highly likely to contract COVID-19 thus must be "accept[ed] as true." *Katz*, 872 F.3d at 118; *see also Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000) (accepting "uncontroverted affidavits" to establish injury in fact); *Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937, 945 (9th Cir. 1993) (same).

The district court next noted that Plaintiff might not ultimately obtain oral antiviral treatments because he may lack "mild to moderate symptoms" when he contracts COVID-19 and his doctor may not prescribe the treatments. JA208. But whether Plaintiff will ultimately need or receive these treatments is irrelevant. 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." *Cisneros*, 37 F.3d at 794. "The injury is not the failure to obtain [the oral antiviral treatments], but is the missed opportunity to compete for [them] on an equal footing with" other New Yorkers. *Id.* Here, Plaintiff "want[s] to be eligible for and obtain [oral antiviral] treatments without having to demonstrate a 'medical condition or other factors that increase [my] risk for severe illness,'" JA34, ¶9—a requirement that applies only to non-Hispanic whites. That Plaintiff may ultimately not receive the treatments for other

reasons doesn't alleviate the equal protection violation. *See City of Jacksonville*, 508 U.S. at 666.[5]

The district court similarly speculated that Plaintiff might have no injury in fact when he contracts COVID-19 because there might not be "a shortage in oral antiviral treatment supplies at the time of Plaintiff's sickness." JA208. But this reasoning confuses injury in fact with questions of mootness. The Policy establishes a racial hierarchy for treatment because there is a "severe shortage of oral antiviral and monoclonal antibody treatment products." JA21. That policy of race-based allocation in times of shortage has not been rescinded. *Supra* 11. That the Department has issued subsequent guidance declaring that there is *currently* no shortage does not eliminate Plaintiff's injury. The Department would "'carr[y] the 'heavy burden' of making 'absolutely clear'" that it will never declare a new shortage of oral antiviral treatments. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). The Department has never even made such argument. To the contrary, the Department admits that another shortage "can happen at any time." JA45, ¶28; *see also supra* 11 (documenting COVID-19 rates in May).

The district court also failed to distinguish this Court's highly relevant decision in *Baur*. There, Michael Baur, a New York resident, challenged a decision from the U.S. Department of Agriculture allowing the use of downed livestock as food for human

[5] Even if this mattered, the Department provided no evidence that Plaintiff—especially given his age—was unlikely to exhibit at least "mild symptoms."

consumption. Baur alleged that he ate beef products and thus was "injured by the risk that he may consume meat that is the product of a downed animal, and by his apprehension and concern arising from this risk." 353 F.3d at 630. Agreeing with Baur, this Court "recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes." *Id.* at 633. Because downed cattle "may transmit . . . a deadly disease with no known cure or treatment," this Court found that "even a moderate increase in the risk of disease may be sufficient to confer standing." *Id.* at 637. If the rule were otherwise, the government could "completely stop[] enforcing" the consumer-safety laws, and "no consumer would have standing to sue, as it would remain purely speculative that any individual consumer would actually consume contaminated beef and contract [the disease] as a result." *Id.* at 641.

So too here. Because COVID-19 is a "deadly disease," "even a moderate increase in the risk" caused by the Policy is sufficient to confer standing. *Id.* at 637; *see also Reliant Transportation, Inc. v. Div. 1181 Amalgamated Transit Union*, 2019 WL 6050345, at *3-4 & n.8 (E.D.N.Y. Nov. 14, 2019) (listing cases). And COVID-19 is obviously far more prevalent than "mad cow" disease. *See Baur*, 352 F.3d at 639 (noting that it was "undisputed that [mad cow disease] has not been detected in the United States despite over ten years of government surveillance").

The district court's reasoning also proves far too much. If an active infection were a prerequisite for Article III standing, then no individual would ever be able to

challenge the Policy because 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). As this Court has recognized, adopting "such a narrow rule would effectively bar standing in any case where the threatened medical injury has a complex etiology or delayed manifestation." *Baur*, 352 F.3d at 641.

The district court believed that the increased-risk doctrine this Court applied in *Baur* is narrowly limited to cases involving "food and drug safety" and "harmful products." JA207 n.2. But there is no principled reason to limit *Baur* in that way or to endorse different views of Article III standing depending on the subject matter of the suit. To the contrary, this Court has routinely held that an "increased risk" of harm constitutes an injury-in-fact under Article III in a wide variety of circumstances. *See, e.g.*, *Baur*, 352 F.3d at 633 (increased risk of deadly disease); *McMorris v. Carlos Lopez & Associates, LLC*, 995 F.3d 295, 299 (2d Cir. 2021) ("increased risk of future identity theft or fraud"); *United States v. Evseroff*, 528 Fed. Appx. 75, 77 (2d Cir. 2013) (increased risk of loss of financial assets); *see also Sutton v. Jude Med. S.C., Inc.*, 419 F.3d 568, 574 (6th Cir. 2005) (increased risk of medical harm); *Massachusetts v. EPA*, 549 U.S. 497, 525 n.23 (2007) ("[E]ven a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability."). Indeed, this Court has held that even "increased health-related *uncertainty*" satisfies the injury-in-fact

requirement. *New York Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 325 (2d Cir. 2003) (emphasis in original).

Finally, the district court improperly discounted the emotional and psychological harms caused by the policy. *See* JA209 n.4. As explained, Plaintiff has "a heightened concern when [he] go[es] about [his] daily activities because [he] know[s] that [he is] not automatically eligible for life-saving treatments under [the Policy] solely because of [his] race and ethnicity." JA34, ¶10. This is a sufficient injury for standing. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 n.7 (2021) ("[A] plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm.").

The district court held that this "injury [was] neither traceable to the [Policy] nor likely to be redressed by a favorable decision" because "Plaintiff suffered his alleged emotional harm before the Guidance existed and will continue to suffer it if the Guidance was found unconstitutional." JA209 n.4 (cleaned up). But nothing in the pleadings or declarations in this case supports this factual finding, and the district court must resolve all inferences and questions of fact in favor of the plaintiff at the motion-to-dismiss stage. *See Christopher v. Harbury*, 536 U.S. 403, 406 (2002) ("Since we are reviewing a ruling on motion to dismiss, we accept Harbury's factual allegations and take them in the light most favorable to her."). Plaintiff fears contracting COVID-19 while "not automatically [being] eligible for life-saving treatments . . . because of [his] race and ethnicity." JA34, ¶10. In other words, Plaintiff's fears are (understandably)

caused by his unequal access to lifesaving treatments. If that barrier were eliminated, his emotional and psychological harms would be too. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 at 560-61 (1992).

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

Because the district court concluded that Plaintiff lacked standing, it dismissed Plaintiff's preliminary-injunction motion as moot. *See* JA209. That holding, which rested on an error of law regarding standing, was necessarily an abuse of discretion. *See North American Soccer League,* 883 F.3d at 36. But rather than remanding on this point, the Court should simply order the entry of a preliminary injunction. As long as the Policy's race-based allocation scheme remains in force, Plaintiff will continue to suffer irreparable harm from a patently unconstitutional policy. If this Court reverses the dismissal of Plaintiff's complaint, it should instruct the district court to preliminarily enjoin the enforcement of the Policy pending further proceedings. *See, e.g., McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021) (granting preliminary injunction to plaintiffs after reversing summary judgment ruling for defendants).

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.

The Equal Protection Clause prohibits a state government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." The "central

mandate" of equal protection is "racial neutrality" by the government. *Miller v. Johnson*, 515 U.S. 900, 904 (1995). "Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (2000). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect." *Fisher*, 570 U.S. at 309 (cleaned up).

"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227. Strict scrutiny is a "searching examination, and it is the government that bears the burden to prove that the reasons for any racial classification are clearly identified and unquestionably legitimate." *Fisher*, 570 U.S. at 310 (cleaned up). 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).

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/Latino whites are ineligible unless they demonstrate a "medical condition" or "risk factor" that increases their risk for severe illness. JA30-31. Because the Policy uses explicit racial classifications, it is subject to strict scrutiny. *Adarand*, 515

U.S. at 229-30; *see Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (all racial classifications trigger strict scrutiny, regardless of whether they are motivated by a racially discriminatory purpose). As a result, the Department must prove that the Policy's racial classifications are "narrowly tailored measures that further compelling governmental interests." *Johnson*, 543 U.S. at 505.

The Department cannot satisfy this heavy burden. First, the Department cannot show a compelling interest for allocating COVID-19 treatments on the basis of race. The Department justifies the Policy as a remedy to "longstanding systemic social and health inequities" JA39, ¶13. But a "generalized assertion that there has been past discrimination" cannot serve as a compelling interest for present racial classifications. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989); *see also Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest."). Any interest "in remedying past discrimination" is insufficient unless there are "judicial, legislative, or administrative findings of *constitutional or statutory violations*" and the discrimination was committed by "the governmental unit involved." *J.A. Croson Co.*, 488 U.S. at 492, 498 (emphasis added); *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (same). The Department has made *no attempt* to show that any such violations occurred.

Second, even if the Department could show a compelling interest, the Policy fails the narrow-tailoring requirement. The Department cannot show "the most exact connection between [its] justification and classification." *Wygant v. Jackson Bd. of Educ.*,

476 U.S. 267, 280 (1986). There is no evidence that the Department ever "considered methods other than explicit racial classifications to achieve [its] stated goals." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 704 (2007).

The Policy fails any conceivable level of tailoring analysis because there are obvious race-neutral alternatives that the Department failed to pursue. Most notably, the Department could have established objective medical criteria or risk factors for *all* patients regardless of race to determine eligibility for antiviral drugs. For example, it is well-established that advanced age, obesity, a weakened immune system, and several other chronic medical conditions such as cancer or lung disease increase the risk of serious illness or hospitalization from COVID-19. By applying the same neutral, objective medical criteria to all patients, the Department could accomplish its goals of reserving treatment for the most at-risk patients without employing the "odious," *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), and "highly suspect tool" of racial classifications, *Croson*, 488 U.S. at 493.

The Policy violates Title VI of the Civil Rights Act of 1964 too. Title VI provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d. The Department receives federal financial assistance as a general matter, *see* New York State Division of the Budget, *Health, Department of*, https://on.ny.gov/3fsjgmY, and has received federal financial assistance with regard to oral antiviral procurement and

distribution in particular, *see, e.g.*, Scott Hensley, *First Doses of Pavloxid, Pfizer's New COVID Pill, Are Released to States*, NPR, (Dec. 23, 2021), https://n.pr/3LSDGo0 (noting that "[t]he federal government has a contract for 10 million courses of [Paxlovid] and is providing the medicine free to state and territorial health departments"). Accordingly, the Department is subject to Title VI's prohibitions. *See* 42 U.S.C. §2000d-4a.

Title VI forbids racial discrimination to the same extent as the Equal Protection Clause. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978). By extension, violations of the Equal Protection Clause also violate Section 1557 of the Affordable Care Act. *See Francois v. Our Lady of the Lake Hosp., Inc.*, 8 F.4th 370, 377 (5th Cir. 2021) (Section 1557 "prohibits discrimination based on any of the grounds protected under Title VI . . . , during the provision of health care."). Because the Policy violates the Equal Protection Clause, *see supra* 23-26, it likewise violates Title VI and Section 1552.

B. Plaintiff satisfies the remaining preliminary injunction factors.

Irreparable Harm. 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)). Without an injunction, Plaintiff and his fellow class members will be subjected to racial discrimination under the Equal Protection Clause and federal civil-rights law, which is classic irreparable harm. Courts have repeatedly held that a plaintiff suffers irreparable harm when he is denied access to a valuable benefit, or forced to compete under more onerous terms,

because of his race. *See*, *e.g.*, *Vitolo*, 999 F.3d at 365 (finding irreparable harm where the government was "allocat[ing] limited coronavirus relief funds based on the race and sex of the applicants"); *Association for Fairness in Business Inc. v. New Jersey*, 82 F. Supp. 2d 353, 363 (D.N.J. 2000) (finding irreparable injury and entering a preliminary injunction where the plaintiffs were forced to "compete on an unfair playing field" as a result of a racial set-aside program).

Moreover, those cases found irreparable harm when the plaintiffs were denied access to mere *economic* benefits—such as economic aid, government contracts, or school admissions—because of their race. It follows *a fortiori* that irreparable harm exists when a plaintiff class is subjected to a racial disadvantage in the provision of lifesaving medical treatment while a pandemic is raging. Because COVID-19 cases are rising once again, *supra* 5, and 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 balance of the equities and the public interest factors "merge when the Government is the party opposing the preliminary injunction." *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors weigh decisively in favor of injunctive relief because 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).

Indeed, "[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. That is precisely the case here: if the Court enjoins the racial preferences in the Policy, it will merely ensure that *all patients*, regardless of race, are eligible for critical antiviral drugs based on neutral, objective criteria regarding their medical risk factors. Plaintiff and his fellow class members have a powerful interest in not facing discrimination on account of their race, while the Department has no cognizable interest in allocating treatment based on race when such decisions could readily be made based on non-racial medical factors.

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: May 17, 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 7,447 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: May 17, 2022 *\s\ J. Michael Connolly*

CERTIFICATE OF SERVICE

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

Dated: May 17, 2022 *\s\ J. Michael Connolly*