No. 20A170

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. PIETRANGELO, II,
Applicant,

v.

CHRISTOPHER SUNUNU, INDIVIDUALLY AND IN HIS CAPACITY AS THE GOVERNOR OF THE STATE OF NEW HAMPSHIRE, ET AL.,
Respondents.

RESPONSE IN OPPOSITION TO APPLICTION FOR WRIT OF INJUNCTION PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court Rules

United States Constitution

United States Code

Executive Orders

Electronic Sources

Adam Sexton, *New Hampshire's pandemic state of emergency to end Friday at midnight*, WMUR.com (Jun. 10 2021, 10:55 p.m.), https://www.wmur.com/article/new-hampshire-covid-update-june-10-2021/36685527 3

COVID-19 Schedule for New Hampshire Residents, New Hampshire COVID-19 Vaccine, https://www.vaccines.nh.gov/ 6, 12

COVID-19 Summary Report, New Hampshire COVID-19 Response (July 16, 2021, 9:00 a.m), https://www.covid19.nh.gov/ 2

Vaccine Phases, New Hampshire COVID-19 Vaccine, https://www.vaccines.nh.gov/vaccine-phases 6, 11

Yael Caplan, et al., *Fighting COVID-19's Disproportionate Impact on Black Communities With More Precise Data*, Stanford Social Innovation Review (Jun. 15, 2020), https://ssir.org/artcles/entry/fighting_covid_19s_disproportionate_impact_on_black_communities_with_more_precise_data# 5

INTRODUCTION

Having failed to obtain relief in the district court or court of appeals, the applicant, James E. Pietrangelo, II, asks this Court to enjoin the portion of New Hampshire's COVID-19 vaccine distribution plan designed to ensure vaccine access to vulnerable populations. The Court should deny this extraordinary request for several reasons. First, Mr. Pietrangelo's claims are moot in light of the widespread availability of COVID-19 vaccines throughout New Hampshire, including within Mr. Pietrangelo's community. Second, Mr. Pietrangelo's claims are moot because he all but acknowledges in his application that he has received at least one vaccine dose and fails to explain how he is not fully vaccinated. Third, Mr. Pietrangelo failed to demonstrate that he had standing to bring his claims after an evidentiary hearing in the district court. Fourth, Mr. Pietrangelo has failed to demonstrate that his claims are meritorious. Accordingly, Mr. Pietrangelo has not established that he has an "indisputably clear" right to the relief he seeks, such that he might be entitled to an injunction pending appeal. *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (citation and quotation marks omitted).

Mr. Pietrangelo similarly has not established that an injunction pending appeal is "'necessary or appropriate in aid of [this Court's] jurisdiction.'" *Turner Broad. Sys., Inc. v. F.C.C.*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers) (quoting 28 U.S.C. § 1651(a)). An injunction is not necessary "to preserve the jurisdiction of [this] Court to consider [Mr. Pietrangelo's appeal] on the merits." *Kimble v. Swackhamer*, 439 U.S. 1385, 1385 (1978) (Rehnquist, J., in chambers).

Mr. Pietrangelo has appealed the district court's standing determination to the First Circuit, and if that court rules against him, he can seek certiorari review from this Court without the injunction he seeks. Moreover, because Mr. Pietrangelo's claims do not present an extant case or controversy, granting Mr. Pietrangelo the relief he requests would likely exceed this Court's jurisdiction under Article III of the Constitution. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). Additionally, this case does not present the type of issue on which this Court would likely invoke its jurisdiction by granting certiorari review. *See* Sup. Ct. R. 10. For these reasons, too, Mr. Pietrangelo's application should be denied.

Finally, Mr. Pietrangelo's application should be denied even if analyzed under the traditional preliminary injunction framework. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Mr. Pietrangelo cannot establish a likelihood of success on the merits because his claims are not justiciable and, in any event, are not meritorious. He cannot demonstrate a likelihood of immediate irreparable harm because he is either already fully vaccinated or could be. And the balance of the equities and the public interest weigh strongly against disrupting the State's efforts to curb the spread of COVID-19 by ensuring that as many people receive vaccines as possible, including those in vulnerable populations. Accordingly, to the extent any of these factors are relevant to the Court's inquiry, Mr. Pietrangelo's application should still be denied.

BACKGROUND

A. Factual Background

1. COVID-19 has not spared New Hampshire. To date, there have been 99,907 confirmed cases in the State and 1,381 total deaths.[1] On March 13, 2020, the Governor declared a state of emergency.[2] The state of emergency only recently expired.[3]

2. The National Academies of Sciences, Engineering, and Medicine ("NASEM") began advising the federal government on its response to COVID-19 even before the virus was widespread. C.A. App. 114, ¶ 24. Anticipating the need to prioritize limited vaccine supplies, the Centers for Disease Control ("CDC") and National Institute for Health ("NIH") asked NASEM to develop recommendations on the equitable allocation of vaccine doses by assembling recommendations from scientists, ethicists, psychologists, epidemiologist, and others based on the latest available information. *Id.* NASEM assembled an Ad Hoc Committee on Equitable Allocation of Vaccine for the Novel Coronavirus. *Id.* ¶ 25. In October 2020, NASEM released a 240-page committee report, based on a significant amount of data and analysis, outlining a model for the equitable distribution of vaccine doses. *Id.*[4]

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[1] *See COVID-19 Summary Report*, New Hampshire COVID-19 Response (July 16, 2021, 9:00 a.m), https://www.covid19.nh.gov/ (last visited July 19, 2021).

[2] *See* Executive Order 2020-04, State of New Hampshire, Office of the Governor, *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-04.pdf. All of the Governor's executive and emergency orders in relation to the pandemic are available at https://www.governor.nh.gov/news-and-media/emergency-orders-2020.

[3] *See* Adam Sexton, *New Hampshire's pandemic state of emergency to end Friday at midnight*, WMUR.com (Jun. 10 2021, 10:55 p.m.), https://www.wmur.com/article/new-hampshire-covid-update-june-10-2021/36685527 (last visited July 19, 2021).

[4]The full committee report is available for download at https://www.nap.edu/catalog/25917/framework-for-equitable-allocation-of-covid-19-vaccine.

NASEM concluded that COVID-19 has had "a disproportionate impact on people who are already disadvantaged by virtue of race and ethnicity, age, health status, residence, occupation, socioeconomic condition, and/or other contributing factors." C.A. App. 115, ¶ 27. This conclusion was consistent with widespread data supporting the public-health community's understanding that racial and ethnic minorities fare worse than their non-Hispanic White counterparts during public-health events. *Id.* at 118–119, ¶¶ 38–39. NASEM developed criteria for vaccine allocation that took into account the risk of infection, severe morbidity and mortality, negative societal impact, and the transmission of infection to others. *Id.* at 116, ¶ 29. The committee report outlined a four-phase framework for vaccine allocation, guided by evidence on how to reduce deaths, prioritize vulnerable populations, and maximize societal benefit. *Id.* at 118, ¶ 37. In conjunction with this framework, NASEM recommended that vaccine access be prioritized during each phase by geographic area based on the CDC's Social Vulnerability Index or the more specific COVID Community Vulnerability Index ("CCVI"). *Id.* at 117 ¶ 32, 118, ¶ 37, 205, ¶ 14.

3. The CCVI is a tool specific to COVID-19 that allows public officials to assess which communities in their States may be less resilient to the pandemic. C.A. App. 117–118, ¶ 35. The CCVI maps vulnerability based on COVID-19 specific epidemiological risk factors, public health system capacity, and variables capturing specific high-risk environments known to facilitate the spread of the virus. *Id.* at 207, ¶ 22. The CCVI employs database programming based on 40 factors grouped

into seven "core" themes." *Id.* The core themes are: minority status and language; socioeconomic status; housing type, transportation, household composition, and disability; epidemiological factors; healthcare system factors; high risk environments; and population density. *Id.* Significant public-health data correlates these core themes (and the factors within them) with heightened COVID-19 vulnerability. *Id.*

The composite CCVI metric ranks each geographical area (State, county, census tract) on a 0 to 1 scale, with 0 indicating the lowest vulnerability and 1 indicating the highest vulnerability. C.A. App. 207, ¶ 22. This method allows each geographic unit to be compared with every other similar unit across the United States. *Id.* Overlaying the CCVI metrics with racial-demographic data reveals that "60 percent of Black Americans live in COVID-vulnerable communities (CCVI of 0.6 or higher)," whereas "[o]nly 34 percent of white Americans are in the same situation."[5]

4. On October 29, 2020, the CDC issued a document entitled "COVID-19 Vaccination Program Interim Playbook for Jurisdiction Operations." C.A. App. 120 ¶ 43; *id.* at 124–196. The playbook was designed to guide States and other jurisdictions in developing vaccination allocation plans. *Id.* at 120, ¶ 43. The CDC emphasized that States "should use this document to develop and update their COVID-19 vaccination plans," noting that "[w]ithin their vaccination plans, [States] must address all requirements outlined in the playbook and clearly describe their responsibility for ensuring activities are being implemented." *Id.* at 128. The CDC recom-

[5]Yael Caplan, et al., *Fighting COVID-19's Disproportionate Impact on Black Communities With More Precise Data*, Stanford Social Innovation Review (Jun. 15, 2020), https://ssir.org/artcles/entry/fighting_covid_19s_disproportionate_impact_on_black_communities_with_more_precise_data# (last visited July 19, 2021).

mended a four-phase distribution plan similar to the plan recommended by NASEM. *Id.* at 120, ¶ 44. With respect to "critical populations," the CDC referred to the NASEM report and information from CDC and NIH, directing jurisdictions to "determine populations of focus for COVID-19 vaccination and ensure equity in access to COVID-19 vaccination availability across the United States." *Id.* at 121, ¶ 46. The CDC further required that States submit their vaccine allocation plans for CDC input. *Id.* at 122, ¶ 48.

5. New Hampshire's vaccine allocation plan was developed by the State's Vaccine Allocation Strategy Branch ("VASB"), with input from the State Disaster Medical Advisory Committee. C.A. App. 109–110, ¶¶ 11–14. The Governor and the Commissioner of the New Hampshire Department of Health and Human Services reviewed the plan. *Id.* The VASB consulted several resources, including guidance and direction from the CDC and NASEM. *Id.*

a. New Hampshire's general vaccine allocation plan consisted of three phases, each with two sub-phases. C.A. App. 122–123, ¶ 48; *see id.* at 211. The plan called for at least 90% of the State's vaccine allocation to be distributed through this three-phase program. *See id.* at 210, ¶ 29, 212–216. The third and final phase began on April 2, 2021.[6] Since that date, all persons age 16 and older have been able to sign up to be vaccinated.[7] As of July 1, 2021, all state-managed fixed vaccination sites are closed and vaccines are widely available at more than 400 locations across the State, with many locations offering walk-in service without the need for an ap-

[6] *See Vaccine Phases*, New Hampshire COVID-19 Vaccine, https://www.vaccines.nh.gov/vaccine-phases (last visited July 19, 2021).

[7] *Id.*

pointment.[8] Anyone seeking a vaccine can find an available location by entering his or her zip code at the following website: https://www.vaccines.gov/search/.

b. Consistent with the NASEM's recommendation, New Hampshire also allocated 10% of its available vaccine supply to vulnerable populations in geographic areas disproportionately at risk from COVID-19. C.A. App. 205, ¶ 14. The State used the CCVI and U.S. Census data to identify census tracts within the State with communities that are statistically less resilient to the effects of COVID-19 and distributed vaccines to vulnerable residents in those communities through mobile or targeted vaccination clinic sites. *Id.* at 206, ¶ 17. To receive a vaccine under the 10% equity allocation, a person had to predominantly reside in a census tract indicated as a high-vulnerability area under the CCVI and meet one of the following criteria: (1) racial or ethnic minority; (2) currently experiencing homelessness; (3) low income; (4) geographically isolated; (5) homebound; (6) physical barriers to travel to the state vaccine distribution points; (7) limited access to registration process due to unreliable internet or no computer; (8) no healthcare provider to verify medical conditions; (9) language or communication access barriers preventing understanding of registration instructions and assent during documentation process; (10) other access barriers that prevent vaccination through routine state mechanism. *Id.* at 212.

The equity allocation plan did not establish a quota for racial and ethnic minorities or prioritize distribution based on race or ethnicity. C.A. App. 207, ¶ 20, 208 ¶ 22, 210 ¶ 20. Rather, it merely dedicated 10% of the State's vaccine supply for dis-

[8] *See COVID-19 Schedule for New Hampshire Residents*, New Hampshire COVID-19 Vaccine, https://www.vaccines.nh.gov/ (last visited July 19, 2021).

tribution to any qualifying individual who predominantly resides in a geographic region identified as a high vulnerability area under the CCVI. *Id.* at 205, ¶ 14, 208 ¶ 22, 212. To the extent not enough vaccine was available for every person seeking vaccination at a vaccine clinic, priority was not given to racial or ethnic minorities. App. 214. Moreover, the 10% figure was merely a target. *Id.* at 210, ¶ 29. The State did not stockpile 10% of its vaccine supply for distribution under the equity allocation plan, so any amount of the allocation not used for vulnerable populations was distributed through the general vaccine allocation plan. *Id.* As of March 1, 2021, only 4–5% of the State's vaccine supply had been allocated under the equity allocation. *Id.*

B. Procedural History

1. Mr. Pietrangelo filed suit in the United States District Court for the District of New Hampshire on February 4, 2021. C.A. App. 1–17 (complaint). He asserted a constitutional equal-protection claim under 42 U.S.C. § 1983, a claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and a claim under Title VI of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116a. *Id.* at 11–17. He sought declaratory and injunctive relief, *id.* at 16–17, and contemporaneously filed a motion for a temporary restraining order or preliminary injunction, *see id.* at 18–35.

After denying the request for a temporary restraining order, *see Pietrangelo v. Sununu*, No. 1:21-cv-124-PB (Feb. 5, 2021 Order), the district court granted Mr. Pietrangelo's request to hold an expedited preliminary-injunction hearing, *Pietrangelo*, No. 1:21-cv-124-PB (Feb. 17, 2021 Order). The district court held an eviden-

tiary hearing on March 19, 2021. C.A. App. 320–410. On April 5, 2021, the district court issued a detailed memorandum and order denying Mr. Pietrangelo's motion for a preliminary injunction on the basis that he had "not demonstrated that he has standing to seek the requested relief." *Pietrangelo v. Sununu*, No. 1:21-cv-124-PB, 2021 WL 1254560, at *1 (D.N.H. Apr. 5, 2021).

2. Mr. Pietrangelo appealed the district court's order to the United States Court of Appeals for the First Circuit. *See Pietrangelo v. Sununu*, No. 21-1366 (1st Cir., May 10, 2021 Docket Entry). He further requested that the First Circuit grant him an injunction pending appeal. *Pietrangelo*, No. 21-1366 (May 13, 2021 Docket Entry). On May 20, 2021, the First Circuit issued an order denying that request, concluding that Mr. Pietrangelo had "not met his burden to show that a preliminary injunction is warranted." Appl., attach. 1. Briefing on Mr. Pietrangelo's appeal remains ongoing, with the respondents' brief due on July 28, 2021. *See Pietrangelo*, No. 21-1366 (May 20, 2021 Briefing Schedule).

3. On June 1, 2021, Mr. Pietrangelo filed the instant application for an injunction pending appeal with Justice Breyer, the Circuit Justice for the First Circuit. Justice Breyer denied the application on June 7. On June 21, Mr. Pietrangelo renewed his application to Justice Thomas, per Rule 22.4 of this Court. On July 2, Justice Thomas requested a response to the application, due by 5:00 p.m. on July 19.

ARGUMENT

An application for an injunction pending appeal is an "extraordinary remedy." *Wisc. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1305 (2004) (Rehnquist, C.J., in chambers). The Justices of this Court "have consistently stated," and the Court's "own Rules require, that such power is to be used sparingly." *Turner Broad. Sys., Inc.*, 507 U.S. at 1303 (1993); *see also* Sup. Ct. R. 20.1 ("Issuance by the Court of an extraordinary writ . . . is not a matter of right, but of discretion sparingly exercised."). This Court will issue an injunction pending appeal "only in the most critical and exigent of circumstances." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (citation and quotation marks omitted).

An injunction pending appeal "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (citation and quotation marks omitted). It therefore "demands a significantly higher justification" than a request for a stay. *Id.* To obtain such an injunction, "an applicant must demonstrate that the legal rights at issue are indisputably clear." *Lux*, 561 U.S. at 1307. Moreover, because "[t]he All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction," *Turner Broad. Sys., Inc.*, 507 U.S. at 1303, "[a]n injunction is appropriate only [when] 'necessary or appropriate in aid of [the Court's] jurisdiction,'" *id.* (quoting 28 U.S.C. § 1651(a)).

Mr. Pietrangelo cannot meet these requirements. His right to relief is not indisputably clear because his claims are moot, he lacked standing to bring them in

the first place, and they fail on the merits. He likewise cannot show that an injunction is necessary or appropriate in aid of this Court's jurisdiction. Mootness and standing are threshold questions of subject-matter jurisdiction that the lower courts should resolve in the first instance. Moreover, none of the regular considerations governing review on certiorari are present in this case. Mr. Pietrangelo's application should therefore be denied.

A. Mr. Pietrangelo has not established an indisputably clear right to relief.

1. Mr. Pietrangelo's entitlement to relief is not "indisputably clear" because his claims are moot. "Article III, § 2 of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving the legal rights of litigants to actual controversies." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (cleaned up). "A corollary to this case-or-controversy requirement is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* (citations and quotation marks omitted). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during the litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 72 (citation and quotation marks omitted).

Mr. Pietrangelo never had standing to maintain his claims for the reasons stated below. But even assuming those claims were justiciable when filed, they are now moot. New Hampshire's general vaccine allocation plan has been open to all

persons age 16 or older since April 2, 2021.[9] Vaccines are currently widely available at more than 400 locations across the State, with many locations offering walk-in service without the need for an appointment.[10] Anyone seeking a vaccine can find an available location by entering his or her zip code at the following website: https://www.vaccines.gov/search/. As of the date of this filing, vaccines are in stock at ten different locations within 25 miles of Glen, New Hampshire, where Mr. Pietrangelo resides.[11] Moreover, Mr. Pietrangelo acknowledges that he was able to sign up for a COVID-19 vaccine back in April (Appl. 15) and appears to acknowledge that he has received at least one dose of a vaccine (Appl. 20).[12] Mr. Pietrangelo accordingly has no personal stake in the outcome of this lawsuit, if he ever had one at all. There is therefore nothing "critical and exigent" about Mr. Pietrangelo's circumstances that might warrant the extraordinary relief he seeks. *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1313.

2. Mr. Pietrangelo likewise cannot establish that his entitlement to relief is "indisputably clear" because he never had standing to bring his claims in the first

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[9] *See Vaccine Phases*, New Hampshire COVID-19 Vaccine, https://www.vaccines.nh.gov/vaccine-phases (last visited July 19, 2021).

[10] *See COVID-19 Schedule for New Hampshire Residents*, New Hampshire COVID-19 Vaccine, https://www.vaccines.nh.gov/ (last visited July 19, 2021).

[11] *See Locations with 25 miles of 03838*, Vaccines.gov, https://www.vaccines.gov/results/?zipcode=03838&medications=779bfe52-0dd8-4023-a183-457eb100fccc,a84fb9ed-deb4-461c-b785-e17c782ef88b,784db609-dc1f-45a5-bad6-8db02e79d44f&radius=25 (last visited July 29, 2021).

[12] Mr. Pietrangelo suggests that he "still is not completely vaccinated as defined by the State/CDS itself," Appl. 20, but provides no explanation for what this statement means. To the extent it means he had only received one dose of a two-dose vaccine as of June 15, the date he filed his application, then there is no reason to infer that he has not now received a second dose. To the extent it means that he was still within two weeks of a final dose of any of the available vaccines, then that, too, no longer remains true as of the date of this filing. Regardless, something far more is needed to demonstrate that it is "indisputably clear" that a case or controversy remains extant. *Lux*, 561 U.S. at 1307.

place. "To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, at 157–58 (2014) (cleaned up). The alleged injury "must be concrete, particularized, and actual or imminent." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (citations and quotation marks omitted). This Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that the allegations of *possible* future injury are not sufficient." *Id.* (citations, quotation marks, and brackets omitted; emphasis in original).

"A federal court is not a forum for generalized grievances, and the requirement [that the plaintiff have] a personal stake [in the outcome] ensures that courts exercise power that is judicial in nature." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (citation and quotation marks omitted). "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *United States v. Hays*, 515 U.S. 737, 743 (1995). Thus, this Court has "made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Id.* at 743–44 (citation and quotation marks omitted). Put differently, a plaintiff must show that he has been "unable to compete on equal footing" in order to have standing to maintain

an equal-protection challenge. *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam) (citations and quotation marks omitted).

a. Mr. Pietrangelo has not suffered and will not imminently suffer any concrete or particularized injury as a result of the equity allocation he challenges in this case. The equity allocation "was designed to reach vulnerable individuals residing in census tracts identified as at risk of disproportionate impact from COVID-19." *Pietrangelo*, 2021 WL 1254560, at *2. "Following NASEM's recommendation, the State utilized the CCVI to identify the top 25%, or the top quartile, of the State's census tracts most susceptible to disparate effects from COVID-19," which resulted in 74 tracts out of 294 being "deemed eligible to partake in the equity plan." *Id.* "To qualify for a vaccine under the State's equity plan, a person must," among other things "'predominantly reside' in a vulnerable census tract." *Id.* at *3 (citation omitted).

Mr. Pietrangelo has never contested that he lives in a census tract that "does not rank within the top 25% most vulnerable census tracts in the State." *Id.* at *4. Indeed, the district court found that "Bartlett, where [Mr. Pietrangelo] resides, is a very low vulnerability tract that is not even close to the top 25% most vulnerable tracts." *Id.* at *6.[13] The district court also observed that Mr. Pietrangelo "presented no evidence that Bartlett would qualify as a vulnerable census tract but for" the fact that the CCVI considers "minority status and language" as one of several themes when "identify[ing] vulnerable tracts." *Id.* (internal quotation marks omitted). "In

[13] As the district court noted, Mr. Pietrangelo lives in the village of Glen, which is within the Bartlett census tract. *See Pietrangelo*, 2021 WL 1254560, at *4

other words," Mr. Pietrangelo never demonstrated "that, but for the allegedly impermissible criteria, he would [have been] eligible to apply for a vaccine through the equity plan." *Id.* His claims are therefore nothing more than the types of "general grievances" this Court has consistently held do not confer Article III standing. *See, e.g.*, *Gill*, 138 S. Ct. at 1929; *Hays*, 515 U.S. at 743.

b. All of Mr. Pietrangelo's arguments for why he has standing are unavailing. For the most part, these arguments boil down to a generalized contention that the State's vaccine plan makes it more difficult for "Whites" to obtain vaccine doses than "Non-Whites." *See generally* Appl. 17–23. Not only does Mr. Pietrangelo provide no competent factual support for this contention, but it largely misses the point. Because Mr. Pietrangelo has never demonstrated that *he* has been "personally denied equal treatment" as a result of the equity allocation, he lacks standing to maintain his claims regardless of how he may believe the vaccine plan operates in the abstract. *Hays*, 515 U.S. at 743.

Relatedly, Mr. Pietrangelo does not have standing to maintain his claims based on an assertion that "other Whites in New Hampshire [are not] able to compete on equal footing with Non-Whites for" vaccine doses. Appl. 20. Again, this is a proposition for which Mr. Pietrangelo has never provided any competent factual support. But even if he had, this Court has "adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v Tesmer*, 543 U.S 125, 129 (2004) (citation and quotation marks omitted). Mr. Pietrangelo is not as-

serting a right possessed by someone with whom he "has a close relationship" but who is "hind[ered]" in some way from "protect[ing] his own interests," such that the only recognized exception to the rule against third-party standing might apply. *Id.* at 130 (citation and quotation marks omitted). Nor is this a case "[w]ithin the context of the First Amendment" or involving "enforcement of the challenged restriction against the litigant [that] would result indirectly in the violation of third parties' rights," such that this Court might relax the standard for third-party standing based on prudential concerns. *See id.* Mr. Pietrangelo accordingly has no realistic claim to third-party standing in this case, much less one that is "indisputably clear." *Lux*, 561 U.S. at 1308.

Mr. Pietrangelo's remaining arguments for why he has standing are little more than disagreements with the district court's factual findings. Appl. 21–23. He has not demonstrated that it is "indisputably clear" that those findings were erroneous, and this Court does not "weigh the evidence for" lower courts. *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982). This Court is "a court of review, not of first view, and the Court of Appeals has not had the chance to review the District Court's decision under the appropriate standard." *McLane Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1170 (2017) (citation and quotation marks omitted). "That task is for the Court of Appeals in the first instance." *Id.* Accordingly, Mr. Pietrangelo's fact-bound arguments in favor of standing are unavailing.[14]

[14] Mr. Pietrangelo's contention that he "likely will have to be re-vaccinated at some later point with vaccine from the State's supply," Appl. 21, is nothing more than speculation and does not render his claims justiciable. *See Clapper*, 568 U.S. at 409 (noting that an injury

3. Finally, even if Mr. Pietrangelo's claims were justiciable—and they are not—it is not "indisputably clear" that he is entitled to relief on the merits. Mr. Pietrangelo contends that he is being discriminated against on the basis of his race. To prevail on an equal-protection claim based on racial discrimination, Mr. Pietrangelo must demonstrate both that he has been treated differently than persons similarly situated to him and that this differential treatment stems from an impermissible racial classification. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985). It is far from clear that he can satisfy either requirement.

As the district court noted, Mr. Pietrangelo "does not object to the utilization of race-neutral themes for ranking census tracts." *Pietrangelo*, 2021 WL 1254560, at *6. The district court found that Mr. Pietrangelo "presented no evidence that Bartlett would qualify as a vulnerable census tract but for" the fact that the CCVI "uses 'minority status and language' as a theme to identify vulnerable tracts." *Id.* Mr. Pietrangelo therefore failed to demonstrate that he was similarly situated to racial or ethnic minorities (or anyone else) residing in the high-vulnerability areas subject to the equity allocation. For this reason alone, his equal-protection claim fails.

Nor is it "indisputably clear" that the CCVI's consideration of racial-demographics data constitutes a "racial classification" triggering strict scrutiny. To the contrary, several circuits have rejected the notion that the mere consideration of such data in formulating policy—as opposed to the allocation of resources based on "individual racial classifications," *see Parents Involved in Cmty. Sch. v. Seattle Sch.*

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must be "certainly impending to constitute an injury in fact, and that allegations of possible future injury are not sufficient" (cleaned up)).

Dist. No. 1, 551 U.S. 701, 720 (2007)—triggers strict scrutiny under this Court's jurisprudence. *See, e.g.*, *Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 355–56 (5th Cir. 2015); *Spurlock v. Fox*, 716 F.3d 383, 394–96 (6th Cir. 2013); *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 545–48 (3d Cir. 2011); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 95 (1st Cir. 2004). Like the school-assignment policies at issue in those cases, the CCVI considers "demographic data and projections" that include race, but does not classify individuals, or distribute government benefits, on the basis of race. Whatever this Court might think about the merits of these decisions, their existence demonstrates that Mr. Pietrangelo is not entitled to an injunction pending appeal. *See Lux*, 561 U.S. at 1308 (concluding that a plaintiff's right to relief is not "indisputably clear" when the courts of appeals have reached "divergent results" on the underlying issue).

For similar reasons, Mr. Pietranglo has not demonstrated that it is "indisputably clear" that he is entitled to relief on his claims under Title VI of the Civil Rights Act and Title VI of Section 1557 of the Affordable Care Act. Title VI of the Civil Rights Act "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *California v. Bakke*, 438 U.S. 265, 287 (1978). While this Court has never addressed the issue, several lower courts have reached the same conclusion with respect to Title VI of Section 1557 of the Affordable Care Act. *See, e.g.*, *Doe v. BlueCross BlueShield of Tenn.*, 926 F.3d 235 (6th Cir. 2019); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817 (D.S.C. 2015); *Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 698–99 (E.D. Pa.

2015). The analysis on these claims is accordingly coterminous with the equal-protection analysis discussed above.

4. In sum, Mr. Pietrangelo's claims do not present a justiciable case or controversy because they are moot and because he never had standing to bring them in the first place. Moreover, Mr. Pietrangelo has not demonstrated that he would prevail on his claims even if they were justiciable. For all of these reasons, he has not demonstrated that his entitlement to relief is "indisputably clear," and his application for an injunction pending appeal should be denied. *Lux*, 561 U.S. at 1307.

B. An injunction pending appeal would not be in aid of this Court's jurisdiction.

1. The injunction Mr. Pietrangelo seeks is also not "'necessary or appropriate in aid of [the Court's] jurisdiction.'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1303 (quoting 28 U.S.C. § 1651(a)). The district court denied Mr. Pietrangelo's request for a preliminary injunction because he had not demonstrated a substantial likelihood that he had standing to maintain his claims. *See Pietrangelo*, 2021 WL 1254560, at *5. Mr. Pietrangelo has appealed that decision to the First Circuit. *See Pietrangelo*, No. 21-1366 (May 10, 2021 Docket Entry). To the extent the First Circuit affirms the district court's decision and Mr. Pietrangelo seeks certiorari review, an injunction pending appeal is in no way necessary "to preserve the jurisdiction of [this] Court to consider [Mr. Pietrangelo's appeal] on the merits." *Kimble*, 439 U.S. at 1385. Mr. Pietrangelo therefore has not satisfied this additional prerequisite to the extraordinary relief he seeks.

Indeed, there is a significant question whether this Court even has jurisdiction to issue that relief in the first place. Like all federal courts, this Court is constrained under Article III to resolving actual cases or controversies. *See Genesis Healthcare Corp.*, 569 U.S. at 71. Mr. Pietrangelo's claims do not present a justiciable case or controversy for the reasons stated in the previous section. Thus, while denying Mr. Pietrangelo's application "would not prevent this Court's exercise of its appellate jurisdiction to decide the merits of [his] appeal," *Turner Broad. Sys., Inc.*, 113 S. Ct. at 1303, granting him affirmative relief would likely *exceed* this Court jurisdiction under Article III, *see Summers*, 555 U.S. at 492.

2. This case also does not present the type of issue on which this Court would likely invoke its jurisdiction by granting certiorari review. While Mr. Pietrangelo focuses much of his application on the merits of his claims, *see* Appl. 23–31, the only issue presently on appeal is the district court's determination as to standing, *see Pietrangelo*, 2021 WL 1254560, at *1 (limiting its ruling to standing). Mr. Pietrangelo does not suggest in his application that a circuit split will arise if the First Circuit affirms the district court's decision on that issue. *See* Sup. Ct. R. 10(a). Nor does the district court's fact-bound determination present the type of "important question of federal law" that might warrant this Court's review. *See* Sup. Ct. R. 10(c). Rather, Mr. Pietrangelo's arguments with respect to standing are nothing more than assertions of "erroneous factual findings" and "the misapplication of a properly stated rule of law" on which this Court rarely grants review. Sup. Ct. R. 10. For this reason, too, an injunction pending appeal is in no way "'necessary or

appropriate in aid of [the Court's] jurisdiction.'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1303 (quoting 28 U.S.C. § 1651(a))

C. None of the traditional preliminary injunction factors weigh in Mr. Pietrangelo's favor.

Mr. Pietrangelo's application likewise fails under the traditional preliminary injunction factors. *See Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66. He is not likely to succeed on the merits of his claims for the reasons stated above: his claims are moot, he lacked standing to bring them in the first place, and, justiciability aside, he has not demonstrated that he is likely to succeed under any of his asserted theories. He has not demonstrated irreparable injury because he appears to acknowledge that he has received at least one dose of a COVID-19 vaccine and, even if he has not received a second dose, the vaccine is widely available throughout New Hampshire. The balance of the equities weighs strongly against the relief Mr. Pietrangelo seeks, as the State continues to have a vital interest in curbing the spread of COVID-19 by ensuring that as many people are vaccinated as possible, particularly those in high-vulnerability areas. And it would in no way promote the public interest for this Court to grant an injunction that would have little practical effect given the current widespread availability of the vaccine, yet would potentially undermine public confidence in the State's vaccine program.

CONCLUSION

Mr. Pietrangelo has not demonstrated that it is "indisputably clear" that he is entitled to the extraordinary relief he seeks. *See Lux*, 561 U.S. at 1307. Nor is that relief "necessary or appropriate in aid of [this Court's] jurisdiction." *Turner Broad. Sys., Inc.*, 507 U.S. at 1303 (citation and quotation marks omitted). Moreover, none of the traditional preliminary injunction factors weigh in Mr. Pietrangelo's favor. Accordingly, his application for an injunction pending appeal should be denied.

Respectfully submitted,

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