12/9/2023

No. 23-630

In The Supreme Court of The United States

JAMES E. PIETRANGELO, II,

Petitioner,

v.

CHRISTOPHER T. SUNUNU et al.,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

James E. Pietrangelo, II, pro se
P.O. Box 67,
Bartlett, NH 03812
(603) 662-2224
jamesepietrangelo2@yahoo.com

CERTIORARI PRINTING
info@certioraripriting.com
Fax (805) 995-3881, Phone (805) 801-1881

QUESTIONS PRESENTED:

Recently, Justice Thomas remarked how, despite the clear constitutional prohibition against racial classifications, government actors continue to "go to great lengths to hide and perpetuate their unlawful [discrimination]" under fashionable but pernicious concepts such as "equity." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College,* 143 S.Ct. 2141, 2191 (2023) (Thomas, J., concurring). Justice Thomas of course was right. During the COVID-19 pandemic, New Hampshire State officials, in the name of equity, created a particularly pernicious Trojan Horse device to expressly prioritize "non-Whites" over Whites in the distribution of fungible vaccine-doses. The device involved a race-neutral allocation deliberately coupled with a race-specific (non-Whites only) allocation in order to try to prevent discriminated-against Whites from having standing to challenge the racial classification. When Petitioner sought Section 1983 money-damages and other relief against State officials after they denied his actual request for the vaccine in the race-specific allocation, the officials argued that he lacked standing. The officials made a "but for" argument that Petitioner could not show that he would have gotten the vaccine any earlier in the race-neutral allocation had the (unconstitutional) race-specific allocation—which the officials nonetheless continued to operate for the duration of the State's vaccination program—not existed in the first place. The officials further argued that, in any case, they had qualified immunity from Petitioner's money damages claim because the unconstitutionality of

prioritizing non-Whites over Whites during a novel pandemic such as COVID-19 was not clearly established at the time of suit. The District Court without opinion accepted the officials' arguments, and, while denying Petitioner's motion for jurisdictional discovery, summarily dismissed his claims. See App. 4a. The First Circuit then without opinion summarily affirmed the dismissal and the denial. See App. 1a.

The questions presented thus are:

1. Whether the First Circuit's affirmance of the District Court's decision conflicts with this Court's precedent holding that "persons who are personally denied equal treatment by the challenged discriminatory conduct" have standing. *Allen v. Wright,* 468 U.S. 737, Syllabus (1984). In other words, doesn't a plaintiff suffer a personalized constitutional injury and have standing to assert Section 1983 claims (including money-damages) for racial discrimination when government officials create dual "separate but (un)equal" categories—one race-neutral and one race-specific—for the distribution of a fungible government benefit, and the plaintiff, who is indisputably entitled to that benefit, requests the benefit under the race-specific category but is denied it there solely because of his race—even as similarly-situated members of the favored-race aren't denied it there—and consequently only receives the benefit at a much later date and with much more difficulty under the race-neutral category. In other words, can a racial classification perversely be its own shield by being deliberately coupled with a race neutral category in a fungible-government-benefit situation?

2. Whether government officials may otherwise defeat standing of a plaintiff on Section 1983 claims in a racial discrimination case simply by placing a geographic limitation on the race-specific category, when the officials don't enforce that geographic limitation against the favored race, and that geographic limitation itself is based on race in the first place—such as the Clinton Foundation's "COVID-19 Community Vulnerability Index" or CCVI that uses race as a factor. In other words, does a racial classification have to perfectly benefit all members of one race and/or perfectly burden all members of another race in order for a plaintiff to have standing to seek relief for being discriminated against under it?

3. Whether the First Circuit clearly erred in affirming, and the District Court clearly erred in entering, (judgment of) dismissal of Petitioner's Section 1983 money-damages claim (and associated declaratory judgment claim) on the grounds that he had no standing to assert it. In other words, wasn't Petitioner personally constitutionally harmed simply by being actually denied the vaccine in the race-specific allocation because of his race when similarly-situated non-Whites were permitted to receive it there because of their race? Wasn't Petitioner also personally constitutionally harmed by being delayed in getting the vaccine in the race-neutral allocation due to the very existence of the race-specific allocation? Wasn't Petitioner also personally constitutionally harmed by being denied an earlier

vaccination appointment in the race-neutral allocation because of his race?

4. Whether the First Circuit's affirmance of the District Court's decision on the issue of qualified immunity conflicts with this Court's pandemic-era precedent holding that COVID-19 was not a talisman for government to engage in clearly unconstitutional conduct or for courts to bypass the strict-scrutiny standard applicable to certain fundamental rights. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67, 68 (2020) (*per curiam*) ("But even in a pandemic, the Constitution cannot be put away and forgotten.") ("Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.'"); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S.Ct. 2485, 2490 (2021) (*per curiam*) ("It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

5. Whether the First Circuit clearly erred in affirming, and the District Court clearly erred in entering, (judgment of) dismissal of Petitioner's money-damages claim (and associated declaratory-judgment claim) on the grounds that the State officials had qualified immunity because the unconstitutionality of prioritizing non-Whites over Whites during a novel pandemic such as COVID-19 was not clearly established at the time of suit. In other words, didn't the State officials fairly "know

that [existing] law [generally] forbade [their] conduct [even if] not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See, also, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

6. Whether the First Circuit clearly erred in affirming, and the District Court clearly erred in entering, denial of Petitioner's timely motion for jurisdictional discovery.

PARTIES

Petitioner is JAMES E. PIETRANGELO, II. He was the Plaintiff-Appellant below.

Respondents are CHRISTOPHER T. SUNUNU, in both his official and individual capacities as Governor of the State of New Hampshire; LORI SHIBINETTE, in both her official and individual capacities as Commissioner of NH Department of Health and Human Services; LISA MORRIS, in both her individual and official capacities as Director of NH Division of Public Health Services; ELIZABETH DALY, in both her individual and official capacities as Chief of NH Bureau of Infectious Disease Control; KIRSTEN DURZY, in both her official and individual capacities as Evaluator and Data and Evaluation Specialist of NH Division of Public Health Services; LUCILLE LINGARD, in both her official and individual capacities as Employee of NH Department of Health and Human Services. Respondents were the Defendants-Appellees below.

RELATED PROCEEDINGS

James E. Pietrangelo, II v. Christopher T. Sununu, et al., No. 22-1208 (1st Cir. Judgment Sept. 29, 2023)

James E. Pietrangelo, II v. Christopher T. Sununu, et al., No. 1:21-cv-00124-PB (D.N.H. Judgment Mar. 10, 2022)

James E. Pietrangelo, II v. Christopher T. Sununu, et al., No. 21-1366 (1st Cir. Order Oct. 1, 2021)

James E. Pietrangelo, II v. Christopher T. Sununu, et al., No. 20A170 (U.S. Sup. Ct. Orders June 7, 2021 & July 22, 2021)

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTIONAL PROVISION

OTHER AUTHORITIES

ORDERS AND JUDGMENTS BELOW

Pietrangelo v. Sununu, et al.,

Unreported, No. 22-1208 (1st Cir. Sept. 29, 2023) (affirming dismissal and denial of jurisdictional discovery) (App.1)

Unreported, No. 1:21-cv-00124-PB (D.N.H. Mar. 10, 2022) (granting motion to dismiss and denying motion for discovery) (App.3)

15 F.4th 103 (1st Cir. 2021), 2021 WL 1254560 (dismissing appeal of denial of preliminary injunction) (App.6)

Unreported, No. 21-1366 (1st Cir. May 20, 2021) (denying injunction pending appeal) (App. 14)

2021 DNH 067 (D.N.H. Apr. 5, 2021) (denying preliminary injunction) (App. 16)

Unreported, No. 1:21-cv-00124-PB (D.N.H. Feb. 5, 2021) (denying temporary restraining order) (App. 37)

JURISDICTION

The First Circuit's judgment was entered on September 29, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The District of New Hampshire had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISION INVOLVED

Section 1, clause 2 of the Fourteenth Amendment to the United States Constitution states in pertinent part: "No state shall deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

The Fourteenth Amendment "proscri[bes] . . . all invidious racial discriminations." *Loving v. Virginia*, 388 U.S. 1, 8 (1967). In amplification of that fundamental constitutional principle, Chief Justice Roberts, more than a decade ago, said: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," period. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007). More recently, Justice Thomas amplified the principle thusly: "Racialism simply cannot be undone by different or more racialism." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S.Ct. 2141, 2191 (2023) (Thomas, J., concurring). However, discrimination dies hard, and despite such crystal-clear judicial pronouncements, government actors today continue to devise invidious racial classifications in the name of public good—believing that only other people's discrimination is bad. See *id.* at 2191. The instant case involves such a racial classification, under the guise of "equity."

In fact, this case involves a profoundly pernicious type of discrimination-device—a Fourteenth Amendment Trojan Horse as it were—which arguably threatens to defeat, and certainly flies in the face of, basic equal protection law, including the Court's seminal case of *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). Such type device allows government to discriminate with impunity on the basis of race in at least the distribution of fungible government benefits, by artificially and arbitrarily creating dual "separate but (un)equal" categories of recipients for a certain same benefit: a race neutral category and a

race-specific category. If an individual challenges his actually being denied the benefit in the race-specific category on the basis of race, the government officials responsible for the denial simply argue that the plaintiff lacks standing to sue (including for money damages), i.e., he lacks a personalized constitutional injury, because 1) he was still able to get the fungible government benefit in the race-neutral category, and 2) he cannot ever show—because of either the fungible nature of the benefit and/or the unconstitutional nature of the racial classification—that he would have gotten the benefit an iota earlier or an iota more easily in the race-neutral category had the race-specific category not existed in the first place. The race-specific category thus perversely becomes its own shield: unchallengeable precisely because it is an unconstitutional racial-classification coupled with a race-neutral classification.

STATEMENT OF THE CASE

I. Factual Background

A. State Officials' COVID-19 Plan

Infamously, from early 2020 to at least late 2021, the U.S.—along with the rest of the world—battled the COVID-19 pandemic. And like every other state in the Union, the State of New Hampshire in December 2020 began receiving from the federal government batches of fungible COVID-19 vaccine-doses ("vaccine" or "vaccine-doses"), which the State then allocated to approved medical-providers for administration to individuals within the State. See D.N.H. Case No. 1:21-cv-00124-PB, Dkt., at ECF 17 (Jt. St. of Undisp. Facts) at ¶¶ 4-5. But because each

state's supply of fungible vaccine-doses from the federal government was, at least initially, limited, New Hampshire State officials in October 2020 came up with a plan as to when individuals (initially only residents) in New Hampshire could get the vaccine. See ECF 2-4 (NH COVID-19 Vaccination Plan, Oct. 2020); ECF 17 at ¶¶ 4, 6. Rather than simply have people compete for the State's supply of fungible vaccine-doses on a completely race/ethnicity-neutral model, the State officials artificially and arbitrarily created two simultaneous programs, or two "separate but (un)equal" programs, to distribute vaccine-doses: a "phases" allocation, and an "equity" allocation with a race-specific category. See ECF 17 at ¶¶ 6-17, 24.

B. The "Phases" Allocation

Under their "phases" allocation, the State officials established three successive phases, expected to occur over a period of months, based on prioritized, ostensibly race/ethnicity-neutral infection-vulnerability statuses—such as essential-worker status (e.g., first responders), medical-issue status (having two or more specified underlying medical-conditions, such as cancer and obesity), congregate-living status (e.g., be-ing in a nursing home), and age-seniority (e.g., 65 and over). See ECF 17 at ¶¶ 7-16. Thus, residents of all races/ethnicities were eligible to receive the vaccine in these respective phases. To actually get the vaccine in the "phases" allocation, individuals generally had to wait for their eligible phase to open up, and then go onto the State's COVID-19 website and try—in competition with everyone else cumulatively already eligible for the vaccine under the "phases" allocation and actually wanting the

vaccine[1]—to get an appointment at one of a limited number of official provider-locations.

However, within each phase of the "phases" allocation, vaccinators, under the State officials' vaccination plan, were expressly permitted if not required in actual practice to prioritize non-Whites over Whites for vaccination. See ECF 50 (2d Am. Compl.) at ¶¶ 17-21, 26-29, 37-40; *infra*. The prioritization obtained from two sources. First, there was express language to that effect in the State officials' plan itself, as well as in several of the phases' initial implementation-documents. See ECF 1 (Compl.) at Exs. 5A & 5B; ECF 2-4 at 12; ECF 2-5 (Phases Alloc. Guidelines) at Phase 1a Guidelines at 5; ECF 26 (Order Denying PI) at App. 16 at 5; ECF 50 at ¶ 20. Second, the State officials' mandated medical-provider agreement expressly required each vaccinator to, under criminal penalty no less, comply with all CDC COVID-19 requirements and recommendations, see ECF 2-8 (Provider Agt.) at 1, 3; ECF 17 at ¶ 37, one of which was prioritizing vaccination of "people from racial and ethnic minority groups," ECF 13-5 (CDC Interim Playbook) at 15.

C. The "Equity" Allocation

For their "equity" allocation, the State officials used a non-governmental index, the "COVID-19 Community Vulnerability Index" or CCVI—developed for all U.S. states by a private foundation endorsing

---

[1] The State officials did not require the general population to get the vaccine. See ECF 25 (Suppl. Rec. granted by order entry 3/24/21) at 1.

"health equity"—to create a so-called COVID-19 "vulnerability" map of New Hampshire. See ECF 13-2 (Defs.' witness Talbot Aff.) at ¶¶ 32-35; ECF 13-6 (Def. Durzy Aff.) at ¶¶ 17-22. The CCVI itself employs six core factors—"minority status and language," and five race/ethnicity-neutral factors—to artificially rate each census-tract in a state. See *ibid.* The State officials took the CCVI's ranking of New Hampshire census-tracts and artificially designated the top quartile of ranked tracts as being "vulnerable" areas. See ECF 13-6 at ¶¶ 17-22; ECF 26 at App. 16 at 5. These areas, not coincidentally, are where most non-Whites live in New Hampshire. See ECF 50 at ¶ 21.

In conjunction with that geographic designation, the State officials artificially designated a handful of population groups in New Hampshire as COVID-19-"vulnerable"—including, solely by virtue of their race/ethnicity, New Hampshire's entire racial/ethnic-minority community, i.e., all "non-Hispanic non-Whites," to use the State officials' own term—that is, all Blacks, Hispanics, Asians, Native Americans and Native Alaskans, and Native Hawaiian and Pacific Islanders.[2] See ECF 2-4 at 13; ECF 13-2 at ¶¶ 40, 46; ECF 13-6 at ¶ 15; ECF 13-10 (FAQ for Vaccine Equity Alloc.) at 1. The State officials then authorized every "equity"-allocation "vulnerable"-population

---

[2] Other designated-"vulnerable" populations all consisted of race /ethnicity-neutral groups, such as the homeless and those living below the federal poverty-line. See ECF 13-10 at 1.

member—thus including every non-White—"predominantly resident" in a "vulnerable" New Hampshire census-tract, to be able, beginning in December 2020 or January 2021, to bypass the "phases" allocation altogether and to immediately and easily receive the vaccine in their own individual homes or at ad hoc clinics in their own neighborhoods. See ECF 13 (Defs.' Obj. to Pl.'s Mot. for TRO/PI) at 12, 20, 37-38; ECF 13-6 at ¶ 31; ECF 13-10 at 1, 4; ECF 17 at ¶ 30; ECF 26 at App.16 at 8; ECF 42 (Mar. 19, 2021 PI Mot. Hrg. Tr.) at 47:21- 48:3; 49:2-4; 49:13-18; 50:19-51:20.

However, as the State officials' own "equity"-allocation expert herself admitted, in practice, when vaccine-doses were administered in homes or neighborhoods under the "equity" allocation, recipients were actually only (required to be) asked if they were predominantly resident in New Hampshire overall—not in a "vulnerable" census-tract itself. See ECF 13-10 at 1, 4; ECF 17 at ¶ 30; ECF 26 at App. 16 at 8; ECF 42 at 47:7-14; 47:21;- 48:3; 49:2-4; 49:13; 18; 50:19; 51:20:

> Q. So you're saying if someone lived two feet outside of the ["vulnerable"] census tract but they otherwise fell under an equity vulnerable population that they have been denied the vaccine by the RPHN?
> A. I cannot say one way or the other. *** . . . we're not able to nor is it our role to play that level of monitoring of the rollout of the vaccine. ***
> ***

> THE COURT: But the guidance does say verify that they live in New Hampshire. It doesn't say verify that they live in the census tract. Are you — do you know what I'm talking about?
> THE WITNESS: Yes, I know.
> ***
> THE COURT: . . . your guidance doesn't expressly preclude people from coming in [from a non "vulnerable" census tract] and you're leaving it up to the partners as to how to do it. Is that a fair way to describe it?
> THE WITNESS: I would — yes, that is a fair way to describe it . . . .
> ***
> THE COURT: But it is true that the guidance document that he's referring to talks about identification that they live in the state; it doesn't expressly say that they must live within the census tract.
> THE WITNESS: Yes.

Moreover, in the "equity" allocation, the State officials —just as in the "phases" allocation—otherwise prioritized non-Whites over Whites: expressly permitting if not requiring vaccinators to vaccinate members of the racial/ethnic-minority-community "vulnerable"-population ahead of those of all race/ethnicity-neutral "vulnerable" populations. See ECF 2-5 at Phase 1b Guidelines at 6; ECF 13-6 at ¶ 23; ECF 17 at ¶ 32; ECF 50 at ¶¶ 21, 26-27.

The "equity" allocation thus allowed at least all non-Whites residing in New Hampshire—if not later

all non-Whites simply present in New Hampshire—each to immediately and easily receive the COVID-19 vaccine solely by virtue of being non-White, i.e., even if they individually were not a member of any race/ethnicity-neutral "vulnerable"-population, and regardless of their eligible phase under the "phases" allocation. That is, under the "equity" allocation, to get vaccinated, non-Whites did not have to wait for their eligible phase to open up; they did not have to compete with hundreds of thousands of other people at any given time for an appointment; and they did not even have to leave the comfort of their own home or neighborhood. This significant advantage continued to be enjoyed by non-Whites "for the remainder of the vaccination effort." ECF 13-6 at ¶ 31. However, Whites were never allowed such advantage, i.e., due solely to their race/ethnicity. See *supra*; ECF 13 at 37-38 (Defendants' admission); ECF 50 at ¶¶ 19-21, 26, 40.

Even members of minority groups in New Hampshire that had no reported cases of COVID-19 infection at the time of the launch of the "equity" allocation—such as Native Hawaiians and Pacific Islanders—were each, again solely by virtue of their race/ethnicity as non-Whites, entitled under the State officials' vaccination plan to immediately and easily receive the vaccine in the "equity" allocation. See ECF 42 (Def. Durzy Test.) at 26:8-27:7; 27:21-29:13; 29:3-18; 32:25-33:22.

New Hampshire's population is almost exactly 90% White and 10% non-White. See ECF 15 (Pl.'s Reply to Defs.' Obj. to Pl.'s Mot. for TRO/PI) at 23 (citing Census statistics available then at https://www. census.gov/quickfacts/fact/table/NH/-

PST045219). Not coincidentally, the State officials' vaccination plan provided that up to 10% of the State's overall supply of fungible vaccine-doses could be used in the "equity" allocation including to vaccinate otherwise-non-"vulnerable" non-Whites. See ECF 2-5 at Phase 1b Guidelines at 1; ECF 13 at 10, 14, 42; ECF 13-6 at ¶ 14; ECF 17 at ¶ 24; ECF 15-2 (Phase 2 Guidelines) at 1; Kevin Landrigan, "NH spells out how all fall into COVID-19 vaccine queue," unionleader.com, Jan. 5, 2021 (Respondent "Dr. Beth Daly, infectious disease bureau director, spelled out how the state's residents will be prioritized in the vaccine queue: Daly said that with the next phase [Phase 1b], the state plans to make up to 10% of vaccine doses available to groups that do outreach with **ethnic and minority groups**").

However, the State officials did not stockpile vaccine-doses for the "equity" allocation; in the absence of requests for vaccine-doses under the "equity" allocation, daily supply of vaccine-doses was simply used up in the "phases" allocation. See ECF 13 at 14; ECF 13-6 at ¶ 29; ECF 17 at ¶ 33. As of March 1, 2021, approximately 7,107 vaccine-doses, or 4-5% of New Hampshire's overall vaccine supply then to date, had been administered under the "equity" allocation. See ECF 13 at 14; ECF 13-6 at 32.

D. The "Equity" Rationale

The genesis of the State officials' prioritization of non-Whites for vaccination in both the "phases" and "equity" allocations was clear. Although non-Whites were not genetically more disposed to being infected with COVID-19, see ECF 13-2 at ¶ 39; ECF 17 at ¶ 40, and although certain individual non-White pop-

ulation groups in New Hampshire, e.g., Blacks, Asians, and Native Hawaiians and Pacific Islanders, were no more likely than the White population in New Hampshire to be infected with or be hospitalized or die from COVID-19, see *supra*; *infra*, New Hampshire's COVID-19 "Equity Response Team," a group of non-White individuals[3] commissioned to provide racial-"equity" advice to New Hampshire Governor Chris Sununu, concluded that prioritization of non-Whites in *all* social contexts was necessary because of generalized historical-inequities suffered by their racial/ethnic groups. See ECF 15-4 (Equity Resp. Team Report) at 4, 5 ("address longstanding systemic inequities that impact the ability of everyone in New Hampshire to live a safe, happy and healthy life"), 9 ("a public health crisis does not create disparity, it creates a tsunami of events that unveil the disparities and inequities already in existence, and further widen the gap and amplify the divide"), 10, 11, 19 ("Underlying structural factors have contributed to the health inequities experienced by racial/ethnic minority populations for centuries. These structural factors are institutionalized in the fabric of the United States constructs of health, housing, education, transportation, and employment. *** Health equity requires 'the removal of obstacles that prevent it, such as poverty, discrimination and the related consequences of powerlessness, lack of access to jobs, fair pay, quality education, housing, safe environments and health care.'"), 23, 26, 27 ("a.

---

[3] Including Respondent Kirsten Durzy. See ECF 15-4 at 2.

Work upstream to address the underlying determinants of COVID-19–The immediate COVID-19 specific needs reflect significant and long-standing upstream inequities in both the social and structural determinants as pre-disposing health conditions that must be addressed in order to mitigate the long-term effects of the pandemic.").

E. Petitioner Is Denied the Vaccine in the "Equity" Allocation Due to His Race

Petitioner is White, and at the relevant times herein was 55-years old. See ECF 2-3 at ¶ 14; ECF 17 at ¶¶ 18, 20; ECF 50 at ¶ 5; ECF 61-1 (Pl. Pietrangelo Decl.) at ¶ 4. Petitioner has been a full-time resident of Carroll County, New Hampshire, since early 2019, see ECF 2-3 at ¶ 1, and thus for purposes of the State officials' vaccination plan he was "predominantly resident" in New Hampshire in all of 2020 and 2021. As a resident of New Hampshire, Petitioner was indisputably entitled to and eligible for one or more of the vaccine-doses (depending on the manufacturer's type) paid for by the federal government and provided to the State of New Hampshire. Under the State officials' vaccination plan, Petitioner did not fall in any of the race/ethnicity-neutral "vulnerable"-populations of the "equity" allocation, and fell under Phase 2b (all residents between 50 and 64) of the "phases" allocation, see ECF 13-8 (Alloc. Plan Summary); ECF 15-1 (Pl. Pietrangelo Decl.) at ¶ 7; ECF 17 at ¶ 19—which phase was originally scheduled to begin sometime in April or May 2021, see ECF 13-2 at ¶ 48; ECF 17 at ¶ 13.

In December 2020 and then again in January 2021, Petitioner, after first learning of the State officials' vaccination plan and special category thereunder for otherwise-non-"vulnerable" individuals (i.e., non-Whites) to bypass the "phases" allocation, contacted various State agencies involved in the roll-out of the vaccine, and requested to be administered the vaccine in the special category. See ECF 2-3 at ¶¶ 10-13; ECF 15-1 at ¶ 6; ECF 17 at ¶ 21. Respondents at that time summarily denied his request, solely because he is White. See *omnes ibid.*; ECF 50 passim & at ¶¶ 21, 23, 26, 29, 38, 40; ECF 61-1 at ¶ 5. Had Petitioner been non-White, Respondents would have given him the vaccine in the "equity" allocation by January 2021 at the latest. See *ibid.*

F. Petitioner's Delay and Difficulty in Then Getting the Vaccine in the "Phases" Allocation

The State officials launched the "phases" allocation with Phase 1a (an approximate population of 110,000) on December 28, 2020, and opened up Phase 1b (an approximate population of 225,000) on January 26, 2021 —by which time the "equity" allocation was also already up and running. See ECF 2-5. The State officials initiated Phase 2a (an approximate population of 175,000) on March 17, 2021. See *ibid.* On March 22, 2021, the State officials initiated Phase 2b (an approximate population of 200,000, including Petitioner himself). See *ibid.* On April 2, 2021, the State officials initiated both Phases 3a and 3b of the plan (a combined approximate population of 650,000). See *ibid.* On April 19, 2021, the State officials opened up the "phases" allocation altogether to anyone—

resident or non-resident—at least 16 years of age. See Tim Callery, "All people 16+, regardless of residency, can now book COVID-19 vaccine appointment in New Hampshire," wmur.com, Apr. 19, 2021, available then athttps://www.wmur.com/ article/new-hampshire-covidvaccine-updateapril-19-2021/36161 851#.

Thus, as of early April 2021, more than a million residents (joined later by non-residents) of all races/ ethnicities were eligible under the "phases" allocation to compete for a vaccination appointment—again with non-Whites being prioritized over Whites in the queue per the provider-agreement—while all predominantly-resident non-Whites continued to enjoy immediate and easy access to the vaccine under the race-specific category of the "equity" allocation.

Indeed, the "equity" allocation literally spawned "Colored Only," or rather, "People of Color Only" (the politically-correct term these days for racial segregation) clinics where even medically-vulnerable Whites were turned away. See Paul Feely, "Discrimination suit filed by White NH man claims he was denied COVID-19 shot over race," unionleader.com, Sept. 28, 2021 (In April 2021, a diabetic White NH resident was denied the COVID-19vaccine because the "equity" clinic in Lebanon, NH at which he sought a dose was "'only serving people of color'" at the time).

The State officials' original minority-prioritization language for the "phases" allocation remained on the State's COVID-19 website even after Phase 1b opened up, and said original language was never expressly or formally repudiated by the officials—nor, for that matter, was the above-mentioned medical-provider agreement. See ECF 15-1 at ¶ 4;

ECF 17 at ¶ 36; ECF 61-1 at ¶ 6. However, later phases' implementation-documents did not contain the original prioritization-language. See *omnes ibid.*

On the morning of the opening day of Petitioner's Phase 2b—March 22, 2021—Petitioner went online to New Hampshire's COVID-19-vaccination-appointment webpage, registered, and then tried to schedule an appointment to get vaccinated—but was unsuccessful due to the sheer volume at the time of other eligible people also seeking appointments under the "phases" allocation, including non-Whites who per the State's provider agreement were being prioritized ahead of him solely by virtue of their indicated race/ethnicity. See ECF 1 at Exs.5A & 5B; ECF 2-4 at 12; ECF 2-5 at Phase 1a Guidelines at 5; ECF 2-8 at 1, 3; ECF 13-5 at 15; ECF 17 at ¶ 37;ECF 36 (Pl. Pietrangelo Decl.) at ¶ 3; ECF 50 at ¶¶ 17-21,26-29, 37-40; ECF 63-1 (Prop. 3d Am. Compl.) at ¶¶ 38,39. Day after day thereafter, Petitioner had the same basic result online when he tried to get an appointment. See *ibid.* It was not until April 28, 2021, that Petitioner was finally able to schedule an appointment for his first shot of a two-dose vaccine. See ECF 61-1 at ¶ 8.

Thus, simply because he is White, Petitioner was denied immediate and easy access to the vaccine beginning in December 2020, and had to both wait four additional months and jump through hoops to get vaccinated against COVID-19. In contrast, among many other non-Whites receiving the vaccine in the "equity" allocation solely by virtue of their race/ethnicity, then-19-year-old Dartmouth College student Russell Chai—who had "hear[d] about the clinic from friends"—found it" really easy" to get vaccinated at

an ad hoc "equity"-allocation clinic exclusively for "Black, Indigenous, and People of Color" (BIPOC) that vaccinated at least 400 non-Whites on March 27, 2021. See Sydney Wuu, "College implements vaccine partnership with NH, Upper Valley residents attend BIPOC vaccination clinic," thedartmouth.com, Mar. 15, 2021, updated Apr. 1, 2021. Remarkably, even though Chai was 36 years younger than Petitioner and thus less vulnerable to COVID-19 due to age than he, Chai was able to receive the vaccine in the race-specific category at least a month before Petitioner was in Phase 2b.

II. Procedural History

A. Petitioner Files Suit

On February 4, 2021, Petitioner filed suit in the District Court against Respondents. See ECF 1; ECF 50. Petitioner claimed that Respondents' discriminatory denial to him and other Whites of immediate/easy and/or priority access to the COVID-19 vaccine in the "equity" and "phases" allocations violated Equal Protection. See *ibid.* Petitioner immediately moved for a TRO/PI preventing Respondents from using race/ethnicity in the allocations. See ECF 2 (TRO/PI Mot.). Respondents subsequently filed an objection/opposition to the motion, and with their objection provided some but not all operative details about their vaccination plan and program—including via an affidavit from Respondent Durzy, the State officials' denominated "equity"-allocation expert, see ECF 13; ECF 13-6. Crucial details omitted from Respondents' overall response included how many non-Whites "predominantly resident" in New Hampshire overall but not in a "vulnerable" census-tract

itself had been allowed under the "equity" allocation to receive the vaccine solely by virtue of being non-White; and actual specifics—street addresses, dates, recipients, etc.—of all of the "equity" vaccinations that had occurred to date. See *ibid.*; ECF 61-1 at ¶ 9.

Due to Respondents' lack of complete responsiveness, Petitioner during a February 16, 2021 status hearing with the District Court requested permission as pro se to subpoena State witnesses to the PI motion-hearing, because, he said, "details of how and when [the vaccination plan's racial/ethnic preferences have] been implemented or will be implemented was peculiarly within the possession of the state defendants," and Petitioner had "got as much evidence as [he could] get from the public domain[.]" ECF 75 (Feb. 16, 2021 Status Hrg. Tr.) at 3:9-25; 4:1-12; 13:23-15:12; 16:5-23. Agreeing that "this is a case where the vast majority of the information that [the court is] going to need to decide this case is in the State's possession," *id.* at 50, the District Court ordered Respondents "to very clearly and completely explain" "what's been going on here" with the "phases" and "equity" allocations. *Id.* at 50:8-16.

B. Respondents Refuse to Provide the Ordered Jurisdictional Discovery

Despite the District Court's clear order, Respondents in the following weeks before the scheduled PI motion-hearing continued to refuse to provide Petitioner with the complete details about their vaccination allocations. On March 1, 2021, Petitioner emailed Respondents' counsel, specifically asking for the "equity"-allocation details. See ECF 15-3. Said counsel never complied. See ECF 15-1 at ¶5. In

March 11 and 12, 2021 emails with Respondents' same counsel, Petitioner asked counsel for production at the PI motion-hearing of five identified State witnesses from whom Petitioner could potentially elicit the thitherto-withheld details, and counsel proffered only two of them (including "equity"-allocation expert Kirsten Durzy)—with the caveat that counsel "will try to find a solution if it ends up there is some gap" in their knowledge. ECF 29-1 (Pietrangelo Decl.) at ¶ 4; ECF 29-2(Email) at 1.

C. The PI Motion-Hearing

The District Court heard the preliminary-injunction motion on March 19, 2021. See ECF 42. At the beginning of the hearing, the District Court itself specifically stated that Petitioner would have to wait until later discovery to get a complete record. See *ECF* 42 at 9:2-15; 10:25-11:10. The District Court also effectively limited Petitioner's direct case to the testimony of Respondents' expert Durzy. See *id.* at 13:22 to 14:9; 15:5-8. Although several weeks had passed since her affidavit, Durzy on the stand still professed ignorance of basic details of the "equity" and "phases" allocations, including on the issue of whether non-Whites from outside of "vulnerable" census-tracts were nonetheless being allowed in practice to receive the vaccine at "equity" clinics solely by virtue of their race/ethnicity. See, e.g., *id.* at 20:6, 21:21, 22:4, 22:20-22,26:1-3, 26:23, 27:9, 28:10, 32:15, 32:15-23, 33:3, 47:11;55:6-7. Despite his earlier promise to "fill the gap, "Respondents' counsel then refused to even stipulate to any of the facts Durzy didn't know. See ECF 29-1 at ¶ 5.

However, during her testimony, Durzy did admit two crucial things. First, she testified that the State officials had, in designating the entire racial/ethnic-minority community in New Hampshire as one "vulnerable" population by itself under the "equity" allocation, knowingly relied on a specific COVID-19-impact comparison-ratio of non-Whites to Whites—specifically," as of November 10, 2020, racial and ethnic minorities in New Hampshire were experiencing 2.8 times the rate of COVID-19 infection, 4.4 times the rate of hospitalization and 1.5 times the mortality rate compared to white New Hampshire residents, after adjusting for differences in age distribution," ECF 13 at 16—that used, as the rate of impact for non-Whites, an *aggregate* of respective impact rates for *all* individual racial/ethnic-minority groups in New Hampshire. See ECF 42 at 26:20-28:2:

> Q. I wanted to just talk with you briefly about the statistics. You say — I thought I heard you say something about nonwhites have a greater vulnerability or are disproportionately impacted by COVID in terms of infection rates, hospitalization, and deaths. Did you — you said something to that effect?
>
> A. I did.
>
> ***
>
> Q. .when you say two times a nonwhite person, so you're lumping together the rates for Asians, for Hispanics, for Blacks, for Pacific Islanders, for Native Alaskans, and for Native Hawaiians, right?

> A. In those statistics, yes. *** So it's — it's not just a matter of adding the numbers together, but it is collapsing nonwhite into one group looking at population size and then those who identify as non-Hispanic/white into another group for this particular statistic[.]

In other words, the State officials admittedly used the very same "monolithic, reductionist" racial categories—White v. non-White/Colored—that segregationists had used, as if individuals were nothing more than the sum of their skin color." *Students for Fair Admissions, Inc.*, 143 S.Ct. at 2203 (Thomas, J., concurring).

Thus, the State officials had deliberately used a false, artificially-weighted statistic to justify a race/ethnicity-based outcome. In fact, as of October 2020, non-Whites in New Hampshire were not on average 2.8 times more likely than Whites to be infected with COVID-19, nor 4.4 times more likely than Whites to be hospitalized from COVID-19, nor 1.5 times more likely than Whites to die from COVID-19. See *supra*; *infra*; ECF 1 at ¶ 24; ECF 50 at ¶ 27. Indeed, according to the CDC itself at the time, in the U.S. overall, Asians were actually less likely (0.7 times as likely) than Whites to be infected with COVID-19, and equally as likely (1.0 times as likely) as Whites to be hospitalized or die from COVID-19; and Blacks were virtually equally as likely (1.1 times as likely) as Whites to be infected with COVID-19. See ECF 15 at 22 (citing CDC statistics available then at https://www.cdc.gov/coronavirus/2019-ncov/covid-

data/investigations-discovery/hospitalization-death-by-raceethnicity.html). Moreover, in New Hampshire itself, there were, at least as of the PI motion-hearing, no reported cases of COVID-19 infection among Native Hawaiians and Pacific Islanders, as compared to approximately 40,491 reported cases of infection among Whites. See *supra*; ECF 42 at 27:21-29:13; Pl.'s Ex. 38 (NH COVID-19 Dashboard).

Furthermore, while the CDC's then respective national-rates of COVID-19 hospitalizations and deaths for Blacks, Hispanics, and Native Americans and Native Alaskans were 2 to 3 times that of the CDC's rate for Whites, those ratios were also false, having been expressly "age-adjusted"—meaning the CDC used selective age-groups of each race, i.e., younger ages, rather than a whole-group-to-whole-group comparison, to reach the result. See CDC rates available the nat https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-raceethnicity.html at fns. 1-3. The hospitalizations and deaths of older Whites from COVID-19 were simply omitted from the equation.

Second, as previewed earlier, Durzy crucially admitted that, under the "equity" allocation's race-specific category for otherwise-non-"vulnerable" non-Whites, individuals were only asked—if at all—if they predominantly resided in New Hampshire overall—not in a "vulnerable" census-tract itself—before they were administered the vaccine. See *supra*.

D. The District Court Denies the PI

On April 5, 2021, the District Court denied Petitioner a preliminary injunction. See ECF 26, 2021

DNH 067 (App.16). The District Court held that Petitioner had demonstrated only a generalized grievance with—not personal discriminatory-treatment from—Respondents' racial/ethnic preferences in their COVID-19-vaccination plan and program, and therefore he lacked standing. See ECF 26 at App. 16 at 19-20. Specifically, the District Court found that Petitioner had not been personally discriminated against under the "phases" allocation because there was no such racial/ethnic-minority prioritization-language in Respondents' later Phase 1b or Phase 2a guidelines as there had been in their plan and Phase 1a guidelines, see ECF 2-5 at Phase 1a Guide lines at 5—meaning, according to the court, that Respondents had in fact abandoned their racial/ethnic preference in the "phases" allocation before Petitioner's own eligible phase opened up. See ECF 26 at App. 15a at 23-24. The District Court further found that Petitioner had not been personally discriminated against under the "equity" allocation either, because he did not reside in a "vulnerable" census-tract, and thus, according to the court, he was never eligible in the first place to receive a vaccine-dose in the race-specific category of the "equity" allocation, and further he could not show that had the race-specific category not existed in the first place, he would have received the vaccine any sooner in the "phases" allocation. See *id.* at 18-19. The District Court likewise found it implausible "that [non-Whites] from non-vulnerable census tracts are utilizing the equity plan to get their COVID-19 vaccines." *Id.* at 22.

E. Petitioner Appeals the Denial

On May 10, 2021, Petitioner appealed the preliminary injunction denial to the First Circuit. See 1st Cir. Appeal No. 21-1366. On October 1, 2021, the First Circuit dismissed Petitioner's appeal as moot. See 10/1/21 Order at 5; 15 F.4th 103, 106 (App. 6).

F. The District Court Dismisses Petitioner's Remaining Claims

On remand, the District Court held a status hearing with the parties on Petitioner's remaining claims. See ECF 76 (Nov. 11, 2021 Status Hrg. Tr.). During the hearing, Petitioner explicitly stated that if "defendants would want a motion to dismiss," he "would like to proceed to discovery on some narrow issues and then []brief on the merits." *Id.* at 2:8-10; 6:5-7. Petitioner told the District Court that he specifically "want[ed] to be able to discover" the "issue of whether the equity program was [actually] limited to people within th[e "vulnerable"-] census-tracts"—a "jurisdictional issue . . . inextricably bound up with the merits issue." *Id.* at 10:14-11:2; 12:1-3;12:9-10. In response, the District Court told Petitioner that, in his opposition to Respondents' anticipated motion to dismiss, "you can with specificity identify what discovery you wanted and how it bears on the analysis of the issues to be raised by [the] motion to dismiss." *Id.* at14:6-10. See, also, ECF 48 (Sched. Order) at 1 at ¶¶ 6, 4.

On January 21, 2022, Respondents filed their motion to dismiss, arguing, among other things, that Petitioner lacked standing on his remaining claims, on the same grounds on which the District Court had earlier held he lacked standing on his preliminary-injunctive-relief claim; and that, in any case, Re-

spondents were entitled to qualified immunity from money-damages. See ECF60/60-1 (Defs.' Mot. to Dismiss). On February 19, 2022,Petitioner timely filed an objection/opposition to the motion. See ECF 61 (Pl.'s. Obj. to Defs.' Mot. To Dismiss). Simultaneously, Petitioner timely filed a motion for jurisdictional discovery, seeking explications of the "equity" and "phases" allocations vis-a-vis the issues of vaccine-recipients' census-tract of residency and whether non-Whites were prioritized for appointments after Phase2a, in order to demonstrate his standing. See ECF 62 at1-2.

On March 10, 2022, the District Court summarily dismissed Petitioner's money-damages and other remaining claims and denied him jurisdictional discovery. *See* ECF 67 (App. 3). The District Court did so by an order without opinion that simply referenced Respondents' analysis in their memoranda. See *ibid.* On March 24, 2022, Petitioner appealed the dismissal and denial to the First Circuit. See 1st Cir. (App.1) No. 22-1208. On September 29, 2023, the First Circuit summarily affirmed, the panel simply stating that it "agree[d] with the [District] court's conclusion that plaintiff has not demonstrated his standing to challenge the race/ethnicity conscious aspects of New Hampshire's COVID-19 vaccination plan" and that "[t]he denial of his motion for jurisdictional discovery rested within the district court's wide discretion." Sept. 29, 2023 Judgment (App. 1).

REASONS FOR GRANTING THE PETITION

The Court should review this case. The First Circuit decided an important question of federal law that has not been, but should be, settled by this

Court, or decided that question in a way that conflicts with relevant decisions of this Court. The First Circuit otherwise so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power.

I. The First Circuit's Decision on Standing Involved a Novel Question, or Conflicts With This Court's Precedent, or Was a Clear Departure from Standard Proceedings

A. A New Racial Device, or Simply an Old Segregation Trick

"Separate cannot be equal." *Students for Fair Admissions, Inc.*, 143 S.Ct. at Syllabus. This is as true now as it was in 1954. Yet, the First Circuit held in the instant case that separate *is* equal when dealing with fungible government benefits: there is no redressable constitutional injury to a discriminated-against plaintiff as long as government officials create dual programs (one race-neutral and one race-specific), and adorn the race specific program with a difference without a distinction that creates "plausible deniability" of standing.

Critically, Petitioner as a U.S. citizen was eligible to begin with for a COVID-19 vaccine-dose or doses from the federal government. Thus, all things being equal, he was as eligible to begin with as any non-White New Hampshire resident for any vaccine-dose(s) within the State of New Hampshire's possession. The State officials' "equity" allocation, race-spe-

cific category therein, and CCVI-based geographic limitation thereof, were all merely classifications constructed by the State officials, and constructed by them to facilitate discrimination against Whites in the name of "equity." See *Personnel Admin'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. **This rule applies as well toa classification that is ostensibly neutral but is an obvious pretext for racial discrimination.**").

When Respondents allowed non-White residents from *any* census tract in New Hampshire—"vulnerable" or not—to immediately and easily receive the vaccine in the race-specific category in the "equity" allocation solely due to their race/ethnicity, but did not allow Petitioner, solely due to his race/ethnicity, the same advantage when he actually sought it, they committed actionable discrimination against Petitioner. Federal courts have never required that racial discrimination perfectly benefit all members of one race or burden all members of another race in order to be actionable by someone actually adversely affected by it.

Indeed, the First Circuit's implicit holding that, had the race-specific category not existed in the first place, Petitioner still would not have received the vaccine any earlier (or more easily) in the "phases" allocation, is utterly disingenuous, and a red herring. The race-specific category did exist, and persisted. And if you stripped the race component from it, you were left with essentially a permissive category for otherwise-non-"vulnerable" residents (like Petitioner) to—for whatever personal reason—get the vaccine

outside of the "phases" allocation, as Petitioner himself actually requested.

Furthermore, Petitioner obviously would have gotten the vaccine sooner had the race-specific category not existed at all. One or more of the vaccine-doses in the race-specific category that were received there by non-Whites (such as Russell Chai), who in the "phases" allocation fell under a phase subsequent to Petitioner' sown phase (Phase 2b), would have actually mathematically inured earlier to Petitioner himself in the "phases" allocation.

Also obviously wrong was the First Circuit's implicit holding that it was implausible both that non-Whites had crossed census-tract lines and been allowed to receive the vaccine in the race-specific category in the "equity" allocation, and that non-Whites had been prioritized for vaccination appointments ahead of Petitioner in the "phases" allocation. Respondent Durzy all but admitted the former—admitting that the "vulnerable"-census-tract geographic limitation was not enforced at "equity" vaccination sites. Indeed, the limitation obviously had only ever been a pretext to try to include as many non-Whites as possible and yet still plausibly exclude all Whites. Moreover, it is beyond cavil that during the COVID-19 pandemic many Americans were desperate for relief, even going to such extreme lengths as drinking bleach. Crossing census-tract lines to get the vaccine would not have been an impediment for them. See Jack Healy, "'It's Like Buying Bruce Springsteen Tickets': The Hunt to Find a Vaccine Shot," nytimes.com, Mar. 3, 2021, available then at https://www.nytimes.com/2021/03/03/us/covid-vaccine-appointment.html (story of NH resident who

scoured the State for a dose to get vaccinated early). And both the nature of census-tracts and the nature of "equity"-vaccination sites obviously readily lent themselves to such cheating. In New Hampshire there are 294 census-tracts—74 of which were designated "vulnerable." See ECF 26 at App.16. Most people didn't even know where such overall census-tracts began and ended—much less which were the 74 designated lucky ones. Residents easily could have mistakenly or even deliberately walked a few yards from a non-"vulnerable" census-tract into a "vulnerable" one and received the vaccine there. Also, the "equity" vaccination sites themselves were people's own homes or neighborhoods—informal locations conducive to lax enforcement.

It clearly was also plausible that in Phase 2b non-Whites were actually prioritized for appointments ahead of Petitioner. Critically, the State officials' just-mentioned racial/ethnic preference in the "equity" allocation was itself still going strong at that point. Moreover, at the time of Phase 2b, the State officials' mandated medical-provider agreement still required vaccinators to prioritize non-Whites in the "phases" allocation. And Petitioner's month-long delay there in getting an appointment was probative of such very prioritization. Indeed, in implicitly holding otherwise—simply due to the lack of prioritization-language in later implementation documents—the First Circuit violated this Court's decisions on mootness holding that executive cessations of policies cannot moot a case. See, e.g., *Los Angeles Cty. v.Davis*, 440 U.S. 625, 631 (1979).

II. The First Circuit's Decision on Qualified Immunity Conflicts With This Court's Precedent, or Was a Clear Departure from Standard Proceedings

The First Circuit's affirmance of the District Court's implicit holding on qualified immunity violated this Court's precedent. It is elementary that a novel situation like a pandemic is not a talisman against Section 1983 liability. See *supra*; *Jacobson v. Massachusetts*, 197 U.S.11, 31 (1905) (smallpox endemic). Yet, Respondents nonetheless dramatically invoked the (actually-not, recall 1918 influenza) unprecedented nature of COVID-19 as if it were a talisman, and the First Circuit bowed to that invocation.

All racial classifications are automatically subject to strict scrutiny. See *Johnson v. California*, 543 U.S. 499,506 (2005). Besides needing a compelling governmental interest, every racial classification requires narrow-tailoring. Respondents obviously knew when they denied/delayed Petitioner the vaccine due to his race that the interest behind the State officials' racial/ethnic preferences was to address generalized historical-inequities. But "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 910 (1996).

Even assuming a putative interest of the State officials in combatting the spread of COVID-19, Respondents also obviously knew when they discriminated against Petitioner that the State officials' racial/ethnic preferences were not narrowly-tailored to accomplishing such an interest, precisely because the preferences' very purpose was to benefit non-

Whites regardless of the societal cost. "The ill fit of means to ends [wa]s manifest." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 621 (1990). The State officials' admittedly-false COVID-19 statistics aside, Whites obviously were by far the racial/ethnic population most impacted by COVID-19 in New Hampshire at the time. See ECF 15 at 22-23 (citing statistics showing 79% of New Hampshire COVID-19 cases in Whites versus 3% in Blacks, 11% in Hispanics, and 2% in Asians, available then at https://www.kff.org/other/state-indicator/covid-19-cases-by-race-ethnicity/?currentTimeframe=0&sortModel=7B%22colId%22:%22Location%22,%22sort%22:% 22asc%22%7D). Indeed, again, several non-White racial/ethnic groups did not even have any reported COVID-19 cases. Yet, non-Whites—and all non-Whites—were prioritized over Whites in both vaccine allocations. See *Roman Catholic Diocese of Brooklyn*, 141S.Ct. at 67 (the State of New York's unconstitutionalCOVID-19 restrictions perversely allowed a large store to have hundreds of shoppers inside per day, but prohibited a nearby church or synagogue with no COVID-19 cases from merely having 10 or 25 worshippers inside). The racial/ethnic preferences themselves thus obviously could not have had a significant effect in combatting COVID-19/harm.

Moreover, New Hampshire residents in general were not required to get the vaccine. And, as in the U.S. generally, some New Hampshire residents—non-White and White—obviously were vaccine-resistant. See Brakkton Booker, "Survey Finds Asian Americans Are Racial Or Ethnic Group Most Willing To Get Vaccine,"npr.org, Dec. 4, 2020 (8 out of 10 Asians, 6 out of 10 Whites, 6 out of 10 Hispanics, and

4 out of 10 Blacks, would choose to get the COVID-19 vaccine). Thus, large numbers of residents—including more Whites than Asians and an equal number of Whites to Hispanics—obviously remained susceptible to contracting and spreading COVID-19. Again, the racial/ethnic preferences themselves thus obviously could not have had a significant effect in combatting COVID-19/harm. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978)(the state defendant "has not shown that its preferential classification is likely to have any significant effect on the problem"). Furthermore, the State officials obviously did not need the racial/ethnic preferences in order to address specific human conditions that might have prevented many non-White as well as White New Hampshire residents from accessing the vaccine—such as poverty and underlying health-issues. See *Metro Broadcasting, Inc.*, 497 U.S. at621 ("Government may not use race and ethnicity as a proxy for other, more germane bases of classification."). Race/ethnicity-neutral Phase 1b of the "phases" allocation already prioritized "people of all ages with comorbid and underlying conditions that put them at significantly higher risk," see ECF 2-5 at 1; and two of the race/ethnicity-neutral "vulnerable"-populations in the "equity" allocation were the homeless and those living below the federal poverty-line, see ECF 13-10 at 1. Again, the racial/ethnic preferences themselves thus obviously could not have had a significant effect in combatting COVID-19/harm.

III. The First Circuit's Decision on Jurisdictional Discovery Conflicts With This Court's Precedent, or Was a Clear Departure from Standard Proceedings

The First Circuit's affirmance of the District Court's denial of jurisdictional discovery was clearly erroneous. "It is well-accepted that a qualified right to jurisdictional discovery exists" under this Court's decision in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978), though "[t]he standards for permitting jurisdictional discovery vary by circuit." *Mother Doe I v. Al Maktoum*, 632 F.Supp.2d 1130, 1144 (S.D. Fla. 2007). In general, "[t]he decision to allow jurisdictional discovery is very much a product of the timing and nature of any jurisdictional discovery request." Id. at 1146. The evidence Petitioner sought through jurisdictional discovery was both essential to opposing Respondents' motion to dismiss and within their peculiar possession. And Petitioner was undeniably diligent in seeking that evidence. Therefore, he was entitled to that discovery.

CONCLUSION

"Equality and racial discrimination cannot co-exist," and "discriminatory policies risk creating new prejudices and allowing old ones to fester." *Students for Fair Admissions, Inc.*, 143 S.Ct. at 2194, 2201 (Thomas, J.,concurring). "Every time the government . . . makes race relevant to the provision of . . . benefits, it demeans us all." *Grutter v. Bollinger,* 539 U.S. 306, 353 2003) (Thomas, J., concurring). The Court should grant certiorari to address the egregious racial-discrimination upheld by the First Circuit in this case.

DATED: DECEMEBER 9, 2023

Respectfully submitted,

s/

James E. Pietrangelo, II, pro se
P.O. Box 67
Bartlett NH 03812
(603) 662-2224
jamesepietrangelo2@yahoo.com