

ONE HUNDRED SEVENTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
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WASHINGTON, DC 20515-6216
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January 28, 2022

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland:

We write in response to disturbing reports that certain states, acting at the recommendation of President Biden's Food and Drug Administration (FDA), have implemented policies governing the distribution of monoclonal antibody and other COVID-19 treatments that discriminate on the basis of race. These policies commit state and local health departments to rationing medical care in a way prohibited by the Fourteenth Amendment. We seek information about the Department of Justice's (DOJ) efforts to protect the rights of Americans from discriminatory actions by state governments during the COVID-19 pandemic.

Due to President Biden's haphazard pandemic response, our nation finds itself in a situation where life-saving treatments are being rationed. Sotrovimab, the most effective monoclonal antibody treatment against the omicron variant of COVID-19, is in short supply across the country.¹ Since the federal government took over the procurement and distribution of the monoclonal antibody treatments in September 2021, medical providers cannot obtain additional supplies until the federal government provides them to state governments.² Unfortunately, the demand for these treatments far outpaces the supply the federal government is providing. In light of this shortage, state health departments have issued criteria, based on FDA guidance, for medical providers to ration these treatments.³

The FDA guidance lists certain medical conditions and factors that elevate a patient's risk for developing severe COVID-19 illness.⁴ However, the document goes beyond those legitimate

¹ See, e.g., Nicole Cobler, *Austin remains without effective antibody treatment*, AXIOS (Jan. 4, 2022).

² See, e.g., James Barragan, *Health agency warns Texas is running out of the only antibody treatment effective against the omicron variant*, TEX. TRIB. (Dec. 27, 2021).

³ See, e.g., Memorandum from the New York State Department of Health to Health Care Providers and Health Care Facilities (Dec. 27, 2021) (on file with the Committee).

⁴ FACT SHEET FOR HEALTHCARE PROVIDERS EMERGENCY USE AUTHORIZATION (EUA) OF SOTROVIMAB, FOOD AND DRUG ADMINISTRATION, <https://www.fda.gov/media/149534/download> (last visited Jan. 17, 2022).

medical criteria to direct providers explicitly to consider race and ethnicity in determining what treatments to give to patients.⁵ At no point does the FDA cite any scientific support for treating patients differently based on their race. Absent evidence showing that race, independent of other factors, directly leads to different levels of COVID-19 severity for patients, this guidance appears to be nothing more than the FDA injecting the malignant scourge of Critical Race Theory into public health policy.

Based upon the FDA's appalling guidance, certain states, including New York, Minnesota, and Utah, prioritized race over high-risk medical conditions in furnishing these lifesaving treatments. For example, New York's Department of Health published a memo detailing its plans for prioritization of monoclonal antibodies and oral antiviral treatments with one "risk factor" being a race or ethnicity that is not White due to "longstanding systemic health and social inequities."⁶

The Minnesota Department of Health directly references the FDA's guidance in its "Ethical Framework for Allocation of Monoclonal Antibodies during the COVID-19 Pandemic," which was last updated on January 12, 2022.⁷ In the document, the Department asserts that the "FDA's acknowledgement means that race and ethnicity alone, apart from other underlying health conditions, may be considered in determining eligibility."⁸

In a truly brazen display of racial discrimination, the Utah Department of Health devised a point system that allocates points for various risk factors. Patients had to attain a certain score, which varies based on vaccination status, to be eligible for monoclonal antibody treatments.⁹ Under this system, being a member of a "Non-White race or Hispanic/Latinx ethnicity" gave a patient twice as many points as hypertension, congestive heart failure, chronic kidney disease, and chronic liver disease.¹⁰

These shocking displays of racial discrimination run counter to the principles we hold dear as Americans. The Fourteenth Amendment to the Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."¹¹ Unfortunately, the inhabitants of these states are receiving different treatment from their own state governments based in no small part on their racial background. That is simply un-American. Racism is an evil that our country has fought against for generations, and we must stand up for the rights of all Americans to receive equal protection under the law.

⁵ *See, Id.* ("Other medical conditions or factors (for example, race or ethnicity) may also place individual patients at high risk for progression to severe COVID-19, and authorization of sotrovimab under the EUA is not limited to the medical conditions or factors listed above.").

⁶ New York Department of Health, *supra* note 3, at 2.

⁷ ETHICAL FRAMEWORK FOR ALLOCATION OF MONOCLONAL ANTIBODIES DURING THE COVID-19 PANDEMIC, MINN. DEPT. OF HEALTH, <https://www.health.state.mn.us/diseases/coronavirus/hcp/mabethical.pdf> (last updated Jan. 12, 2022).

⁸ *Id.* at 13.

⁹ Lisa Riley Roche, *Utah reevaluating COVID-19 treatment qualifications after Fox News host claims whites are losing out*, DESERETNEWS (Jan. 11, 2022).

¹⁰ *Id.*

¹¹ U.S. CONST. amend. XIV.

So that we may understand how the DOJ is confronting these flagrantly unconstitutional policies, we respectfully request that you arrange for a staff-level briefing on the Department's activities to protect Americans from unlawful discrimination in the provision of healthcare services during the COVID-19 pandemic. Please provide this briefing as soon as possible but not later than 5:00 p.m. on February 11, 2022. If you have any questions about this request, please contact Judiciary Committee staff at (202) 225-6906.

Thank you for your prompt attention to this matter.

Sincerely,



Dan Bishop
Member of Congress



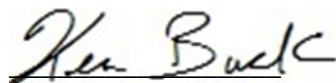
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Ranking Member



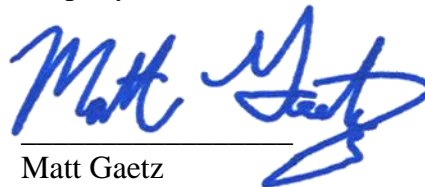
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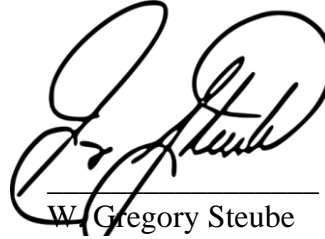
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Ranking Member
Subcommittee on the Constitution,
Civil Rights and Civil Liberties



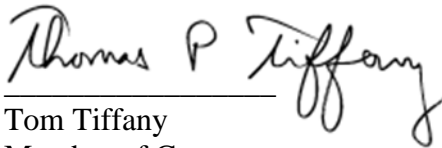
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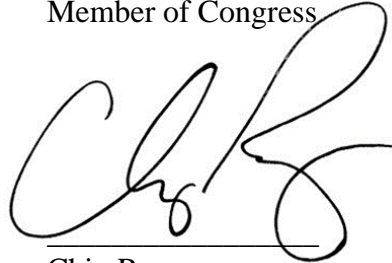
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