

APPENDICES

APPENDIX A

September 29, 2023, United States Court Of Appeals For The First Circuit Case JUDGMENT affirming dismissal and denial of jurisdictional Discovery Case No. 22-1208 Before Kayatta, Lynch and Gelpí, Circuit JudgesApp.1

APPENDIX B

March 10, 2022, United States District Court For The District Of New Hampshire ORDER granting dismissal and denying jurisdictional discovery No. 21-cv-124-PB Paul Barbadoro, United States District JudgeApp.3

APPENDIX C

March 10, 2022, United States District Court For The District Of New Hampshire Order prevailing party recover cost by Judge Paul Barbadoro in Case No. 21-cv-124-PB.....App.5

APPENDIX D

October 1, 2021, United States Court Of Appeals For The First Circuit ORDER and JUDGMENT Dis-Missing Plaintiffs/Petitioner's Appeal Of Denial Of Preliminary Injunction To Him published at 15 F.4th 103 (2021) Case No. 21-1366. Before Lynch and Barron, Circuit Judges, and Burroughs, District Judge.....App.6

APPENDIX E

October 1, 2021, United States Court Of Appeals For The First Circuit JUDGMENT Dismissing Plaintiffs/Petitioner's Appeal Case No. 21-1366.....App.12

APPENDIX F

May 20, 2021, United States Court Of Appeals For
The First Circuit DENYING Petitioner's/Plaintiff
Injunction Pending Appeal Case No. 21-1366 Before
Howard, Chief Judge, Lynch and Barron, Circuit
Judges.....App.14

APPENDIX G

April 5, 2021, United States District Court for The
District Of New Hampshire MEMORANDUM AND
ORDER denying preliminary injunction to petition-
er/plaintiff, 2021 DNH 067, Case No. 21-cv-124-PB
Before Paul Barbadoro, District Judge.....App.16

APPENDIX H

April 5, 2021, United States District Court for The
District Of New Hampshire ORDER denying
Temporary Restraining Order To Petitioner/ plaintiff,
Case No. 21-cv-124-PB, Before Paul J. Barbadoro
United States District Judge.....App.37

App.1

APPENDIX A
[FIRST CIRCUIT JUDGMENT AFFIRMING
DISMISSAL OF PETITIONER'S CLAIMS AND
DENIAL OF JURISDICTIONAL DISCOVERY TO
HIM, FILED SEPTEMBER 29, 2023]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1208

JAMES E. PIETRANGELO, II,
Plaintiff - Appellant,

v.

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,

Defendants - Appellees,

UNKNOWN DOES, various public and private healthcare agencies, corporations, entities, organizations, and persons in New Hampshire who are

App.2

currently involved in, and/or in the future will be involved in, the distribution and/or administration of the COVID-19 vaccine,

Defendants.

Before
Kayatta, Lynch and Gelpí,
Circuit Judges.

JUDGMENT

Entered: September 29, 2023

The judgment of the district court is summarily affirmed. We agree with the 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. The denial of his motion for jurisdictional discovery rested within the district court's wide discretion. See *Gordo-González v. United States*, 873F.3d 32, 37 n.3 (1st Cir. 2017).

Affirmed. See 1st Cir. R. 27.0(c).

By the Court:
Maria R. Hamilton, Clerk

cc: James E. Pietrangelo II
Laura E. B. Lombardi
Samuel R. V. Garland

App.3

APPENDIX B
[DISTRICT COURT ORDER AND JUDGMENT
DISMISSING PETITIONER'S CLAIMS AND
DENYING JURISDICTIONAL DISCOVERY TO
HIM, FILED MARCH 10, 2022]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

James E. Pietrangelo, II

v. Case No. 21-cv-124-PB

Christopher T. Sununu et al.

ORDER

The defendants have filed a motion to dismiss supported by memoranda that thoroughly and persuasively explain both why jurisdictional discovery is not warranted and why dismissal of the second amended complaint is required. I have nothing of substance to add to the defendants' analysis of those issues. Accordingly, the defendants' motion to dismiss (Doc. No. 60) is granted, and the plaintiff's motion for jurisdictional discovery (Doc. No. 62) is denied. The plaintiff has also moved to file a third amended complaint. Because the proposed amendment does not cure deficiencies in the operative pleading that mandate dismissal, I deny the motion to amend (Doc. No. 63) on the ground of futility. The clerk of court is directed to enter judgment and close the case.

SO ORDERED.

App.4

/s/ Paul Barbadoro
Paul Barbadoro
United States District Judge

March 10, 2022

cc: James E. Pietrangelo, II, pro se
Samuel R. V. Garland, Esq.
Laura E. B. Lombardi, Esq.

App.5

APPENDIX C
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW HAMPSHIRE

James E. Pietrangelo, II

v.

Case No. 21-
cv-124-PB

Christopher T. Sununu et al.

JUDGMENT

In accordance with the Order by Judge Paul Barbadoro dated March 10, 2022, judgment is hereby entered.

The prevailing party may recover costs consistent with Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920.

By the Court:

/s/ Daniel J. Lynch

Daniel J. Lynch
Clerk of Court

Date: March 10, 2022

cc: Counsel of Record

App.6

APPENDIX D

**[FIRST CIRCUIT ORDER AND
JUDGMENT DISMISSING PETITIONER'S
APPEAL OF DENIAL OF PRELIMINARY
INJUNCTION TO HIM, FILED OCTOBER 1,
2021]**

15 F.4th 103 (2021)

James E. PIETRANGELO, II,
Plaintiff, Appellant,
v.

Christopher SUNUNU, individually and in
his official capacity as Governor of the State
of New Hampshire, Lisa Morris, individually
and in her capacity as Director of NH
Division of Public Health Services; Lori
Shibinette, individually and in her capacity
as Commissioner of NH Department of
Health and Human Services; Elizabeth Daly,
individually and in her capacity as Chief of
NH Bureau of Infectious Disease Control
Defendants, Appellees,

Unknown Does, in their individual and
official capacities,
Defendants.

No. 21-1366

United States Court of Appeals, First Circuit.

October 1, 2021.

App.7

Appeal from the United States District Court for the District of New Hampshire, [Hon. Paul J. Barbadoro, *U.S. District Judge*].

James E. Pietrangelo, II on brief pro se.

Laura E. B. Lombardi, Senior Assistant Attorney General, and Samuel R. V. Garland, Assistant Attorney General, on brief for appellees.

Before LYNCH and BARRON, Circuit Judges, and BURROUGHS,[*] District Judge.

105*

105LYNCH, Circuit Judge.

In the early stages of COVID-19 vaccine distribution, the State of New Hampshire implemented a plan to allocate its then-scarce supply. Under the plan, at least ninety percent of the state's supply would be distributed in phases based on age, occupation, and medical risk. The overall plan also earmarked up to ten percent of vaccines to an "equity plan" in order "to reach vulnerable individuals residing in census tracts identified as at risk of disproportionate impact from COVID-19." *Pietrangelo v. Sununu*, No. 21-cv-124-PB, 2021 WL 1254560, at *2(D.N.H. Apr. 5, 2021). The factors the state used to designate census tracts as high risk included "minority status and language." New Hampshire

residents who lived in those high-risk census tracts could qualify for an equity-plan vaccine by meeting one of ten criteria, including identifying as a racial or ethnic minority.

Before he obtained a vaccine appointment, plaintiff James E. Pietrangelo, II sued to challenge the equity plan. Pietrangelo, who is white and was then age fifty-five, argued that the plan illegally discriminated on the basis of race. He sought a preliminary injunction, which the district court denied after concluding Pietrangelo failed to establish a substantial likelihood of standing. *Id.* at *5. Pietrangelo appealed from that denial of injunctive relief. As we determine that his claims are moot, we dismiss this appeal.

“[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *ACLU of Mass. v. U.S. Conf. of Cath. Bishops*, 705 F.3d 44, 52 (1st Cir. 2013) (quoting *D.H.L. Assocs., Inc. v. O’Gorman*, 199 F.3d 50, 54 (1st Cir. 1999)). When we can no longer “give any ‘effectual relief’ to the potentially prevailing party,” we must dismiss the case. *Id.* (quoting *Horizon Bank & Tr. Co. v. Massachusetts*, 391 F.3d 48, 53 (1st Cir. 2004)). Unless an exception to the doctrine applies, to do otherwise would be to render an advisory opinion, which Article III prohibits. See *id.* at 52-53.

By the time the district court denied preliminary relief, New Hampshire was providing vaccines to all of its residents older

than sixteen. And since then, the supply of vaccines available to New Hampshire, like the rest of the country, has skyrocketed. As a result, vaccine scarcity is no longer the problem it once was. Since early July, the demand for vaccines in New Hampshire has plateaued. See State of New Hampshire, Vaccination *106 Dashboard (last visited Sept. 30, 2021), <https://www.covid19.nh.gov/dashboard/vaccination>. [1] Vaccine supply in New Hampshire currently outstrips demand. See Ctrs. for Disease Control & Prevention, COVID Data Tracker: COVID-19 Vaccinations in the United States (last visited Sept. 30, 2021), <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (showing in New Hampshire 1,750,221 doses administered and 2,142,860 doses delivered); id. (showing seven-day average of 119 newly vaccinated individuals per day). As for Pietrangelo, because he scheduled a vaccine appointment in April 2021, he no longer has any stake in how New Hampshire allocates its abundant supply of vaccines. His claim for a preliminary injunction is thus moot.

Pietrangelo's arguments to the contrary fail. He argues that the state's "voluntary compliance" cannot moot the case, that he may need to receive a booster shot, that the equity plan increases his risk of contracting a breakthrough infection from an unvaccinated person, and that, if moot, the case presents a question capable of repetition yet evading review. [2] Starting with the voluntary compliance argument, the point is not that New Hampshire changed its actions but that

a court can provide him with no relief. Nor does Pietrangelo's speculation about booster shots affect the mootness of his efforts to enjoin New Hampshire's plan to deal with limited vaccine supplies earlier this year. As to Pietrangelo's concerns about non-vaccinated New Hampshire residents, the widespread availability of vaccines makes the risk based on the record before us far too insubstantial to qualify as a concrete injury. See *Equal Means Equal v. Ferriero*, 3 F.4th 24, 29 (1st Cir.2021). Finally, this controversy is not capable of repetition yet evading review because we have no reason to think that New Hampshire will face a vaccine supply crunch in the future. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S.449, 463, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007).

The appeal is dismissed.

[*] Of the District of Massachusetts, sitting by designation.

[1] While our review is generally limited to the record below, see Fed. R. App. P. 10, we may take judicial notice of facts which are "capable of being determined by an assuredly accurate source." *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 570 (1st Cir. 2004); see Fed. R. Evid. 201(b)(2). The accuracy of state and federal vaccine distribution data cannot be reasonably questioned, and we take judicial notice of them.

[2] Pietrangelo also argues that his claims for declaratory relief and damages are still live. Whether that contention is true, those claims are not before us

App.11

in this interlocutory appeal from the denial of a preliminary injunction.

App.12

APPENDIX E
United States Court of Appeals
For the First Circuit

No. 21-1366

JAMES E. PIETRANGELO, II,
Plaintiff - Appellant,
v.

CHRISTOPHER T. SUNUNU, in both his official
and individual capacities as Governor of the State of
New Hampshire; LISA MORRIS, in both her
individual and official capacities as Director of NH
Division of Public Health Services; LORI
SHIBINETTE, in both her official and individual
capacities as Commissioner of NH Department of
Health and Human Services; ELIZABETHDALY, in
both her individual and official capacities as Chief of
NH Bureau of Infectious Disease Control,
Defendants - Appellees,
UNKNOWN DOES, in their official and/or individual
capacities, Defendants.

JUDGMENT

Entered: October 1, 2021

This cause came on to be submitted on the briefs
and original record on appeal from the United States
District Court for the District of New Hampshire.

Upon consideration whereof, it is now here order-
ed, adjudged and decreed as follows: The appeal is
dismissed as moot.

App.13

By the Court:
Maria R. Hamilton, Clerk

cc: James E. Pietrangelo II,
Laura E. B. Lombardi,
Daniel Edward Will,
Samuel R. V. Garland

App.14

APPENDIX F
[FIRST CIRCUIT ORDER DENYING INJUNCTION
PENDING APPEAL TO PETITIONER, FILED MAY
20, 2021]

United States Court of Appeals
For the First Circuit

No. 21-1366

JAMES E. PIETRANGELO, II,
Plaintiff - Appellant,

v.

CHRISTOPHER T. SUNUNU, in both his official and
individual capacities as Governor of the State of New
Hampshire; LISA MORRIS, in both her individual
and official capacities as Director of NH Division of
Public Health Services; LORI SHIBINETTE, in both
her official and individual capacities as
Commissioner of NH Department of Health and
Human Services; ELIZABETHDALY, in both her
individual and official capacities as Chief of NH
Bureau of Infectious Disease Control,
Defendants - Appellees,

UNKNOWN DOES, in their official and/or individual
capacities,
Defendants.

Before Howard, Chief Judge, Lynch and Barron,
Circuit Judges.

ORDER OF COURT

App.15

Entered: May 20, 2021

Several motions are pending before the court. We have carefully reviewed the parties' submissions and resolve the requests as follows:

Plaintiff-appellant James Pietrangelo's "motion for leave" to file an enlarged motion for injunction pending appeal is granted, and the tendered "emergency motion for injunction pending appeal" is accepted for filing.

Defendants-appellees' "assented-to motion for leave to enlarge word limit for objection to appellant's emergency motion for injunction pending appeal" is granted, and the tendered response is accepted for filing.

Pietrangelo's "emergency motion for injunction pending appeal" is denied. Pietrangelo has not met his burden to show that a preliminary injunction is warranted. See *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) (preliminary injunction standard); *Donahue v. City of Bos.*, 371 F.3d 7, 14 (1st Cir. 2004)(relevant standing principles).

Pietrangelo's "emergency motion to expedite appeal" is denied. The clerk shall set a briefing schedule in the ordinary course.

By the Court:
Maria R. Hamilton, Clerk

cc: James E. Pietrangelo II
Laura E. B. Lombardi
Daniel Edward Will

App.16

APPENDIX G
[DISTRICT COURT ORDER DENYING
PRELIMINARY INJUNCTION TO PETITIONER,
FILED APRIL 5, 2021]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

2021 DNH 067

James E. Pietrangelo, II,

v.

Christopher T. Sununu et al.

Case No. 21-cv-124-PB.

United States District Court, D. New Hampshire.

April 5, 2021.

MEMORANDUM AND ORDER

PAUL BARBADORO, District Judge.

James Pietrangelo has sued New Hampshire Governor Christopher Sununu and other State of New Hampshire("State") officials arising out of the State's plan for the distribution of COVID-19 vaccines. Before me is Pietrangelo's request for a preliminary injunction, wherein he seeks to enjoin the defendants from using "race, ethnicity, or minority-group status" as a factor in vaccine distribution. The defendants object. Because Pietrangelo has not

demonstrated that he has standing to seek the requested relief, I deny his motion.

I. BACKGROUND

A. Factual Background

In March 2020, the World Health Organization and the Centers for Disease Control and Prevention (“CDC”) officially declared the novel Coronavirus Disease 2019 (“COVID-19”) a pandemic. In response to the threat to public health and safety, the President of the United States declared a national emergency, and Governor Sununu declared a state of emergency in New Hampshire. To date, COVID-19 has caused approximately 553,000 deaths in the United States, and 1,249 in New Hampshire.

Since December 2020, the Food and Drug Administration has authorized three vaccines for emergency use in the prevention of COVID-19. Because of a limited supply, the State could not obtain sufficient doses to inoculate its entire population at once. To obtain federal immunization funding, the State had to submit a vaccine allocation plan to the CDC for approval. The State consulted several resources in preparing its plan, including guidance and direction from the CDC and the National Academies of Sciences, Engineering, and Medicine (NASEM).[1]

At the CDC’s request, NASEM assembled the Ad Hoc Committee on Equitable Allocation of Vaccine for the Novel Coronavirus (“Committee”). In October 2020, the Committee released a report that offers a framework for equitable allocation of COVID-19 vaccines (“NASEM Report”). The NASEM Report cited extensive data showing that COVID-19 has had a “disproportionate impact on people who are already disadvantaged by virtue of their race and ethnicity,

age, health status, residence, occupation, socioeconomic condition, and/or other contributing factors.” Aff. of Elizabeth Talbott, Doc. No.13-2 ¶ 27 (quoting NASEM Report at 2). With respect to minorities, data showed that COVID-19 has “disproportionately affect[ed] particular racial and ethnic minority groups, including Black, Hispanic or Latinx, American Indian and Alaska Native, and Native Hawaiian and Pacific Islander communities.” Doc. No.13-2 ¶ 27 (quoting NASEM Report at 2). Nationally, these groups have experienced on average infection rates nearly three times higher, hospitalization rates nearly five times higher, and mortality rates between one and two times higher than non-Hispanic whites. Doc. No. 13-2 ¶ 27(citing NASEM Report at 3-4). [2]

The NASEM Report outlined a phased framework for vaccine allocation that was guided by data on how to reduce deaths, prioritize vulnerable populations, and maximize societal benefit. In addition to the phased approach, the NASEM Report recommended setting aside a percentage of the vaccine supply to target vulnerable geographic areas identified through the CDC’s Social Vulnerability Index or the more specific COVID-19Community Vulnerability Index (“CCVI”) developed by the Surgo Foundation. The Committee explained that those indices “represent and attempt to incorporate the variables that the committee believes are most linked to the disproportionate impact of COVID-19 on people of color.” Doc. No. 13-2 ¶ 32 (quoting NASEM Report at 9).

In its guidance to the states, the CDC endorsed the NASEM Report and echoed the Committee’s recommendations both in terms of creating a phased vaccination program and focusing separately on “critical populations,” including minority groups. The

CDC also suggested partnering with local agencies and organizations to reach those populations.

Consistent with guidance from the CDC and NASEM, New Hampshire's vaccine allocation plan consists of two components. The first is a phased allocation plan for distributing COVID-19 vaccines statewide, through which at least 90% of the State's vaccine supply is being disseminated ("general plan"). The second is a separate "equity" allocation plan for distributing up to 10% of the vaccine supply to "critical populations" living in census tracts deemed most vulnerable to COVID-19 ("equity plan").

The general plan has three phases, with each phase split into two sub-phases. In Phase 1a, the State distributed vaccines to high-risk health workers, first responders, and residents and staff of long-term care facilities. In Phase 1b, people over the age of 65, medically vulnerable individuals at high risk for severe illness from COVID-19, family caregivers of medically vulnerable minors, residents and staff of residential facilities for persons with intellectual and developmental disabilities, staff of correctional facilities, and remaining health workers became eligible for vaccination. In Phase 2a, vaccination opened to K-12 school and childcare staff. In Phase 2b, the State offered vaccines to residents between the ages of 50 and 64. In Phase 3a, medically vulnerable individuals under 50 years old at moderate risk for severe illness from COVID-19 became eligible for inoculation. Finally, in Phase 3b, the current phase, the State is offering vaccines to everyone else over the age of 16.

The equity plan, launched at the same time as Phase 1b, was designed to reach vulnerable individuals residing in census tracts identified as at risk of disproportionate impact from COVID-19. 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. Seventy-four census tracts, out of a total of 294, were deemed eligible to partake in the equity plan.

The CCVI combines COVID-specific epidemiological risk factors and health system capacity variables with the sociodemographic variables from the CDC's Social Vulnerability Index to assess which geographic areas may be less resilient to the impacts of the pandemic. At the time the State utilized it, the CCVI employed database programming based on thirty-four indicators grouped into six "core" themes: (1) socioeconomic status, (2) household composition and disability, (3) minority status and language, (4) housing type and transportation, (5) epidemiological factors, and (6) healthcare system factors.[3] All themes were weighted equally to calculate a composite metric that ranked each census tract relative to one another on a 0-1 scale, with 0 representing the least vulnerable and 1 representing the most vulnerable census tract. The most vulnerable census tract in New Hampshire was ranked 0.922, and the last census tract that made it into the top quartile for vulnerability was ranked 0.248. See Ex. D to Durzy Aff., Doc. No. 13-10 at 6-8.

To qualify for a vaccine under the State's equity plan, a person must "predominantly reside" in a vulnerable census tract and must satisfy at least one of the following criteria: identifies as a racial or ethnic minority, defined as all groups except non-Hispanic white; is homeless; lives below the federal poverty level; is geographically isolated; is homebound; has physical barriers to travel; lacks a computer or reliable internet to register for

vaccination through the general plan; lacks a medical home; has language or communication access barriers; or has other access barriers. Doc. No. 13-10 at 1.

The State has partnered with the thirteen New Hampshire Regional Public Health Networks ("RPHNs"), each serving a defined public health region in the State, to distribute COVID-19 vaccines through the equity plan. The RPHNs can distribute vaccines in four ways. First, and primarily, the RPHNs work with service agencies invulnerable census tracts, such as homeless shelters and soup kitchens, to schedule mobile clinics for their clients. At such clinics, the RPHNs are not required to ask for any identification documents. Second, the RPHNs can schedule clinics not affiliated with one service agency, by hosting a mobile clinic at a local site in a vulnerable census tract familiar to the targeted populations, such as a faith or community-based organization. The RPHNs utilize community health or outreach workers to engage local community members in that census tract who meet the criteria to come to the vaccination clinic. The State directed the RPHNs to ensure that they are serving only New Hampshire residents at such clinics, including through pre-clinic advertising that the clinic is only open to New Hampshire residents, asking for proof of residency or identification at the vaccination site, or, for those who do not have such proof, asking them where they live. Third, the RPHNs can schedule clinics that aim to vaccinate unsheltered homeless persons in locations where they may be living, such as encampments. Fourth, the RPHNs may vaccinate persons referred to them by the State who qualify for a vaccine under the guidelines of the equity plan and require special

accommodation, such as home visits for homebound residents.

The State does not stockpile 10% of the total vaccine supply for use as part of the equity plan. Instead, when an RPHN schedules a clinic, it must request from the State, one week in advance, the amount of vaccine it expects to use to inoculate qualifying individuals at that clinic. The State approves the request if it meets two requirements: (1) the clinic will serve the targeted populations in a vulnerable census tract, and (2) there is enough vaccine in the 10% allocation to cover all requests that week. If the allocation requests exceed the 10% allocation, the State works with the RPHNs to adjust the requests. In the event that not enough vaccine is available for everyone who wants to be inoculated at a clinic, priority is given to those who are older, have more comorbidities, live in multi-generational households, have greater access barriers, have more public contact, did not have COVID-19 within the prior ninety days, or have fewer opportunities for vaccination through other means. Doses that are not administered as part of the equity plan become available to vaccinate people through the general plan.

As of February 23, 2021, sixty-two clinics in eleven public health regions were held via the equity plan, including at homeless shelters, senior housing locations, low-income housing locations, community health centers, soup kitchens, rescue missions, community agencies, and individual homes. A total of 7,107 doses were administered at those clinics, representing 4-5% of the State's vaccine supply. The State has never used 10% of its vaccine supply as part of the equity plan because, according to the State, the populations it aims to vaccinate are hard to identify and reach. Again, the remaining doses

backflow into the general plan, so no vaccines are wasted or stockpiled for later use.

B. Procedural Background

Pietrangelo is a white, 55-year-old New Hampshire resident who wants a COVID-19 vaccine “as soon as possible.” Compl. ¶ 21. He filed this suit in February 2021, challenging the constitutionality and legality of the State’s vaccine allocation plan on the ground that it discriminates on the basis of race by prioritizing minority populations. The complaint asserts that the plan violates (1) equal protection under the *Fifth* and *Fourteenth Amendments* to the United States Constitution, (2) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and (3) Title VI of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a).

Simultaneously with his complaint, Pietrangelo filed a motion seeking a temporary restraining order and a preliminary injunction. I denied the motion to the extent it requested a temporary restraining order because Pietrangelo failed to demonstrate that he would suffer immediate and irreparable injury before there was time to schedule a hearing on his request for a preliminary injunction. See Doc. No. 4. At Pietrangelo’s request, I scheduled an expedited preliminary injunction hearing, which was held on March 19. See Doc. No. 8. [4] Prior to the hearing, the defendants objected to the motion and voluntarily shared with Pietrangelo evidence concerning the State’s vaccination efforts, which I summarized above.

At the hearing, the parties agreed that Pietrangelo lives in Glen, a village within the Bartlett census tract (tract 9551) in Carroll County. The defendants represented, and Pietrangelo did not contest, that Bartlett is a very low vulnerability census

tract that does not rank within the top 25% most vulnerable census tracts in the State.

Kirsten Durzy, MPH, testified at the hearing. She has served in several key roles during the planning, preparation, and implementation of the State's vaccine allocation plan, including as the State's COVID-19 Equity Subject Matter Expert. Durzy's testimony was consistent with the evidence the State submitted in its objection to the preliminary injunction motion. She emphasized that geography is at the center of the equity plan, which was designed to "look at both place [of residence] and[individual] vulnerability." Tr. 35. Thus, a New Hampshire resident who identifies as a minority but does not predominantly live in one of the seventy-four vulnerable census tracts is not eligible for vaccination through the equity plan. Tr. 35, 46. Durzy also testified that the State does not advertise the times and locations of clinics scheduled through the equity plan, and she did not believe the RPHNs did so either. Tr. 47. In other words, "the program . . . is really intended to find people, it's not intended for people to find the program." Tr. 46.

II. STANDARD OF REVIEW

A preliminary injunction is "an `extraordinary and drastic remedy' that `is never awarded as of right.'" *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d26, 32 (1st Cir. 2011) (quoting *Munaf v. Geren*, 553 U.S.674, 689-90 (2008)). A plaintiff seeking a preliminary injunction must show that: (1) he is likely to succeed on the merits of his claim; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities is in his favor; and (4) injunctive

relief is in the public interest. *Id.* Likelihood of success on the merits is the most important factor. *Norris ex rel.A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 22 (1st Cir. 2020). “To demonstrate likelihood of success on the merits, plaintiff[] must show more than mere possibility of success — rather, [he] must establish a strong likelihood that [he] will ultimately prevail.” *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1,10 (1st Cir. 2012) (per curiam) (internal quotation marks omitted). If the plaintiff cannot demonstrate that he is likely to succeed on the merits, the request for a preliminary injunction must be denied. *Arborjet, Inc. v. Rainbow Tree care Sci. Advancements, Inc.*, 794 F.3d 168,173 (1st Cir. 2015).

The plaintiff, as the party invoking the court’s jurisdiction, bears the burden of establishing standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158(2014). “[E]ach element of Article III standing ‘must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation.’” *Bennett v. Spear*, 520 U.S. 154, 167-68, (1997) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Although neither the Supreme Court nor the First Circuit has squarely addressed this burden at the preliminary injunction stage, several circuit courts have held that “the ‘merits’ on which plaintiff must show a likelihood of success encompass not only substantive theories but also establishment of jurisdiction,” including standing. *Waskulv. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250,256 n.4 (6th Cir. 2018) (quoting *Obama v. Klayman*, 800F.3d 559, 565 (D.C. Cir. 2015) (Williams, J.)); see also *Yazzie v. Hobbs*, 977 F.3d 964, 966 (9th Cir. 2020). In other words, a party who seeks a preliminary injunction “must show a

'substantial likelihood' of standing." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir.2015) (quoting *Klayman*, 800 F.3d at 568 (Williams, J.)). This is so because an "affirmative burden of showing a likelihood of success on the merits . . . necessarily includes a likelihood of the court's reaching the merits, which in turn depends on a likelihood that plaintiff has standing." *Waskul*, 900 F.3d at 256 n.4 (internal quotation marks omitted). "A party who fails to show a 'substantial likelihood' of standing is not entitled to a preliminary injunction." *Vilsack*, 808 F.3d at 913.

III. ANALYSIS

The defendants argue that Pietrangelo has not shown that he has standing to seek a preliminary injunction and that his substantive claims lack merit. Pietrangelo disagrees on both counts. Because I conclude that Pietrangelo has not established a substantial likelihood of standing, I have no jurisdiction to award him the relief he seeks and thus need not address the parties' remaining arguments.

Rooted in Article III's case-or-controversy requirement, the constitutional core of standing requires a showing that a plaintiff "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). An injury in fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). An injury in fact is fairly traceable to the defendant's conduct where there is "a causal connection between the injury and the conduct complained of" such that the injury is not the result of "independent action of some

third party not before the court.” *Id.* at 560 (internal quotation marks omitted). The redressability requirement entails a showing that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision” for the plaintiff. *Id.* at 561 (internal quotation marks omitted).

The Supreme Court has rejected the notion “that every citizen has ‘standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws.’” *United States v. Hays*, 515 U.S. 737, 744 (1995) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489-90 n.26 (1982)). “[E]ven 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 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984) (internal quotation marks omitted)). Thus, standing may not rest upon a generalized grievance against governmental conduct of which the plaintiff disapproves; rather, the plaintiff must show a particularized denial of equal treatment to establish standing to sue. See *Id.*

Where the plaintiff seeks prospective relief for an injury stemming from his inability to compete for a governmental benefit on equal footing, the plaintiff “satisfies the injury requirement if he shows (1) a likelihood that he will compete for the governmental benefit in question in the future, and (2) that he will be prevented from competing on equal footing because of the government’s discriminatory practice.” *Cotter v. City of Bos.*, 323 F.3d 160, 167 (1st Cir. 2003); accord *Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666

(1993). In other words, the plaintiff need not prove that he would be successful in obtaining that benefit, but he must demonstrate that "he is 'able and ready' to apply for the benefit and that the challenged 'discriminatory policy prevents [him] from doing so.'" *Donahue v. City of Bos.*, 304 F.3d 110, 119 (1st Cir. 2002) ("Donahue I") (quoting *Jacksonville*, 508 U.S. at 666). The plaintiff lacks standing to seek injunctive relief from the operation of a race-conscious program if he would not be able to compete for the benefit in question because of race-neutral requirements. See *Donahue v. City of Bos.*, 371 F.3d 7, 14 (1st Cir. 2004) ("*Donahue II*").

The First Circuit's decision in *Donahue II* illustrates these principles. There, a white applicant for a police officer position with the City of Boston challenged the City's affirmative action program under the equal protection clause. *Id.* at 10. The First Circuit affirmed the district court's decision that the plaintiff had failed to establish standing to seek injunctive relief. The court explained that the plaintiff was not "able and ready" to apply for appointment to the Boston Police Department because, at the time of the district court's decision, he was no longer eligible for hire due to an age restriction imposed by a state statute. *Id.* at 14-15. As a result, the plaintiff was not prevented from competing for a position by virtue of the challenged discriminatory policy but rather due to a race-neutral requirement that applicants be younger than thirty-two years of age, which applied to all applicants regardless of race. See *Id.*

Pietrangelo maintains that he has an injury in fact because (1) he is unable to apply for a COVID-19 vaccine through the equity plan as a result of the weight that the equity plan gives to minority status,

and (2) the equity plan's preference for minorities has a stigmatizing effect on him as a white person. The record before me does not support either theory of standing. Pietrangelo has not demonstrated that he is "able and ready" to participate in the equity plan but cannot do so because of the plan's discriminatory criteria. See *Jacksonville*, 508 U.S. at 666; *Donahue II*, 371 F.3d at 14-15. The equity plan is fundamentally a geography based program that identifies, by census tract, areas whose residents may be eligible for vaccination. Only residents of the top 25% tracts deemed most vulnerable to the impacts of COVID-19 may qualify for a vaccine through the equity plan. Pietrangelo does not live in one of those tracts. Bartlett, where he resides, is a very low vulnerability tract that is not even close to the top 25% most vulnerable tracts. In the six-theme CCVI, Bartlett is ranked 144th out of 294 tracts, which is near 50% for overall vulnerability. In the seven-theme CCVI, it is ranked 195th out of 294 tracts, falling in the bottom 50% for overall vulnerability.[5] Thus, residents of Bartlett, regardless of their race or ethnicity, do not qualify for a vaccine through the equity plan.

Pietrangelo has also presented no evidence that Bartlett would qualify as a vulnerable census tract but for the State's reliance on racial criteria. Importantly, he does not object to the CCVI's utilization of race-neutral themes for ranking census tracts. Instead, he challenges the State's reliance on the CCVI only to the extent the index uses "minority status and language" as a theme to identify vulnerable tracts. But he has not produced any evidence that Bartlett would move to the top 25% ranking if that theme were removed from the CCVI. In other words, he has not shown that, but for the allegedly

impermissible criteria, he would be eligible to apply for a vaccine through the equity plan. Absent such evidence, I cannot conclude that his injury is either particularized or redressable.

On this record, I must conclude that Pietrangelo merely has a generalized grievance. "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *Hays*, 515 U.S. at 743. In an analogous context, the Supreme Court held in *Hays* that citizens who did not live in the district that was the primary focus of racial gerrymandering lacked standing to bring suit. See *id.* at 744-45. The Court rejected the argument that "anybody in the State has a claim," and reasoned that standing required "individualized harm." *Id.* (internal quotation marks omitted). Pietrangelo has not demonstrated that he is likely to suffer individualized harm because he is in no different position than anyone else in the State.

Even if Pietrangelo has a concrete and particularized injury, he had not shown that it is likely to be redressed by a favorable court ruling. Pietrangelo does not challenge the equity plan wholesale but only its preference for minorities. Even if I ordered the State to stop utilizing minority status and language as part of the CCVI algorithm, there is no evidence that Bartlett would rank in the top quartile for vulnerability under the remaining race-neutral themes. It is mere speculation, then, that Pietrangelo would reside in a vulnerable tract if the court invalidated the State's approach. Therefore, he has not shown that granting his request for a preliminary injunction would redress his injury by allowing him to request a vaccine under the equity plan.

Pietrangelo's invocation of a stigmatizing injury fares no better. A "stigmatizing injury" "accords a

basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Allen*, 468 U.S. at 754 (internal quotation marks and citation omitted). It does not confer standing to those asserting only a generalized grievance against allegedly illegal government conduct. *Hays*, 515 U.S. at 743-44. Again, there is no evidence that Pietrangelo was, or is likely to be in the future, personally subjected to unequal treatment. Indeed, he is on equal footing with minority residents of his census tract, who likewise are not eligible to participate in the equity plan. Therefore, the alleged stigma he claims he suffered because of the State's use of racial criteria in the equity plan does not satisfy the injury in fact requirement.

Pietrangelo presents three arguments why he nonetheless has standing. All three rest on sheer speculation. First, he argues that a person does not have to be a resident of a vulnerable census tract to get a vaccine through the equity plan. In support, he points out that the State does not require the RPHNs to verify that individuals participating in their clinics live in a vulnerable census tract; instead, it only requires verification of their New Hampshire residence. But the mere fact that verification of census-tract residence is not required does not mean that these clinics are open to all New Hampshire residents. On the contrary, the equity plan was designed to serve certain populations in vulnerable census tracts, and allocation requests from the RPHNs are approved only if they in fact propose to vaccinate people in those tracts. Further, the way those clinics operate in practice makes it exceedingly unlikely that individuals residing in other tracts would be vaccinated. The RPHNs work with service agencies or other local organizations to schedule clinics within vulnerable

census tracts, without widely publicizing their schedule. Any outreach efforts occur within the targeted vulnerable tracts.

Even if it is conceivable that an RPHN may administer a vaccine to someone residing in a non-vulnerable tract, there is no evidence that this has ever happened. Pietrangelo has neither attempted to get a vaccine by showing up at an equity clinic nor demonstrated that other ineligible persons have done so. Thus, it is both speculative and implausible that people from non-vulnerable census tracts are utilizing the equity plan to get their COVID-19 vaccines.

Second, Pietrangelo argues that removing discriminatory criteria from the equity plan would lead to fewer vaccinations as part of that plan and thus increase the number of vaccines that flow back to the general plan. This, the argument goes, would shorten the amount of time he has to wait for a vaccine in the general plan queue. To the extent his argument rests on removing minority status and language as a factor in identifying vulnerable census tracts, he has not explained why the overall usage of vaccines as part of the equity plan would decrease. If anything, logic suggests that the usage would not change substantially. Because he does not challenge the equity plan as a whole, the plan would continue to take up to 10% of the vaccine supply. New census tracts would replace existing ones that are included by virtue of having a higher percentage of minority residents, and populations in those new tracts would become eligible for vaccination through the equity plan. There is no evidence that those new tracts would have fewer residents who qualify for a vaccine based on race-neutral criteria.

To the extent Pietrangelo argues that eliminating minority status as a criterion for qualifying for a vaccine would decrease the demand for vaccines within the equity plan, he again has no evidence to back up that claim. He would have to show, for example, that minorities who do not meet any of the other criteria represent a high Percentage of persons receiving vaccines through the equity plan. Absent such evidence, it is wholly speculative that precluding minorities from qualifying solely on account of their minority status would meaningfully impact the distribution of vaccines whereby the equity plan would utilize significantly fewer doses, leading to higher vaccine availability for the general plan. Lastly, Pietrangelo maintains that he has standing because the State is prioritizing minority residents even within the general plan. He relies on language in the State's interim vaccine allocation plan and guidelines for Phase 1 that can be read to suggest that vaccine access would be prioritized for vulnerable geographic areas as part of the general plan. See, e.g., Doc. No. 2-4 at 14. However, the State has submitted evidence showing that this ambiguous language has been superseded and that no such prioritizing is occurring within the general plan. See Doc. No. 13-9; Defs.' Ex. J. In short, the record dispels the notion that vulnerable regions or minorities are being put to the front of the queue in the general plan.

In sum, in the record before me, there is no evidence that Pietrangelo would be able to apply for a vaccine but for the allegedly discriminatory criteria. Absent such evidence, he cannot demonstrate that he will suffer in the future a particularized injury that is redressable by a favorable court order. Accordingly, Pietrangelo has not met his burden of establishing a

substantial likelihood of standing to obtain injunctive relief. See *Jacksonville*, 508U.S. at 666; *Donahue II*, 317 F.3d at 14-15. By extension, he has not demonstrated a likelihood of success on the merits, which dooms his request for a preliminary injunction. See *Vilsack*, 808 F.3d at 913.

IV. CONCLUSION

For the foregoing reasons, I deny Pietrangelo's request for a preliminary injunction (Doc. No. 2).

SO ORDERED.

[1] NASEM is a private, nongovernmental institution that advises the nation on issues related to science and technology.

[2] New Hampshire's figures closely track the national trend. Racial and ethnic minorities in the State have experienced on average infection rates 2.8 times higher, hospitalization rates 4.4 times higher, and mortality rates 1.5 times higher than non-Hispanic whites, after adjusting for differences in age distribution. Aff. Of Kirsten Durzy, Doc. No. 13-6 ¶ 16.

[3] The current version of the CCVI uses forty indicators grouped into seven themes. Minority status and language is a theme in both versions. As I discuss in the analysis section, the differences between the two versions of the index do not affect the outcome in this case. For the sake of clarity, I note that the State's witness, Kirsten Durzy, described generally the seven-theme CCVI, see Doc. No. 13-6 ¶ 22, but an exhibit to her affidavit shows that the State relied on the six theme CCVI. Specifically, an internal State document providing

guidelines for implementing the equity plan describes themes as they appear in the six-theme CCVI and references a document discussing the methodology for the six-theme CCVI. See Ex. D to Durzy Aff., Doc. No. 13-10 at 13 (listing themes and citing for full list https://docs.google.com/document/d/1aN9BcOYoJcr7p9zRnwBHYJ_02fKDyJJavnjTl3A0JT0/edit). The State's exhibit also includes a list of census tracts in the top quartile for vulnerability, along with a composite metric for each. See Doc. No. 13-10 at 6-8. According to Durzy, that list was based on data sourced from the CCVI's website. See Doc. No. 13-6 ¶ 20 (citing <https://precisionforcovid.org/ccvi>). This website currently presents data for the seven-theme CCVI, whose composite metrics do not match the State's metrics for the same seventy-four census tracts, and in some instances, their rankings are different. Compare Doc. No. 13-10 at 6-8, with <https://covidstatic-assets.s3.amazonaws.com/US-CCVI/ccvi-US.xlsx> (accessed March 26, 2021). That website, however, contained data for the six-theme CCVI through December 2020, shortly before the State announced it was utilizing the CCVI in January 2021. See https://web.archive.org/web/XXXXXXXif_/https://precisionforcovid.org/ccvi. The rankings and composite metrics for New Hampshire's census tracts in the six-theme CCVI perfectly match both the State's rankings of the most vulnerable census tracts and their composite metrics. Compare Doc. No. 13-10 at 6-8, with https://docs.google.com/spreadsheets/d/1qEPuziEpxj-VG11IAZoa_5RWEr4GhNoxMn7aBdU76O5k/edit#gid=XXXXXXXXXX.

[4] At the time of the hearing, Pietrangelo had not received a COVID-19 vaccine. Vaccination for his age group (Phase 2b) began on March 25. Given that vaccine appointments are now available to all age

groups, presumably Pietrangelo has already received, or will receive shortly, his vaccine. I note that this would raise mootness concerns, but since the parties have not raised that issue, I do not address it.[5] Bartlett's composite metric in the six-theme CCVI is 0.124, whereas the last tract in the top 25% has a composite metric of 0.248. Similarly, in the seven-theme CCVI, Bartlett's score is 0.050, compared to the score of 0.250 for the last tract in the top quartile.

APPENDIX H

**[DISTRICT COURT ORDER DENYING
TEMPORARY RESTRAINING ORDER TO
PETITIONER, FILED FEBRUARY 5, 2021]**

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

James E. Pietrangelo, II v.

Case No. 21-cv-124-PB

Christopher T. Sununu et al.

ORDER

Pro se plaintiff James Pietrangelo requests a temporary restraining order and preliminary injunction against New Hampshire Governor Christopher Sununu and other State officials. He seeks to enjoin the defendants "from in any way using race, ethnicity, or minority-group status, or their proxy 'equity,' as a factor in whole or in part in the distribution and administration of the COVID-19 vaccine(s) and/or in determining who gets (access to) the COVID-19 vaccine first or in priority or before anyone else." Doc. No. 2 at 1.

A motion for temporary restraining order under Federal Rule of Civil Procedure 65 is appropriate only when conditions exist which pose a threat of an "immediate and irreparable injury, loss, or damage" to the applicant if the conduct of the opposing party is not restrained until a hearing can be held on an application for preliminary injunction. See Fed. R. Civ. P. 65(b). The requirements of Rule 65(b) are "stringent" and "reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides

of a dispute.” *Granny Goose Foods, Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974).

The plaintiff cannot satisfy this requirement because he does not claim that he would be eligible to be vaccinated now but for the defendants’ allegedly unconstitutional conduct. The complaint alleges that the plaintiff, who is fifty-five years old, falls in Phase 2B of the State’s vaccination plan and is anticipated to become eligible for a vaccine starting in March. Compl. ¶ 21, Doc. No. 1. Accordingly, the plaintiff would not suffer immediate and irreparable injury before there is time to schedule a hearing on the plaintiff’s motion for a preliminary injunction and allow the defendants an opportunity to be heard.

The plaintiff’s request for a temporary restraining order (Doc. No. 2) is denied without prejudice to his right to seek preliminary and permanent injunctions after the defendants have appeared and responded to the motion.

SO ORDERED.

/s/ Paul J. Barbadoro
Paul J. Barbadoro
United States District Judge

February 5, 2021

cc: James E. Pietrangelo, II, pro se