No. 22-757

In The
Supreme Court of the United States

JONATHAN ROBERTS and CHARLES VAVRUSKA,

Petitioners,

v.

JAMES V. MCDONALD, in his official capacity as Commissioner for New York State Department of Health, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR EQUAL OPPORTUNITY, THE KIRKWOOD INSTITUTE, MANHATTAN INSTITUTE, AND REASON FOUNDATION IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
MANHATTAN INSTITUTE
52 Vanderbilt Avenue
New York, NY 10017

JOHN J. PARK, JR.
Counsel of Record
for Amici Curiae
P.O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

During the COVID-19 pandemic, the U.S. Food and Drug Administration granted emergency approval for lifesaving oral antiviral treatments, Facing a severe shortage of these treatments, the State of New York and New York City issued directives instructing medical providers to prioritize treatments to individuals on the basis of race. Petitioners are New York City residents who are disadvantaged by the directives' racial criteria.

The Second Circuit held that being disadvantaged for lifesaving treatments on account of race was not an "actual or imminent" injury. It required Petitioners to show they were denied treatment on the basis of race. Because the antiviral treatments must be taken within five days of symptom onset, the lowers court's decision effectively shields the government's race-based directives from judicial review.

The questions presented are:

1. Whether plaintiffs' injury is imminent where it flows from a predictable course of events that results from the defendant's conduct.

2. Whether the Second Circuit's ruling conflicts with *Ne. Fla. Chapter of Assoc. Gen. Contractors of America v. City of Jacksonville, Fla*., 508 U.S. 656, 666 (1993), which holds that the "injury in fact in an equal protection case" involving racial discrimination "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."

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STATEMENT OF *AMICI CURIAE*[1]

The Center for Equal Opportunity (CEO) is a nonpartisan, nonprofit research and educational organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code and dedicated to issues of race and ethnicity. Its fundamental vision is straightforward; America has always been a multiethnic and multiracial nation, and it is becoming more so. This makes it imperative that our national policies not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E Pluribus Unum* . . . out of many, one. Distributing scarce antiviral treatments on the basis of race is not consistent with CEO's fundamental vision.

The Kirkwood Institute is a nonprofit corporation formed under the laws of the State of Iowa. Its mission is, in part, to advance constitutional governance by advocating for the enforcement of rights guaranteed to all citizens, whether guaranteed by the Constitution of the State of Iowa, the Constitution of the United States, or both. It has challenged laws and ordinances that perpetuate racial and gender discrimination in both federal and state courts.

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[1] The parties were notified of the filing of this brief more than 10 days before its filing. See Sup. Ct. R. 37.2(a). Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting racial nondiscrimination, from thinkers such as Thomas Sowell, Walter Williams, and Abigail and Stephan Thernstrom. Current MI scholars continue this research, including at the policy nexus of health care and race underlying this litigation.

The Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank. Reason's mission is to advance a free society by applying libertarian principles and policies – including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as *amicus curiae* in cases raising significant issues.

This case concerns *amici* because it represents unequal treatment of Americans based on race, in flagrant defiance of federal law and constitutional equal protection.

SUMMARY OF ARGUMENT

The Court has repeatedly held that those challenging a racial classification suffer an actual injury when they encounter a barrier that does not allow them to compete for public benefits on an equal footing. Petitioners further attested to their interest in obtaining the antiviral treatments if they became necessary. They thereby demonstrated both an actual and an imminent injury, which is sufficient to show standing. The lower courts' decisions to the contrary are erroneous.

Respondents' plan to use race as a plus factor when distributing scarce antiviral treatments is plainly unconstitutional. The program does not serve a compelling state interest, so it fails strict scrutiny.

ARGUMENT

I. Petitioners had standing to contest the imposition of a race-based barrier to their receipt of a public benefit.

The Second Circuit held that Petitioners lacked standing because they did not demonstrate an actual or imminent injury in fact. Pet. Appx. at 4a. The Second Circuit said, "They suffered no actual injury because a provider neither delayed nor denied their COVID-19 treatment because of the guidance, which operated during the supply shortage." *Id*. at 5a. In so doing, the court erred because it overstated the requirements for standing to contest the imposition of a race-based

barrier to the receipt of a public benefit, as this Court's precedent has established.

In *Ne. Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), the Court held that the imposition of the barrier, not more, was sufficient to establish standing. There, the City imposed a requirement that 10% of its contract spending be allocated to minority-business enterprises (MBE). The Eleventh Circuit held that the contractors' association lacked standing. *Ne. Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville*, 951 F.2d 1217 (11th Cir. 1990). The Court reversed, holding that the association did not have to show that one of its members would have received a contract but for the MBE set-aside.

Instead, the "injury in fact" was "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." 508 U.S. at 666. The Court pointed to other cases in which the barrier alone constituted the injury in fact, discussing:

(1) *Turner v. Fouche*, 396 U.S. 36 (1970), the Court held that someone who did not own property could challenge a law limiting school board membership to property owners. That holding "did not depend upon an allegation that he would have been appointed to the board but for the property requirement. All that was necessary was that the plaintiff wished to be considered for the position." *Ne. Fla. Chapter*, 508 U.S. at 664.

(2) *Clements v. Fashing*, 457 U.S. 957 (1982), where the Court held that judges could challenge a law requiring their automatic resignation from their positions when announcing a run for higher judicial office. It explained that the law did not "present[ ] only a speculative or hypothetical obstacle to appellees' candidacy for higher office." *Id*. at 962. As the Court observed in *Ne. Fla. Chapter*, "[W]e did not require any allegation that the plaintiffs would have been elected but for the prohibition." 508 U.S. at 665.

In 1995, the Court followed *Ne. Fla. Chapter* in holding that a construction contractor had standing to challenge a subcontracting MBE set-aside. *Adarand Constr. v. Pena*, 515 U.S. 200 (1995). A federal road construction contract gave the general contractor additional compensation if it hired MBE subcontractors. The Court rejected the contention that Adarand, a non-minority subcontractor, lacked standing, noting, "Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a 'discriminatory classification prevent(s) the plaintiff from competing on an equal footing.'" *Id*. at 211 (quoting *Ne. Fla. Chapter*, 508 U.S. at 667).

The *Adarand* Court went on to consider whether Adarand "made an adequate showing that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors," couching that inquiry in a review of imminence. *Id*. at 211. Such a showing was necessary for Adarand

to pursue forward-seeking relief. The Court found the evidence it was looking for in the deposition testimony of Adarand's general manager. *Id*. at 212.

Whether the *Adarand* Court, or the Second Circuit here, had to look at imminence is not clearly established. As the Court said in *Lujan v. Defs. of Wildlife*, 504 U.S. 550, 560 (1992), the injury must be "actual *or* imminent," not actual *and* imminent. *Id*. (emphasis added). The actual injury in *Adarand* and in this case is the barrier that prevents those injured "from competing on an equal footing." *Adarand*, 515 U.S. at 211; Pet. Appx. at 4a-5a. Given that an injury is actual, there is no reason to consider whether it is also imminent.

Assuming that there was reason to inquire into imminence, the lower courts should have considered the allegations the Petitioners made in the Complaint. Both Petitioners alleged that they "want[ed] the ability to access oral antiviral or monoclonal antibody treatments on an equal basis, without regard to their race, if they contract COVID-19." Pet. Appx. at 39a, ¶ 10; 72a, ¶¶ 5, 6; 75a, ¶ 5. They also pointed out that, as of January 11, 2022, outpatient therapeutics and Paxlovid were both subject to tight supply. *Id*. at 40a, ¶ 14. There is nothing to suggest that if the treatments were made available and Petitioners needed them, they would not have sought them out.[2]

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[2] To the extent that the emergency has passed, both as to infection rates and as to the availability of treatments, this case is not moot. The race-based distribution of public benefit is

More to the point, the lower courts ruled without the benefit of discovery. That discovery could well have provided additional support for Petitioners' claim to forward-looking relief. Petitioners should not be held responsible for a showing that they were not allowed to make.

II. The Court's decisions involving standing in educational cases are also contrary to the Second Circuit's approach.

The *Ne. Fla. Chapter* Court declared that *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), was "the most closely analogous" decision to the Jacksonville case. *Ne Fla. Chapter*, 508 U.S. at 665. In both *Bakke*, and its progeny, the Court has found Plaintiffs challenging race-based practices in schools to have standing.

In *Bakke*, Justice Powell found that the injury arose from the medical school's "decision not to permit Bakke to compete for all 100 places in the class because of his race." 438 U.S. at 281, n. 14 (Powell, J.). The University of California Medical School at Davis had reserved 16 of the 100 places in the entering class for minority students. Justice Powell explained that it was not necessary for Bakke to show that "he would have been admitted in the absence of the special program" to demonstrate that he had standing. *Id*.

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capable of repetition and capable of evading review. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974).

Subsequently in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court rejected the contention that Petitioner Hamacher lacked standing, to challenge the use of race in the University of Michigan's undergraduate school, an argument asserted in Justice Stevens's dissent.[3] It explained, "After being denied admission, Hamacher demonstrated that he was 'able and ready' to apply as a transfer student should the university cease to use race in undergraduate admissions." *Id*. at 263. That showing parallels *Ne. Fla. Chapter*, in which the challenger "need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id*. (quoting *Ne. Fla. Chapter*, 508 U.S. at 666). The Gratz Petitioners faced an admission scheme that gave 20 points to an applicant "based upon his or her membership in an underrepresented racial or ethnic group." *Id*. at 255.

Finally, in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), the Court again held that "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *Id*. at 719 (citing *Adarand*, 515 U.S. at 211; *Ne. Fla. Chapter*, 508 U.S. at 666). That injury was "validly claim[ed]." *Id*. It was not necessary for the parents to have their children "seek to enroll in a Seattle public high school and

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[3] In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the University of Michigan Law School's counterpart to *Gratz*, the Court concluded, "Petitioner clearly has standing to bring this lawsuit." *Id.* at 317 (citing *Ne. Fla. Chapter*, 508 U.S. at 666).

choose an oversubscribed school that is integration positive." *Id*. at 718. Their injury would not evaporate if the parents chose "an undersubscribed school or an oversubscribed school in which their race is an advantage." *Id*. at 718-19.

These cases again show that the Second Circuit erred in concluding that Petitioners lacked standing. They encountered a race-based barrier that kept them from competing for a scarce public resource on an equal basis. That represents an actual injury, one that is neither speculative nor conjectural.

III. The race-based distribution of antiviral treatments is plainly unconstitutional.

"The way to stop discriminating on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. The challenged program goes in entirely the wrong direction.

That program uses race as a risk factor that represents an automatic plus factor in deciding who would get scarce antiviral treatments. Such a plus factor was found unconstitutional in *Adarand*. In *Bakke*, the university set aside 16 of 100 places in the entering class. In *Gratz*, the university gave all underrepresented minority applicants a 20-point boost in their evaluations. Respondents' program is just as constitutionally suspect as the schemes involved in *Adarand*, *Bakke*, and *Gratz*.

More to the point, the Court has rarely justified the use of race. Racial classifications can be used to remedy the effects of past intentional discrimination. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). But, "[r]acial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." *Id*. Alternatively, in the context of higher education, student body diversity can be a compelling state interest. Even so, "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups." *Bakke*, 438 U.S. at 315 (Powell, J.). Finally, racial classifications on those limited grounds are subject to strict scrutiny and must be narrowly tailored to achieve the asserted governmental interest.

Respondents state that "[N]on-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." Pet. Appx. 93a, ¶ 13. They justified their use of a race-based criterion pointing to "evidence-based data that Black, Indigenous, Latinx, and other people of color communities have been disproportionately impacted by COVID-19." *Id*. at 84a, ¶ 23. Respondents explained that "five key areas of social determinants of health" are "influence[d]" by "[d]iscrimination, which includes racism

and associated chronic stress." *Id*. at 85a, ¶ 24. This is said to lead to differential outcomes, as "non-Hispanic blacks had significantly higher length of hospital stay and odds of ventilator dependence and death" than "non-Hispanic Whites." *Id*.[4]

Respondents' justification is more about correlation than causation. The discrimination is said to be systemic, but nowhere identified as de jure. Cf. *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267, 274 (1986) ("This Court never held that societal discrimination alone is sufficient to justify a racial classification."). Accordingly, it represents nothing more than untethered disparate impact. But, disparate impact, standing alone, is not unconstitutional. Accordingly, Respondents' effort to justify their use of race as a plus factor does not serve a compelling state interest.

[4] The reliance on ventilators was likely overdone. In April 2020, one commentator noted, "[A] few physicians have voiced concern that some hospitals have been too quick to put COVID-19 patients on mechanical ventilators, that elderly patients in particular may have been harmed more than helped, and that less invasive breathing support, including simple oxygen-delivering nose prongs, might be safer and more effective." Sharon Begley, *New analysis recommends less reliance on ventilators to treat coronavirus patients* (Apr. 21, 2020), available at tinyurl.com/mvz9r7af.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the writ of certiorari and, reverse the judgment of the court below.

Respectfully submitted,

JOHN J. PARK, JR.
Counsel of Record for Amici Curiae
P.O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

ILYA SHAPIRO
MANHATTAN INSTITUTE
52 Vanderbilt Avenue
New York, NY 10017