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January 18, 2022

Acting Commissioner Mary T. Basset
New York Department of Health
Corning Tower
Empire State Plaza
Albany, NY 12237

Re: ***Prioritization of Anti-SARS-CoV-2 Monoclonal Antibodies and Oral Antivirals for the Treatment of COVID-19 During Times of Resource Limitations***

Dear Acting Commissioner Basset:

I am writing on behalf of the Project for Fair Representation. This letter is to warn the Department of Health about serious legal problems in the Department's new racially discriminatory guidance on the prioritization of COVID-19 treatments, problems for which you have already been sued and will surely be sued again.[1]

The policy requires health providers to prioritize treatment with monoclonal antibodies (mAbs) and oral antivirals (OAVs) for certain patients, at the expense of others, on the basis of race or ethnicity. Specifically, according to the Department's December 29th guidance: "Non-white race or Hispanic/Latino ethnicity should be considered a risk factor, as longstanding systemic health and social inequities have contributed to an increased risk of severe illness and death from COVID-19."[2] This blatantly discriminatory policy violates federal civil rights laws, federal Department of Health and Human Services (HHS) guidance, and New York State law, and the Fourteenth Amendment.

New York is not the only state to implement this type of discriminatory policy—Minnesota, for example, rolled out, and then rolled back, race-based

[1] *See* Complaint, Jacobson v. Basset, (N.D.N.Y. 2022) (not yet docketed).

[2] *See* Prioritization of Anti-SARS-CoV-2 Monoclonal Antibodies and Oral Antivirals for the Treatment of COVID-19 During Times of Resource Limitations, New York Department of Health (Dec. 29, 2021) https://coronavirus.health.ny.gov/system/files/documents/2021/12/prioritization_of_mabs_during_resource_shortages_20211229.pdf.

rationing of COVID-19 treatments[3]—but it is one of the few that persists. If permitted to continue, this policy will lead to needless loss of life and will illegally perpetuate immoral racial categories.

This is not to say that there are no disparities in health outcomes that correlate with race. Rather, the problem is that there is no scientific, legal, or moral justification for using such a profoundly reductionist racial binary, dividing everyone into only two categories: "white people" versus "non-white people." As the CDC has pointed out, "[r]ace and ethnicity are risk *markers* for other underlying conditions that affect health, including socioeconomic status, access to health care, and exposure to the virus related to occupation."[4] The use of such crude markers is not narrowly tailored to advancing any compelling state interest. Public health can be advanced much more effectively using race-neutral methods. And even on its own terms, the policy is irrational and factually misguided, since Asians as a group have *better* COVID-19 outcomes than other racial groups.[5] These aspects of the policy make it difficult to avoid the conclusion that the Department has acted based on anti-white animus rather than dispassionate scientific or medical analysis.

Such divisive animus is unfortunately increasingly widespread.[6] Unlike most such declarations, however, the Department's policy goes beyond mere rhetoric into actually harming people based on their race. There is also a sad irony to the policy, which has a disturbing similarity to discredited and pseudo-scientific arguments used by eugenicists and racialists of the past to hold up whites as "better" or "stronger" than other races. Like those thinkers, the policy claims that the ill-defined category of "whites" has some kind of better physical constitution that makes them more able to resist the ill effects of disease than all other racial groups. This kind of argument was wrong when it circulated in the 1920s and it is wrong now in the 2020s.

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[3] Jeremy Olson, *Minnesota removes race as factor in rationing COVID-19 antibody treatment*, Star Tribune (Jan. 13, 2022) https://www.startribune.com/minnesota-removes-race-as-factor-in-rationing-covid-19-antibodies/600135503/?refresh=true.

[4] *Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity*, CDC (last accessed Jan. 7, 2022) (emphasis added), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html.

[5] *Id.*

[6] See, for example, the recent New York Post report on how New York City is allocating coronavirus testing resources on the basis of race. Jon Levine and Conor Skelding, *NYC admits prioritizing race in distributing COVID tests: leaked emails*, New York Post (Jan. 1, 2022) https://nypost.com/2022/01/01/nyc-admits-to-prioritizing-race-in-distributing-covid-tests/.

New York has received more funding to combat COVID-19 from the federal government and HHS than almost any other state.[7] Using these funds in a discriminatory manner is a violation of federal law. Section 1557 of the Affordable Care Act, for example, provides that "no individual" may "be excluded from participation in, denied benefits of, or be subject to discrimination under" any federally administered or funded health program or activity because of membership in various categories including race, color, and national origin that are protected under civil rights laws including Title VI of the Civil Rights Act of 1964.[8] HHS's website further explains: "Programs that receive Federal funds cannot distinguish among individuals on the basis of race, color or national origin, either directly or indirectly, in the types, quantity, quality or timeliness of program services, aids or benefits that they provide or the manner in which they provide them."[9]

At the beginning of the COVID-19 Public Health Emergency in March 2020, HHS reminded "entities covered by civil rights authorities" that they should "keep in mind their obligations under laws and regulations that prohibit discrimination on the basis of … exercise of conscience and religion in HHS-funded programs."[10] As the Department of Justice stated: "Civil rights protections and responsibilities still apply, even during emergencies. They cannot be waived."[11]

Recent guidance issued by the Biden administration on COVID-19 vaccination programs, presumably in response to a racially discriminatory vaccination program in New Hampshire,[12] HHS has again insisted that programs "cannot distinguish among individuals on the basis of race, color or national origin (including language), either directly or indirectly, in the types, quantity, quality or timeliness of program services, aids or benefits that they provide or the manner in

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[7] HHS COVID-19 Funding, Tracking Accountability in Government Grants System (last accessed Jan. 3, 2022) https://taggs.hhs.gov/Coronavirus/Overview.

[8] 42 U.S.C. § 18116.

[9] *Civil Rights Requirements- A. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. ("Title VI"),* U.S. Dep't of Health & Hum. Servs. (last accessed Jan. 3, 2022) https://www.hhs.gov/civil-rights/forindividuals/special-topics/needy-families/civil-rights-requirements/index.html.

[10] HHS Office for Civil Rights in Action, Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19) 1 (Mar. 28, 2020), https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf.

[11] U.S. Dep't of Just., *Civil Rights and COVID-19* (last updated May 12, 2021), https://www.justice.gov/crt/Civil_Rights_and_COVID-19.

[12] *See* Letter from Michael Buchbacher and Rachel N. Morrison to Pamela Barron, Deputy Director, Civil Rights Division, U.S. Department of Health and Human Services (Sep. 28, 2021) https://eppc.org/wp-content/uploads/2021/09/OCR-Complaint-for-Unlawful-Racial-Set-Asides-in-NH-COVID-Vaccine-Distribution_Redacted.pdf.

which they provide them."[13] As an example, the guidance specifically outlines a scenario involving vaccine distribution that is uncannily similar to the prioritization the New York Department of Health recommends.

> Example #1: A state or local public healthcare authority or federally assisted health care provider that establishes a policy or procedure that provides priority to vaccines based on race, color, or national origin, including language spoken, without a legitimate non-discriminatory reason for doing so would violate Title VI and Section 1557.[14]

Like the entity in the example, the New York Department of Health is violating Title VI and Section 1557.

The Department's discriminatory policy also violates New York State law. The New York Bill of Rights states that, "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."[15] Such discrimination is subject to severe penalties, hundreds of thousands of dollars in fines and compensatory and punitive damages.[16] The New York State Human Rights Law, states that "[i]t shall be an unlawful discriminatory practice, . . . because of race . . . to withhold from anyone" any advantages or services in places of public accommodation, including hospitals and other health treatment facilities.[17] Withholding medical treatment on the basis of race is a particularly egregious violation.

Finally, this policy violates the Fourteenth Amendment to the U.S. Constitution. As the Supreme Court has held, "[r]acial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to

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[13] *Guidance on Federal Legal Standards Prohibiting Race, Color and National Origin Discrimination in COVID-19 Vaccination Programs"),* U.S. Dep't of Health & Hum. Servs. (last accessed Jan. 3, 2022) https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-federal-legal-standards-covid-19-vaccination-programs/index.html#footnote13_gluhrmc

[14] *Id.*

[15] NY Const art. I § 11.

[16] N.Y. Exec. Law 15 § 296.4

[17] N.Y. Exec. Law 15 § 296.2

eliminate racial discrimination emanating from official sources in the States.'"[18]

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New York's policy does not remove but upholds and perpetuates the evil of racial discrimination. We understand that in times of great need medical treatments may need to be prioritized to those whose health is in greatest jeopardy and that health outcomes are not completely the same across different racial categories. But the policy's crude use of race—dividing "whites" from everyone else—is divorced from any kind of medical or scientific reality and instead clumsily reinforces discredited stereotypes and actively threatens real harm to the health of the patients of all races and backgrounds that the Department is charged with protecting.

Sincerely yours,

C. Boyden Gray

[18] *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)).