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VIA ECF

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, New York 10007

Re: *Roberts v. Bassett*, No. 22-622 (argued on Oct. 25, 2022, before
Cabranes, Lynch, and Robinson, JJ.)

Dear Ms. Wolfe:

The appellee New York City Department of Health and Mental Hygiene submits this letter in response to the panel's request at oral argument on October 25, 2022 to explain its regulatory and enforcement authority with respect to the advisory at issue—the Department's 2021 Health Advisory #39 (JA40–44).

As an initial matter, the Department does not license doctors or pharmacists. *Robin v. Hempstead*, 30 N.Y.2d 347, (1972) (“[T]he State has reserved to itself regulation of the practice of medicine...”). Nor, as

explained below, did the Department have authority to discipline or punish any healthcare provider who ignored the advisory.

Among the “core public health services” that the Department is required to provide are education on public health issues and control of communicable disease. N.Y. Pub. Health L. § 602(1)(b) and (2)(b). One way that the Department fulfils these responsibilities is through its Health Alert Network (known as HAN), which allows health professionals and members of the public to sign up to receive Department health advisories by email (JA55). These advisories are also posted on the Department’s website¹ and include important information about current public health matters of concern. Both the New York State Department of Health and the CDC also issue these kinds of health advisories to keep healthcare professionals abreast of up-to-date information about pressing public health issues.

While the Department aims to provide health information to the public through dissemination of its health advisories, no law or regulation requires medical professionals (or anyone else) to read such health advisories, let alone to comply with their advice. To be sure, in

¹ <https://www1.nyc.gov/site/doh/providers/resources/health-alert-network.page>

New York City, the Department does have the power to enforce the New York City Health Code—the City’s health regulations adopted by the New York City Board of Health, which can be found in title 24 of the Rules of the City of New York (RCNY). The Department similarly has the power to promulgate other regulations and issue Commissioner’s Orders. N.Y.C. Charter § 558(a), (b), (c). It can punish violations of the Health Code and its regulations and orders with fines, penalties, forfeitures, or imprisonment, “as may be prescribed therein or otherwise by law.” N.Y.C. Charter § 558(b); *see also* 24 RCNY § 3.11.

The advisory at issue here and all the Department’s many other health advisories, however, are not issued under any provision of the Health Code and do not have the status of a regulation or a Commissioner’s Order. And nothing that is in the Health Code, the Department’s regulations, or the Commissioner’s Orders requires, or has ever required, doctors to consider race when treating patients with COVID-19. The advisory was thus not an enforceable mandate.

Respectfully submitted,

/s/ Diana Lawless

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cc via ECF: all counsel