

# Congress of the United States

## House of Representatives

SELECT SUBCOMMITTEE ON THE CORONAVIRUS PANDEMIC

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### STAFF MEMORANDUM

**TO:** Select Subcommittee on the Coronavirus Pandemic Members

**FROM:** Select Subcommittee on the Coronavirus Pandemic Majority Staff

**DATE:** September 9, 2024

**RE:** Findings from the Select Subcommittee’s Investigation into the Cuomo Administration’s March 25 Directive admitting COVID-positive patients into Nursing Homes

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#### I. BACKGROUND

It was well understood early in the pandemic that COVID-19 did not harm all people equally. Age and comorbidities were the most important risk factor for predicting hospitalization and death from COVID-19. Accordingly, it was critically important that public health policy prioritize high-risk populations to reduce their risk of infection.

This fact was known by then-New York State Governor Andrew Cuomo. Mr. Cuomo was aware of the deaths occurring in the State of Washington—the early epicenter of COVID-19—as the result of COVID-19 in nursing homes.<sup>1</sup> On March 10, 2020, in response to a question on the threat that COVID-19 posed on nursing homes, he stated that coronavirus in nursing homes was a “nightmare” scenario.<sup>2</sup>

[T]hat’s my nightmare and that’s where you’re going to see the pain and the damage from this virus. Senior citizen homes, nursing homes, congregant senior facilities...

Days later, Mr. Cuomo allegedly told Mr. Jared Kushner—who helped lead the early White House response—that “[f]or nursing homes, *this could be like fire through dry grass.*”<sup>3</sup>

Nonetheless, on March 25, 2020, the Cuomo Administration issued a directive entitled “Hospital Discharges and Admissions to Nursing Homes” (hereinafter the “March 25

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<sup>1</sup> ANDREW CUOMO, AMERICAN CRISIS: LEADERSHIP LESSONS FROM THE COVID-19 PANDEMIC (Oct. 13, 2020).

<sup>2</sup> New York Executive Chamber, *Audio & Rush Transcript: Governor Cuomo is a Guest on CNN’s the Lead With Jake Tapper*, available at <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-cnns-lead-jake-tapper-0> (Mar. 10, 2020).

<sup>3</sup> Steven Nelson & Bernadette Hogan, *Cuomo feared COVID ‘fire’ in nursing homes before notorious order: Kushner*, N.Y. POST (Aug. 2, 2022) (emphasis added).

Directive”).<sup>4</sup> The March 25 Directive ordered that “[n]o resident shall be denied re-admission or admission to the [nursing home] solely based on a confirmed or suspected diagnosis of COVID-19” and “[nursing homes] are prohibited from requiring a hospitalized resident who is determined medically stable to be tested from COVID-19 prior to admission or re-admission.”<sup>5</sup> The March 25 Directive was issued following a *direct request* to Governor Cuomo from the Greater New York Hospital Association (GNYHA).<sup>6</sup>

As a result, more than 9,000 COVID-19 patients were readmitted or admitted to nursing homes between March 25, 2020 and May 8, 2020.<sup>7</sup> This unjustifiably exposed vulnerable nursing home populations to COVID-19, causing predictable but disastrous consequences.

In response to criticism regarding the March 25 Directive, the former Governor—and his staff—desperately tried to control the narrative. The Cuomo Administration used alternating methodologies throughout the pandemic to account for nursing home fatalities—ultimately, making the decision to withhold the number of nursing home fatalities occurring outside the nursing homes. While the Cuomo Administration asserted that the numbers needed to be audited for accuracy, the facts and circumstances tend to show that the decision was seemingly self-serving.

The Select Subcommittee is investigating the development of the March 25 Directive and the resulting cover-up. As of September 9, 2024, the Select Subcommittee has reviewed nearly 550,000 pages of documents from the State of New York and conducted ten transcribed interviews.<sup>8</sup> However, the State of New York is still withholding documents vital to this investigation that could inform legislative solutions to ensure this tragedy never happens again.

This memorandum outlines the interim findings of the Select Subcommittee’s investigation.

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<sup>4</sup> Memorandum from the New York State Department of Health to Nursing Home Administrators, *et. al.* (Mar. 25, 2020) (on file with Select Subcomm. Staff).

<sup>5</sup> *Id.*

<sup>6</sup> Transcribed Interview of Dr. Howard Zucker, by H. Select Subcomm. on the Coronavirus Pandemic Staff, at 88-89 (Dec. 18, 2023) [hereinafter Zucker TI].

<sup>7</sup> Bernard Condon & Jennifer Peltz, *Over 9,000 virus patients sent into NY nursing homes*, ASSOCIATED PRESS. (Feb. 11, 2021).

<sup>8</sup> Transcribed Interview of Dr. Howard Zucker, by H. Select Subcomm. on the Coronavirus Pandemic Staff (Dec. 18, 2023); Transcribed Interview of Dr. Eleanor Adams, by H. Select Subcomm. on the Coronavirus Pandemic Staff (Apr. 8, 2024); Transcribed Interview of Gareth Rhodes, by Select Subcomm. on the Coronavirus Pandemic Staff (May 3, 2024); Transcribed Interview of Dr. Jim Malatras, by Select Subcomm. on the Coronavirus Pandemic Staff (May 20, 2024); Transcribed Interview of Beth Garvey, by Select Subcomm. on the Coronavirus Pandemic (May 30, 2024); Transcribed Interview of Linda Lacewell, by H. Select Subcomm. on the Coronavirus Pandemic Staff (May. 31, 2024); Transcribed Interview of Andrew Cuomo, by H. Select Subcomm. on the Coronavirus Pandemic (June 11, 2024); Transcribed Interview of Melissa DeRosa, by H. Select Subcomm. on the Coronavirus Pandemic Staff (June 21, 2024); Transcribed Interview of Larry Schwartz, by H. Select Subcomm. on the Coronavirus Pandemic Staff (June 24, 2024); Transcribed Interview of Bradley Hutton, by H. Select Subcomm. on the Coronavirus Pandemic Staff (Aug. 27, 2024).

## II. THE MARCH 25 DIRECTIVE

### *Development and Issuance of the March 25 Directive*

**Finding:** Governor Cuomo and the Executive Chamber were involved in the decision that led to the March 25 Directive.

Dr. Howard Zucker, the former Commissioner of the New York State Department of Health (NYSDOH), testified that the March 25 Directive was prompted by a phone call that Mr. Cuomo received from the GNYHA.<sup>9</sup>

#### **Dr. Howard Zucker (December 18, 2023)**

- Q. When you did ask questions did you ever ask what prompted the directive to be drafted?
- A. I know why this was drafted. I know why this was drafted.
- Q. Can you just briefly summarize?
- A. Sure. Sure. So it goes to what was transpiring at the time. So we have to put this in context. And now we're in March, the middle of March, and the numbers are going up. The third week of March the cases were escalating at a rapid pace, and I would wake up in the morning with 1,000 more positive cases, and unbelievable numbers of people being admitted to the hospital. But a few days before this was drafted, or sent out I should say, the modelers came back with what is going to happen. So the governor asked for the public health expert modeling teams that were consultants to provide us with where this was going, and they predicted up to 136,000 people would be in the hospital at peak, which was X number of weeks away. I don't remember, 4, 6 weeks away from where we were at that point. And when I looked at the rate at which people were going to the hospital it made sense that we could end up there. And at that point, we also had, around this same time, a crisis at Elmhurst Hospital, where they had about 234 positive people in the hospital with COVID out of their 400-or-so beds, and 13 had died in one 24-hour period. And the hospitals were getting overwhelmed. ***Greater New York Hospital Association called the governor and the team – we were all there in a conversation; a lot of us were there – and said that we have individuals who are better, they have recovered, and they are just sitting in a hospital***

<sup>9</sup> Zucker TI, at 88-89; See also Jimmy Vielkind, et. al., *In Worst-Hit COVID State, New York's Cuomo Called All the Shots*, WALL ST. J. (Sept. 11, 2020) (Reported that "Mr. Raske, president of the Greater New York Hospital Association, said he contacted Mr. Cuomo's team for help with nursing homes. Hospitals couldn't afford to house recovered nursing-home residents long-term, with models showing they soon could be swamped.")

*bed but they need to go “home,” quote “home” for those who are in long-term care facilities or the other ones would just go home. And the long-term care facilities were not going to take them and that we needed to do something, which generated this document...*

Dr. Zucker testified to the Select Subcommittee that he was not involved with the drafting, review, or issuance of the March 25 Directive, but said that it was decided following the GNYHA’s phone call that a directive would be issued.<sup>10</sup>

**Dr. Howard Zucker (December 18, 2023)**

Q. ...When did you first see a copy [of the directive]?

A. So I actually do not remember seeing this advisory. I was there, along with others, from the Governor’s Office when the decision was made to issue an advisory, and then it was put into motion...

In a transcribed interview with the Select Subcommittee, Mr. Cuomo testified that he played no role in the issuance of the March 25 Directive and was not aware of it until he was asked about it at a press conference on April 20, 2020.<sup>11</sup> Mr. Cuomo testified that he did not recall receiving a phone call from the GNYHA related to discharging hospitalized individuals to nursing homes.<sup>12</sup> However, he testified that his discussions with GNYHA “always” related to hospital capacity—the issue the March 25 Directive was purportedly drafted to correct.<sup>13</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. Do you recall such a phone call taking place?

A. No.

Q. Regardless of the phone call, do you recall the Greater New York Hospital Association asking you to do something related to that issue?

A. No. The discussion with the Greater New York Hospital Association was always about the hospital capacity and they were tracking the capacity, which never actually happened.

Q. As far as hospital capacity is concerned, would it be possible that they would have proposed something similar to the March 25 order in order to increase hospital capacity?

<sup>10</sup> Zucker TI, at 93.

<sup>11</sup> Transcribed Interview of Andrew Cuomo, by H. Select Subcomm. on the Coronavirus Pandemic, at 38-41 (June 11, 2024) [Hereinafter Cuomo TI].

<sup>12</sup> Cuomo TI, at 202-203.

<sup>13</sup> *Id.*

A. No. I'll use the analogy I used before. Fire capacity is 41 in this room. It's not a problem until the 42<sup>nd</sup> person shows up. Then it will be a discussion, but we never – that never happened.

Ms. Melissa DeRosa, the former Secretary to the Governor, similarly testified to Select Subcommittee staff that she played no role in the development of the March 25 Directive and only learned about it at the press conference on April 20, 2020.<sup>14</sup> Ms. DeRosa speculated that it was drafted by a “midlevel person” within NYSDOH.<sup>15</sup>

**Ms. Melissa DeRosa (June 21, 2024)**

Q. ... [D]id you ask where the order originated from?

A. Yes.

Q. And to be clear, did you receive an answer on where the order came from?

A. After the press conference, when I was asking questions about what the order did, where it came from, what it was based on, et cetera, I recall being told that it was drafted initially by – I want to say it was like a midlevel person in the public health group that worked in the nursing home group, in consultation with or alongside with someone senior at DOH. I'm using Sally's name, but I don't want to commit myself to saying it was Sally. But it was someone at Sally's level that they were working with.

Q. And the person who told this, was that Dr. Zucker?

A. I think it was Dr. Zucker. It could have been Linda Lacewell. It was someone in that – the room was a little interchangeable.

Mr. Brad Hutton, the former Deputy Commissioner of NYSDOH, testified that the March 25 Directive was developed by NYSDOH staff.<sup>16</sup> Similarly to Dr. Zucker, Mr. Hutton testified that the March 25 Directive was prompted by “an urgent phone call from the [Chief Executive Officer] of a hospital in the Hudson Valley” that was concerned about hospital capacity.<sup>17</sup>

**Mr. Brad Hutton (August 27, 2024)**

<sup>14</sup> Transcribed Interview of Ms. Melissa DeRosa, by H. Select Subcomm. on the Coronavirus Pandemic Staff, at 20 (June 21, 2024) [hereinafter DeRosa TI].

<sup>15</sup> DeRosa TI, at 114-115.

<sup>16</sup> Transcribed Interview of Bradley Hutton, by H. Select Subcomm. on the Coronavirus Pandemic Staff, at 26-28 (Aug. 27, 2024) (hereinafter Hutton TI).

<sup>17</sup> *Id.*

- Q. Did you play any role in the development of this guidance?
- A. Yes.
- Q. Can you describe what role you played in the development and issuance of this guidance?
- A. I was involved in some of the initial conversations that resulted in the development of the guidance, and I was part of the process to review and approve the guidance.
- Q. Who was involved in the initial conversations regarding this guidance?
- A. I recall a conversation with Mark Kissinger late one night.
- Q. Do you recall anyone else being involved in those discussions?
- A. I don't recall anyone specifically in that initial late-night conversation.
- Q. What prompted the guidance to be drafted?
- A. Mark approached me late one evening and explained that he had received an urgent phone call from the CEO of a hospital in the Hudson Valley. I believe it was St. Luke's in Newburgh. The hospital reported receiving a van-load of nursing home residents in their emergency room who were reportedly COVID-positive, but as the CEO explained, did not at all require a hospital level of clinical care. And the CEO was very concerned, given that at the time we were all very worried about preventing a surge that would overwhelm our acute care facility capacity. He was worried that if this continued to happen, he would not have the beds to be able to treat patients who required urgent treatment for COVID-19, and asked that we urgently deal with this. I recall that he shared that he had some tense conversations with the operator of the nursing home who was not going to budge and had basically just left those residents at the emergency room.

**Finding:** The March 25 Directive was approved by the New York State Executive Chamber.

Mr. Hutton testified that the March 25 Directive “absolutely” received approval from the Executive Chamber prior to issuance.<sup>18</sup>

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<sup>18</sup> Hutton TI, at 51.

**Mr. Brad Hutton (August 27, 2024)**

- Q. ... [T]he Executive Chamber signs off on all Health Department guidance that was issued. Is that right?
- A. In the pandemic, yes.
- Q. So, for the record, the March 25<sup>th</sup> order did receive sign-off from the Executive Chamber?
- A. Yes, absolutely.

Similarly, Dr. Zucker testified all NYSDOH guidance needed to be approved by the Executive Chamber.<sup>19</sup>

**Dr. Howard Zucker (December 18, 2023)**

- Q. ...[D]o you agree with Ms. DeRosa's characterization of the Department's practices in issuing guidance?
- A. I would say that during this pandemic everything ended up on the second floor.
- Q. Can you elaborate on that?
- A. Yeah, well, the second floor being the Executive Chamber, the governor's floor.
- Q. So it's –
- A. And there were times when we, the Department of Health, would say, "Where is that guidance?" and it still hasn't been cleared from over on the second floor.
- Q. And when you say "second floor" –
- A. That is the Governor's Office. Sorry.
- Q. Okay. Would you presume that would include the governor himself being privy to—
- A. I can't answer how that process went. We knew that things needed to be cleared, and sometimes they were legal issues, which Beth

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<sup>19</sup> Zucker TI, at 43-44.

Garvey was involved, and other issues, obviously, the secretary to the Governor, Melissa DeRosa, was the one who signed off on it.

Furthermore, according to Dr. Zucker, “most things” had to be approved by Ms. DeRosa, herself.<sup>20</sup>

**Dr. Howard Zucker (December 18, 2023)**

Q. During the pandemic did anyone in the Governor’s Chamber, Ms. DeRosa included, act as a clearinghouse of information?

A. Well, everything ended up having to go through the Governor’s Office. And when I use the phrase “governor’s office” I refer to the entire, you know, the executive team, the second floor, however one wants to refer to it. But that’s what I mean when I say “governor’s office.”

Q. What did that look like? Did you like a stamp of approval? Who gave the final stamp of approval on issuing something?

A. Well, most things went through the secretary to the governor, Melissa DeRosa. That was, I guess, in a lot of ways, the voice of what the governor wants, right? And we moved forward on addressing whatever the challenges were.

Ms. Beth Garvey, formerly the Special Counsel to Governor Cuomo, testified that she had a role in the approval of the March 25 Directive.<sup>21</sup>

**Ms. Beth Garvey (May 30, 2024)**

Q. Did you play any role in the development of this guidance?

A. Yes.

Q. Can you explain your role?

A. Um, so I have no specific memory of this, but as I stated earlier, guidance was coming to the Executive Chamber and it was being reviewed by a number of different staff people and ultimately coming to me for approval to go out. It did typically run through Joe Popcun, who sent this e-mail. He was deployed, you know, from Department of State to help our office. And so I would have looked at this guidance to make sure that it was consistent with executive

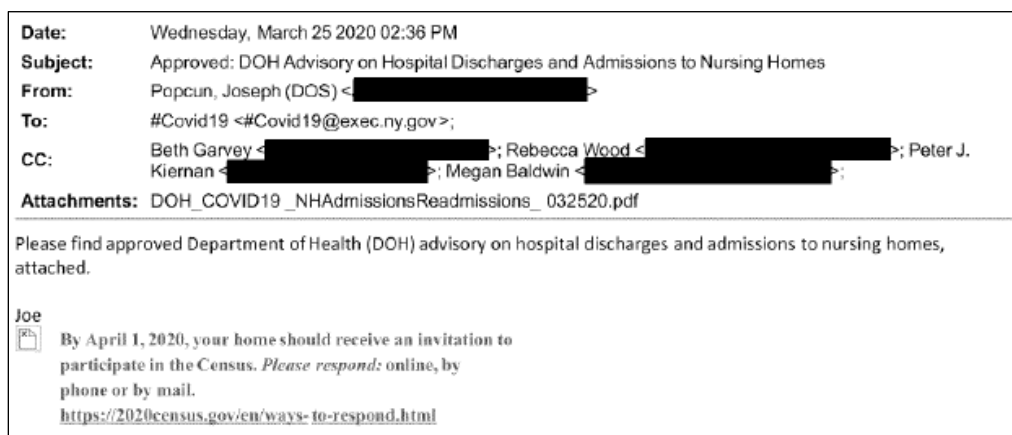
<sup>20</sup> Zucker TI, at 22-23.

<sup>21</sup> Transcribed Interview of Beth Garvey, by Select Subcomm. on the Coronavirus Pandemic, at 81-82 (May 30, 2024) [hereinafter Garvey TI].



orders, policies, every, you know, communication that the Governor was making and then approved it for distribution by whatever department had asked for the guidance.

Indeed, the approved March 25 Directive was attached in an email from Mr. Joseph Popcun to several Executive Chamber officials, including Ms. Garvey, Ms. Rebecca Wood, Mr. Peter Kiernan, and Ms. Megan Baldwin.<sup>22</sup>



Despite Ms. DeRosa normally approving COVID-19 related directives, Ms. Linda Lacewell, the former Superintendent of New York’s Department of Financial Services (DFS), testified that Mr. Cuomo and Ms. DeRosa were “surprised” by the March 25 Directive and cited the March 25 Directive as a rare example of an instance when something was issued without sign-off from Ms. DeRosa.<sup>23</sup> To Ms. Lacewell, this was not “supposed to happen.”<sup>24</sup>

**Ms. Linda Lacewell (May 31, 2024)**

Q. Do you think it would be fair to say nothing got approved without Ms. DeRosa’s approval?

A. Well, actually things did get approved without Melissa DeRosa, but that wasn’t supposed to happen.

Q. Do you have an example of that?

A. I do.

Q. Can you share?

<sup>22</sup> E-Mail from Joseph Popcun, N.Y. Dep’t of State, to Beth Garvey, Special Counsel to the Governor, *et. al.* (Mar. 25, 2020).

<sup>23</sup> Transcribed Interview of Linda Lacewell, by H. Select Subcomm. on the Coronavirus Pandemic Staff, *at* 42-43 (May. 31, 2024) [hereinafter Lacewell TI].

<sup>24</sup> *Id.*

A. I can.

Q. Please go ahead.

A. Um, the March guidance. The governor and Ms. DeRosa were not – let me rephrase that. They were surprised by the guidance. So to the best of my understanding, they were not consulted, and she was not consulted more specifically beforehand because she was surprised. And from time to time, that did happen.

For her part, Ms. Lacewell testified to Select Subcommittee staff that she had a “privileged” discussion regarding the March 25 Directive prior to its issuance with Mr. Larry Schwartz, who formerly served as the Secretary to the Governor and volunteered to assist with the Cuomo Administration’s response to the pandemic.<sup>25</sup>

**Ms. Linda Lacewell (May 31, 2024)**

Q. What were the nature of the conversations of COVID-19 and the nursing homes with Mr. Schwartz?

A. Well, he was part of the group assembled in the Executive Chamber to manage COVID. So we regularly had conversations with each other in the day-to-day management of the pandemic during that period of time.

Q. Anything specific to the directive or nursing homes?

...

A. Other than privileged conversations, I don’t have anything for you.

Q. What was the topic of the privileged conversations?

...

A. Nursing homes.

Q. I think we can get a little bit more specific with that without touching a privileged conversation right now. So—

A. I had privileged conversation [sic] with Mr. Schwartz about the subject matter of the March directive before it was issued.

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<sup>25</sup> Lacewell TI, at 20-21.

Mr. Schwartz testified that he did not recall having any conversations, privileged or otherwise, with Ms. Lacewell related to the March 25 Directive.<sup>26</sup> He also testified to Select Subcommittee staff that he did not know the origins of the March 25 Directive.<sup>27</sup>

**Finding:** Dr. Zucker declined to testify before the New York State Senate that the Executive Chamber was not involved in the March 25 Directive – testimony Dr. Zucker believed amounted to a false statement.

In his transcribed interview with Select Subcommittee staff, Dr. Zucker identified himself as the senior NYSDOH official in the report issued to the New York State Assembly Judiciary Committee (hereinafter “Impeachment Report”).<sup>28</sup> Dr. Zucker was instructed to testify to the New York State Senate that “the March 25<sup>th</sup> directive was authorized by NYSDOH and the Executive Chamber was not involved.”<sup>29</sup> The Impeachment Report did not identify the Executive Chamber official who wrote on the whiteboard for Dr. Zucker, however Dr. Zucker identified Ms. DeRosa as the Senior Executive Chamber Official who wrote the message on the whiteboard.<sup>30</sup> Dr. Zucker testified that he did not state what Ms. DeRosa wrote on the whiteboard because Dr. Zucker believed it could be a false statement.<sup>31</sup>

**Dr. Howard Zucker (December 18, 2023)**

Q. So, Dr. Zucker, were you the senior DOH official who was remotely testifying?

A. I was.

Q. And do you recall who the senior Executive Chamber official was who wrote on the whiteboard?

A. It was Melissa.

Q. It was Melissa? Do you believe that she was acting under the governor’s orders?

A. I don’t know. I can’t get in her head.

Q. And why did you refuse to testify to –

<sup>26</sup> Transcribed Interview of Larry Schwartz, by H. Select Subcomm. on the Coronavirus Pandemic Staff, at 12-13 (June 24, 2020) [hereinafter Schwartz TI].

<sup>27</sup> Schwartz TI, at 13.

<sup>28</sup> Zucker TI, at 102-104; see also Davis Polk & Wardwell LLP, *Impeachment Investigation Report to Judiciary Committee Chair Charles Lavine and the New York State Assembly Judiciary Committee*, (Nov. 22 2021), available at [https://nyassembly.gov/write/upload/postings/2021/pdfs/20211122\\_99809a.pdf](https://nyassembly.gov/write/upload/postings/2021/pdfs/20211122_99809a.pdf).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

A. Because as it said, it's not true, and I was going to make a statement that it wasn't true.

...

Q. Generally, so this issue has been investigated by Congress, DOJ, the New York Attorney General, the New York Assembly, your department, all sorts of people. Outside of this issue, were you ever instructed by anyone in the Governor's office or anyone else in the New York State government to provide false testimony?

A. No.

Q. Just this one time?

A. This statement.

Ms. DeRosa testified that she “did not recall this occurring” and even if it did occur, there was “no malintent.”<sup>32</sup> Further, Ms. DeRosa testified that it was her understanding, from Dr. Zucker, that the NYSDOH drafted the March 25 Directive.<sup>33</sup> Ms. DeRosa’s understanding of the origin of the March 25 Directive and Executive Chamber involvement and Dr. Zucker’s somewhat conflict.

**Ms. Melissa DeRosa (June 21, 2024)**

Q. I think I can guess the answer to this question, but I'll ask it anyway. The impeachment report said that the statement that the March 25th directive was authored by DOH and the Executive Chamber was not involved was not true. Asking you to speculate a little bit, but do you think the involvement that they're referencing is the counsel review or during your –

A. So here's what I will say about this. The impeachment report has -- they looked at many things, and the section on sexual harassment, for example, has since been completely discredited. I put zero credibility in this report whatsoever because, by definition, it's incomplete, right? They spoke to, like, a handful of people who said they would speak to them probably because they were still working for the state and didn't have a choice or felt there was some interest in protecting themselves, whatever it was. But this is an incomplete document. The whiteboard, there was a whiteboard. I was in and out of the room. People -- multiple people, including lawyers, were putting notes up on the whiteboard as a reminder, or there's this fact, you said this wrong, make sure this is correct. If this

<sup>32</sup> DeRosa TI, at 121 and 123. See Hutton TI.

<sup>33</sup> *Id.*

was put up on the whiteboard, and it could have been, could it have been me? Maybe. I don't remember it. As I sat there in August, as I sat there in April, when I said, where did this come from? As I sit here today, it is my understanding that the Department of Health drafted the order -- guidance, excuse me, now I'm using your language -- drafted the guidance and were charged with implementation and oversight of it. So I don't think that that's an incorrect statement either way. If someone wants to say, oh, because it went through counsel's office review, that somehow means that, then that's their interpretation. And so he said or disagreed with it or didn't say or disagreed with it, but there was no malintent.

### ***Applicability of March 25 Directive with Federal Guidance***

Mr. Cuomo and members of his Executive Chamber repeatedly argued that the March 25 Directive followed federal guidance, from both the U.S. Centers for Medicare and Medicaid Services (CMS) and U.S. Centers for Disease Control and Prevention (CDC), regarding protecting residents in nursing homes and other long-term care facilities.<sup>34</sup> Mr. Cuomo argued that it was “written from CMS and CDC.”<sup>35</sup> This testimony is contradicted by federal health officials – including former CMS Administrator Seema Verma and former White House Coronavirus Response Coordinator Dr. Deborah Birx.

#### **Mr. Andrew Cuomo (June 11, 2024)**

Q. I'm talking about this directive right now and the wording of the directive.

...

A. It was written from CMS and CDC. And it refers to – it is referring to the guidance they received two days before, which says, “When should a nursing home accept a resident who is diagnosed with COVID-19 from a hospital? A nursing home can accept a resident diagnosed with COVID-19 and still under transmission-based protocol.” So still infections, as long as the facility can follow CDC guidance for transmission-based precautions. If they can't, they can't take the person.

Similarly, Dr. Zucker testified that the March 25 Directive was consistent with CMS and CDC guidance.<sup>36</sup>

#### **Dr. Howard Zucker (December 18, 2023)**

<sup>34</sup> Cuomo TI.

<sup>35</sup> Cuomo TI, at 129.

<sup>36</sup> Zucker TI, at 90-91.

A. ...But the fact is we followed the CDC guidance that was out at the time, and CMS guidance, and the guidance, the CDC guidance about transmissible disease at that point, said that those individuals were not infectious, based on the criteria...

**Finding:** The March 25 Directive was not consistent with applicable federal guidance regarding hospital to nursing home transfers and COVID-19 related infection control.

None of the witnesses interviewed by the Select Subcommittee consulted—nor knew of anyone within the Cuomo Administration that consulted—CMS or CDC prior to the issuance of the March 25 Directive.

In response to the Cuomo Administration’s insistence that the March 25 followed federal guidance, former-CMS Administrator Seema Verma disagreed, saying, “[u]nder no circumstances should a hospital discharge a patient to a nursing home that is not prepared to take care of those patient’s needs.”<sup>37</sup>

Indeed, CMS guidance entitled, “For Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes” (hereinafter “CMS Guidance”) did not mandate COVID-19 positive patients back to nursing homes but, instead, stated that a COVID-19 case at a hospital does not preclude the nursing home from accepting a COVID-19 negative patient.<sup>38</sup> This is contrary to the March 25 Directive.

During a transcribed interview on October 13, 2021, Dr. Deborah Birx, former White House Coronavirus Response Coordinator, when asked about the March 25 Directive testified that it “violated” CMS guidance.<sup>39</sup>

**Dr. Deborah Birx (October 13, 2021)**

Q. On the bottom of page 4 of this CMS guidance it gives guidance on how to return a resident diagnosed with COVID-19 back to their nursing home; and it says it should be done if a facility can follow CDC guidance for transmission-based precautions. First, what would those transmission-based precautions have been?

A. So that would require isolation and gowning, masking, and ensuring no contact with any other residents.

<sup>37</sup> Charles Creitz, *Medicare chief Verma blasts Cuomo for trying to deflect blame onto White House for NY nursing home deaths*, FOX NEWS (May 28, 2020).

<sup>38</sup> Memorandum from David R. Wright, Director, Quality, Safety & Oversight Group, U.S. Centers for Medicare & Medicaid Services, to State Survey Agency Directors (Mar. 13, 2020) (on file with Comm. Staff).

<sup>39</sup> Transcribed Interview of Dr. Deborah Birx, by H. Select Subcomm. on the Coronavirus Crisis Staff, at 119-121 (Oct. 13, 2021) [hereinafter Birx TI].

- Q. [CMS] Administrator [Seema] Verma said about this guidance, ‘under no circumstances should a hospital discharge a patient to a nursing home that is not prepared to take care of those patient’s needs.’
- A. Correct.
- Q. If we turn now to the New York Guidance...Does that have the same qualifier of able to take CDC precautions as the CMS guidance required?
- A. No.
- Q. So, would [the March 25 Directive] have violated CMS guidance?
- A. Yes.

Dr. Birx further testified to the negative effects of readmitting potentially positive COVID-19 nursing home residents.<sup>40</sup>

**Dr. Deborah Birx (October 13, 2021)**

- Q. Do you think admitting potentially positive COVID-19 nursing home residents back into the nursing home without the ability to quarantine or isolate them is dangerous and could lead to unnecessary deaths?
- A. Yeah, I think that’s why the CDC guidance was very clear about precautions needed to protect them. And I think that’s why [CMS Administrator] Seema [Verma] was proactively working on this infection control guidance.

CMS Guidance was understood as non-binding and used language such as “can” and “should.”<sup>41</sup>

**When should a nursing home accept a resident who was diagnosed with COVID-19 from a hospital?**

A nursing home can accept a resident diagnosed with COVID-19 and still under Transmission-Based Precautions for COVID-19 as long as the facility can follow CDC guidance for Transmission-Based Precautions. If a nursing home cannot, it must wait until these precautions are discontinued. CDC has released [Interim Guidance for Discontinuing Transmission-Based Precautions or In-Home Isolation for Persons with Laboratory-confirmed COVID-19](#).

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<sup>40</sup> Birx TI, at 123.

<sup>41</sup> *supra* n. 36.

**Note:** Nursing homes should admit any individuals that they would normally admit to their facility, including individuals from hospitals where a case of COVID-19 was/is present. Also, if possible, dedicate a unit/wing exclusively for any residents coming or returning from the hospital. This can serve as a step-down unit where they remain for 14 days with no symptoms (instead of integrating as usual on short-term rehab floor, or returning to long-stay original room).

Conversely, the March 25 Directive referred to itself as a “directive” and used prescriptive language such as “must” and “shall” and “prohibit.”<sup>42</sup> In fact, it underlined the operative language.<sup>43</sup>

No resident shall be denied re-admission or admission to the NH solely based on a confirmed or suspected diagnosis of COVID-19. NHs are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.

In a transcribed interview with Select Subcommittee staff, Mr. Hutton testified that it was an established “norm” to include prescriptive language, as the Executive Chamber did not like to be “perceived as being too soft or suggestive as opposed to directive.”<sup>44</sup>

**Mr. Brad Hutton (August 27, 2024)**

Q. ...When you look at the last two paragraphs that we reviewed that uses permissive language such as “should” or “can,” whereas the March 25<sup>th</sup> Order uses restrictive language such as “shall” or “must,” is that – was the language that was used in the March 25<sup>th</sup> order ever discussed during your review?

A. I don’t recall.

Q. Did you have any concerns with the language that was used in the order?

A. I didn’t, but I guess I would qualify it by saying that it had been established as the norm, that this Executive Chamber preferred the orders be much more directive in their language and that we would commonly receive things sent back if they were perceived as being too soft or suggestive as opposed to directive.

Q. And you said that was an executive order – or Executive Chamber suggestion?

A. I would say a norm, yeah, a norm that this Executive Chamber did not react favorably to soft or what they perceived as weak or

<sup>42</sup> *supra* n. 4; See also ‘Like Fire Through Dry Grass: Nursing Home Mortality and COVID-19 Policies,’ Hearing Before the Select Subcomm. on the Coronavirus Pandemic, 118<sup>th</sup> Cong. (May 17, 2023) (Written Testimony of Bill Hammond, Senior Fellow for Health Policy, Empire Center for Public Policy).

<sup>43</sup> *Id.*

<sup>44</sup> Hutton TI, at 60.



suggestive language but instead, whether it was local health departments or nursing homes or any other entity, that we be much more directive in our language when we issue guidance.

### ***Prohibition on Testing Prior to Admission or Re-Admission***

The March 25 Directive restricted nursing homes from testing prior to admission. According to Dr. Zucker, the prohibition was partly included to address the limited supply of tests at the beginning of the pandemic.<sup>45</sup>

#### **Dr. Howard Zucker (December 18, 2023)**

- Q. ....Prohibition on testing seems contrary to most public health guidance. I would just like your interpretation of that sentence.
- A. So my interpretation is that it goes back to timing, that at that point in time if there were not enough tests to go around, in general, then requiring all of these people leaving the hospital to be tested, then we may not have enough tests...

The March 25 Directive’s prohibition, coupled with concerns of limited testing supplies, raise issues with how the Cuomo Administration allocated tests at the beginning of the pandemic. Namely, as it relates to a preferential testing policy that was reported to have provided tests to family and other individuals close to the Cuomo Administration.<sup>46</sup> Indeed, Mr. Cuomo seemingly acknowledged the existence of a “preferential COVID-19 testing” policy in a letter to the New York State Assembly Judiciary Committee in October 2021.<sup>47</sup>

However, in his transcribed interview with the Select Subcommittee, Mr. Cuomo denied the existence of any such policy.<sup>48</sup>

#### **Mr. Andrew Cuomo (June 11, 2024)**

- Q. ....[T]he allegation that people close to you personally were given preferential access to tests when they were in limited supply. In the spring of 2020, how did New York determine how to allocate the limited supply of COVID-19 tests?
- A. There was – to the best of my information, there was no priority testing, preferential testing program. What happened was two people who worked for me, my press secretary and another press

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<sup>45</sup> Zucker TI, at 118.

<sup>46</sup> See Josh Dawsey, *et. al.*, *Andrew Cuomo’s family members were given special access to covid testing, according to people familiar with the arrangement*, WASH. POST (Mar. 24, 2021).

<sup>47</sup> Letter from Andrew Cuomo, former Governor of New York, to Charles Levine, Chairman, Judiciary Comm., N.Y. State Assembly, (Oct. 8, 2021).

<sup>48</sup> Cuomo TI, at 105-106.

aide got COVID. And I had been working with them for days, and it was just by good fortune that I didn't get COVID. That was an alarm bell for the health department, and they set up a protocol, anyone who is going to be in contact with the governor has to be tested and you have to have quarantine. If I was going to visit a family member, they had to be tested. Coincidentally, I went to the White House at the same time. They had a really elaborate testing mechanism for obvious reasons. You don't want the president to get sick, which he wound up getting sick. They didn't want me to get sick at that time, because I was important to the state.

Mr. Cuomo testified that he did not direct anyone within his Administration to conduct tests for individuals close to him.<sup>49</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. ...Did you direct government employees to administer COVID-19 tests to people with whom you had purely personal relationships?

A. No. I didn't – I didn't – didn't ask them to do anything. They saw my schedule. They knew who was coming in and out. They handled it.

Q. Did anyone on your staff direct that there should be such a priority testing program?

A. No, it was not a priority testing program. It was all ad hoc.

Dr. Eleanor Adams—who was reportedly ordered to conduct tests for family members of the former Governor<sup>50</sup>—testified that she tested individuals as directed.<sup>51</sup>

**Dr. Eleanor Adams (April 8, 2024)**

Q. Like, the rationale that we have heard before and agree with, and it applies across governments, is that the governor is an important person. You don't want the governor to get sick. The people who are meeting with him should be tested to ensure that the governor doesn't get sick, but were you ever instructed to provide a test to anyone who did not meet that criteria?

A. I tested as I was directed to do and we always think about the population level...

<sup>49</sup> Cuomo TI, at 107.

<sup>50</sup> *supra*, n. 43.

<sup>51</sup> Transcribed Interview of Dr. Eleanor Adams, by H. Select Subcomm. on the Coronavirus Pandemic Staff, at 135 (Apr. 8, 2024) [hereinafter Adams TI].

Dr. Adams testified that she had to travel to administer tests.<sup>52</sup>

**Dr. Eleanor Adams (April 8, 2024)**

Q. ...And did you personally travel to administer tests?

A. I think every tester traveled to administer a test.

Further, Dr. Adams testified that there were individuals that she had reservations about testing and subsequently refused to test.<sup>53</sup>

**Dr. Eleanor Adams (April 8, 2024)**

Q. Did you ever have any moral reservations about administering a test to a patient to whom you had administered a test?

A. If I had moral reservations, I did or would have pushed back. That's who I am and how I am and there were other testing methods. And as I said, there were people who went and used other testing methods...

...

Q. To anyone that you administered a test, or directed to administer a test, suggested to administer a test or advised to administer a test, did you have any moral reservations in actions you took pursuant to those requests, directives, procedures, protocols, et cetera?

A. I will say that I do – well, I recall not testing some individuals and having them directed to other testing. I cannot recall why I did that, but that's what I'm remembering right now, was that there were some that I did not test and asked for other arrangements to be made.

The existence of a policy to provide priority tests to family of Mr. Cuomo, sometimes unnecessarily, raises questions how the Administration allocated the limited supply of tests at the beginning of the pandemic.

***Termination of the March 25 Directive***

**Finding:** The Cuomo Administration superseded the March 25 Directive in response to public pressure, not a change in applicable science.

<sup>52</sup> Adams TI, at 142.

<sup>53</sup> Adams TI, at 146-147.

Despite testifying in his transcribed interview that he was not involved with the issuance, Dr. Zucker stood by the March 25 Directive.<sup>54</sup>

**Dr. Howard Zucker (Dec. 18, 2023)**

Q. ...On February 19, 2021, you defended the state's decision to issue the March 25<sup>th</sup> directive, stating, "We would make the same decision again." For the record, do you stand by that, still?

A. I do.

Mr. Cuomo testified that he did not initially understand the March 25 Directive prior to being briefed by Dr. Zucker.<sup>55</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. Going back to when you were first made aware and debriefed and Dr. Zucker you said answered questions. What questions did you ask? Did you have –

A. Well, all the questions you're asking.

Q. So you did have concerns about the directive?

A. I didn't understand it.

However, he testified that he had no concerns with it once Dr. Zucker explained it to him.<sup>56</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. Were you concerned about the language of the [March 25] directive when it was first brought to your attention?

A. When [Dr. Zucker] explained it to me, no. Because he explained it to me in the context of the CMS/CDC...

The March 25 Directive remained in effect until it was superseded by an Executive Order on May 10, 2020.<sup>57</sup> In a transcribed interview with Select Subcommittee staff, Ms. DeRosa testified that the Cuomo Administration did not have any discussions related to rescinding the March 25 Directive until the days leading up to the Executive Order on May 10.<sup>58</sup>

<sup>54</sup> Zucker TI, at 169-170.

<sup>55</sup> Cuomo TI, at 152.

<sup>56</sup> Cuomo TI, at 153.

<sup>57</sup> N.Y. Exec. Order No. 202.30 (May 10, 2020).

<sup>58</sup> DeRosa TI, at 115-116.

**Ms. Melissa DeRosa (June 21, 2024)**

- Q. When did you have discussion related to rescinding the order?
- A. You're using the word rescinding. I would use the word superseding.
- ...
- Q. When did those discussions begin?
- A. I believe we did the superseding order on May 10<sup>th</sup>. So in the days leading up to May 10<sup>th</sup>.

According to emails produced to the Select Subcommittee, NYSDOH was instructed to remove the March 25 Directive from its website on April 29, 2020, despite the Directive still being operable.<sup>59</sup>

**From:** Navarette, Kristen (HEALTH) <[REDACTED]>  
**Sent:** Tuesday, May 12, 2020 12:56 PM  
**To:** Montag, Jill E (HEALTH) <[REDACTED]>; Bass, Michael G (HEALTH) <[REDACTED]>  
**Cc:** Holmes, Gary C (HEALTH) <[REDACTED]>  
**Subject:** RE: MARCH 25 GUIDANCE - PRIVILEGED AND CONFIDENTIAL

Yes, on April 29<sup>th</sup> it was instructed that this needed to be pulled down, along with the Health Care Provider Return to Work Guidance.

In a subsequent email, another NYSDOH official said they were instructed by the Executive Chamber to remove it because it was “inconsistent.”<sup>60</sup>

**Date:** Wednesday, May 27 2020 04:32 PM  
**Subject:** RE: KRISTEN? RE: MARCH 25 GUIDANCE - PRIVILEGED AND CONFIDENTIAL  
**From:** Mazeau, Adrienne V (HEALTH)  
**To:** Navarette, Kristen (HEALTH) <[REDACTED]>; Montag, Jill E (HEALTH) <[REDACTED]>  
**CC:** Bass, Michael G (HEALTH) <[REDACTED]>; Holmes, Gary C (HEALTH) <[REDACTED]>

Yes because it was inconsistent and we were directed by Chamber to pull it . I can try to find emails on this.

Mr. Cuomo testified that the March 25 Directive was terminated because of “public relations.”<sup>61</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

<sup>59</sup> E-Mail from Kristen Navarette, N.Y. State Dep’t of Health, to Jill Montag, N.Y. State Dep’t of Health, *et. al.* (May 12, 2020).

<sup>60</sup> E-Mail from Adrienne Mazeau, N.Y. State Dep’t of Health, to Kristen Navarette, N.Y. State Dep’t of Health, *et. al.* (May 27, 2020).

<sup>61</sup> Cuomo TI, at 158

Q. But yet you rescinded the order on May 10. Talking about the decision-making process—

A. Because the public relations after April 20 had made the public so nervous and so concerned, anyone who had family in a nursing home was agitated and frightened.

Q. Did you discuss those public relations in these articles with your team?

A. I spoke to Dr. Zucker about it.

Q. Who else?

A. Basically Dr. Zucker. And I said, “Look, it may be false, but we have a lot of concerned people out there now.” And it was coincident with we have ramped up our testing capacity. So we could now actually test nursing home staff, which was what he believed and I believed it was really all about.

Similarly, Dr. Zucker testified that the Administration reversed the policy in response to criticism surrounding the March 25 Directive and maintained that it was not changed because of issues with the Directive, itself.<sup>62</sup>

**Dr. Howard Zucker (December 18, 2023)**

Q. ...[I]f the March 25<sup>th</sup> guidance wasn't wrong, then why change it?

A. It was not changed because of this guidance. It was changed more because there was such criticism about something which we felt there shouldn't be criticism on, as I was just saying. But it's not going to hurt anyone, and we're not sort of, you know, jeopardizing someone else's care by running a test on this person.

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<sup>62</sup> Zucker TI, at 159.

### III. THE JULY 6 NYSDOH REPORT

On July 6, 2020, the NYSDOH released a report entitled, “Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis” (hereinafter “July 6 Report”). The July 6 Report alleged that it was the nursing home staff—not the March 25 Directive—that was the source of transmission that resulted in deaths of nursing home residents.<sup>63</sup> However, this report was heavily edited by the Executive Chamber to show more causality and was not a scientific nor peer-reviewed publication.

#### *The Governor and Executive Chamber’s Involvement in the July 6 Report*

**Finding:** Cuomo Administration officials believed Mr. Cuomo directed the issuance of a report to combat criticism of the March 25 Directive.

On June 7, 2020, Ms. Stephanie Benton emailed Dr. Jim Malatras, Mr. Gareth Rhodes, Dr. Zucker, and Ms. DeRosa that the criticism surrounding the March 25 Directive would be “the great debacle in the history books.”<sup>64</sup> The email directed them to “[g]et a report on the facts because this legacy will overwhelm any positive accomplishment.”<sup>65</sup>

**From:** Stephanie Benton <[REDACTED]>  
**Sent:** Sunday, June 07, 2020 9:51 AM  
**To:** Jim Malatras <[REDACTED]>; Gareth Rhodes (dfs.ny.gov) <[REDACTED]>; Howard A Zucker (health.ny.gov) <[REDACTED]>  
**Cc:** Melissa DeRosa <[REDACTED]>  
**Subject:**

This is going to be the great debacle in the history books. The longer it lasts the harder to correct. We have a better argument than we made. Get a report on the facts because this legacy will overwhelm any positive accomplishment. Also how many covid people were returned to nursing homes in that period? How many nursing homes? Don't u see how bad this is? Or do we admit error and give up?

The recipients of this email understood—or suspected—that this was a message from Mr. Cuomo himself.<sup>66</sup> In a transcribed interview with Select Subcommittee staff, Dr. Malatras, a former adviser to Mr. Cuomo, testified that the demand to “[g]et a report on the facts” was referring to the July 6 Report.<sup>67</sup>

#### **Dr. Jim Malatras (May 20, 2024)**

<sup>63</sup> New York State Department of Health, *Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis*, (July 6, 2020).

<sup>64</sup> E-Mail from Stephanie Benton, Executive Assistant to the Governor, to Dr. Jim Malatras, Advisor to the Governor, *et. al.* (June 7, 2020) (emphasis added).

<sup>65</sup> *Id.*

<sup>66</sup> Zucker TI, at 160-161; Transcribed Interview of Gareth Rhodes, by Select Subcomm. on the Coronavirus Pandemic Staff, at 104-105 (May 3, 2024) [hereinafter Rhodes TI]; Transcribed Interview of Dr. Jim Malatras, by Select Subcomm. on the Coronavirus Pandemic Staff, at 130 (May 20, 2024) [hereinafter Malatras TI]; DeRosa TI, at 198-199.

<sup>67</sup> Malatras TI, at 130.

Q. Then, [Benton] writes: “Get a report on the facts.” Do you think she’s referring to the July 6 report?

A. Yes.

Dr. Malatras testified that this email prompted the July 6 Report to be drafted.<sup>68</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. ...[W]hat prompted this report to be written?

A. I believe that came from that June 7<sup>th</sup> e-mail from Ms. Benton, which was really a passing through a message from Governor Cuomo in response – I think it was a newspaper article at the time.

Ms. DeRosa testified that Mr. Cuomo was referring to the July 6 Report but would not provide a clear answer of whether he ordered it to be drafted.<sup>69</sup>

**Ms. Melissa DeRosa (June 21, 2024)**

Q. ...Do you think this email is referring to the July 6<sup>th</sup> report?

A. Yes.

Q. Did the governor direct the report to be drafted?

A. So the governor and Dr. Zucker had a conversation in front of me, I believe we were in the helicopter, actually, in May of 2020, where Dr. Zucker was lamenting after a press conference because more questions on nursing homes – the March 25<sup>th</sup> admissions policy kept coming up. And Dr. Zucker kept saying, if they only looked at the facts they would see it’s the staff, it’s the staff, it’s the staff. And the governor said to him, well, if that’s the case, then look at it. Do a report on it. Put the numbers out. You know, like do an actual report and explain this, because otherwise it’s going to be tainted by the politics and the press and we’re not explaining this properly. The entire time he’s like we’re not clearly explaining this. And so this email, I read as he’s needling us because it’s like, guys, how many times have we said we’re not properly explaining this? It continues to get misconstrued, misrepresented in the press. You know? Go explain this properly. And I believe at this point, the report was already underway. I think the Health Department and McKinsey, Linda, started pulling together the data in May at some point, middle

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<sup>68</sup> Malatras TI, at 198.

<sup>69</sup> DeRosa TI, at 200-201.



to end of May. And where he says here, how many people returned from nursing homes in that period? That's him saying, because Dr. Zucker kept assuring him over and over it's staff. Okay, so what's the answer? How many people? When were they? Which nursing homes? Which were the deaths in those nursing homes? How do you analyze if it was the staff. So this was him needling us a little.

According to Dr. Zucker, the NYSDOH had already started its own analysis of the March 25 Directive, intending to release its findings in a medical journal, but the desire to publish quickly superseded a thorough and scientific peer-review process.<sup>70</sup>

**Dr. Howard Zucker (December 18, 2023)**

Q. ... Did this email start that report?

A. No. Actually what started the report had nothing to do with this. It started as a result of me curious about – it was not the report. I was curious as to what was happening in the nursing homes and what we could do to prevent further problems, not just for New York but for the rest of the country. So I asked one of my senior staff, who I trusted, I said, “Let’s put together an article for one of the leading medical journals. We’ll look at this. We will analyze it,” in the same way you analyze other medical problems that surface in hospitals. So her team sort of started to work on this. This was in the beginning of June, around this time, maybe a little before this, probably a little bit before this. And then the newspaper articles started to keep getting published about the nursing home issues, these issues, and the decision was to put a report together about this. And that came from Melissa [DeRosa] to – that was the charge, from Melissa to Jim Malatras, who was involved, and our team obviously had the information, and the ask was to pull all this data together. So we had what we were working on as a paper, and we had a lot of graphs and tables, and I believe the ask also came from Linda Lacewell, to bring all this stuff together. And, you know, Eleanor from my team pulled all of these documents together and provided them to the Governor’s team to look at this. I recognized, and I said to our team, that there will not be a medical paper ever from us because once this information is public knowledge no journal is going to publish it. But I said whatever, you know, and I felt a little badly because the team was working on it, but it’s okay. It’s the way it is. And so then the team, our team, provided these graphs and tables, and a paper was put together to address a lot of these issues, particularly this March 25<sup>th</sup> issue, and it goes back to the question that was asked before about the timing of the deaths versus the peak in nursing

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<sup>70</sup> Zucker TI, at 163-164

home admissions. And I said at some point I'll present this, so that was July 6<sup>th</sup>, although the ask was to get it presented a little earlier, but I didn't feel we were ready. There were many conversations back and forth about this, and our team, who was involved from the public health side of this, you know, when they saw drafts of what was put together and felt there were errors, there were conversations with me, and then I pulled in the Chamber team that was working on this to say that we need to correct these things...

Dr. Zucker testified that Ms. DeRosa asked for a "medical journal" publication to be released, but the decision was made to make it a report given the pressure to release it quickly.<sup>71</sup>

**Dr. Howard Zucker (December 18, 2023)**

Q. ...Do you recall meeting regarding this email?

A. I don't recall meeting about this email, but I had so many meetings to discuss this issue of the presentation in July. It was like, where are we? And there were discussion[s] about where are we with this paper. And at one point, you know, Melissa had asked and said, "Well, get a medical journal out," or something. But as I've explained to others, you can't get a medical journal to just publish a paper in a week, unless it's something which literally is going to affect people's lives and everyone sees. No, but this is not of that nature. So even if I got on the phone with the editor of the Journal, they would say, "Fine. We'll send it through the peer review process." So ultimately it needed to be done in a different format, which was a paper report and then my presentation.

In a transcribed interview, Dr. Adams testified that she viewed the NYSDOH's work on a scientific article as separate from what would eventually become the July 6 Report.<sup>72</sup> Dr. Adams testified that she provided "talking points" to the Executive Chamber that would be used to draft the July 6 Report.<sup>73</sup> According to emails produced by the NYSDOH, Dr. Adams sent Dr. Zucker these "talking points" within hours of the debacle email.<sup>74</sup>

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<sup>71</sup> Zucker TI, at 167-168.

<sup>72</sup> Adams TI, at 118-119.

<sup>73</sup> Adams TI, at 80.

<sup>74</sup> E-Mail from Dr. Eleanor Adams, Special Advisor to the Commissioner, N.Y. State Dep't of Health, to Dr. Howard Zucker, Commissioner, N.Y. State Dep't of Health, (June 7, 2020).

**From:** "Adams, Eleanor H (HEALTH)" <[REDACTED]>  
**Date:** June 7, 2020 at 11:34:18 AM EDT  
**To:** "Zucker, Howard A (HEALTH)" <[REDACTED]>  
**Cc:** "Bass, Michael G (HEALTH)" <[REDACTED]>  
**Subject:** Privileged and Confidential

PRIVILEGED AND CONFIDENTIAL  
DRAFT

Dr. Zucker,

Per your request, here is the nursing home data talking points. I attached the draft McKinsey analysis that you saw last week. Please call me so I can walk you through.

Main talking points:

- (Simplified) Our data from early March – early May shows that the majority (55%) of NH residents with COVID-19 who died were exposed to prior to March 25th. Thus, the March 25<sup>th</sup> guidance likely did not drive nursing homes deaths.
- (Simplified) Admissions/readmission of residents with COVID-19 were increasing when the number of nursing home deaths were already decreasing. If the March 25<sup>th</sup> policy had been the driver, the death peak should have been after the peak in admissions, not before.
- (Detailed) The difference in directionality (increasing number of admissions to nursing homes of residents with COVID-19 at a time when the number of deaths in nursing home residents was decreasing), coupled with the known delay between onset of symptoms and death, shows that readmissions/admissions of residents with COVID-19 to nursing homes was not likely a driver of the number of deaths in nursing homes.
- (Detailed) The death curve for nursing home residents is the same shape as the overall New York death curve for all residents, and is not the curve one would expect if admissions/readmissions were causing the deaths (which would show a peak AFTER the majority of admissions/readmissions, not BEFORE).

Details:

- The death curve for nursing home residents is the same shape as the overall New York death curve for all residents, and is not the curve one would expect if admissions/readmissions were causing the deaths (which would show a peak AFTER the majority of admissions/readmissions [April 14-21], not before).

Dr. Adams also attached charts similar, but seemingly less favorable, to those that would eventually be used in the July 6 Report.<sup>75</sup>

**Finding:** The July 6 Report was not independently drafted by the NYSDOH and not peer reviewed.

Dr. Adams testified that the July 6 Report was not authored by her nor the NYSDOH, and that it was not in fact a “peer reviewed” publication as claimed by the former Governor and his staff.<sup>76</sup>

**Dr. Eleanor Adams (April 8, 2024)**

Q. Would you consider yourself an author of this report?

A. No.

Q. Would you consider the department of health an author of this report?

<sup>75</sup> *Id.* (on file with Comm. Staff).

<sup>76</sup> Adams TI, at 128-131.

A. I would not. It was the dataset that we worked on and I consistently voiced that I didn't think this should be a DOH report. I provided edits as directed and asked, but they were not all accepted. And I told Dr. Zucker that I did not think this should be labeled as a department of health report as presented.

...

Q. ...[T]he governor deemed this a peer reviewed paper at one point. Would you consider this a peer reviewed paper?

A. For the science point of view for the peer review process, the reviewers are picked by the journal, so they are independently picked, and that process was not gone through here. So it wouldn't meet the usual criteria for a peer-reviewed paper.

Q. Have you sat on peer review committees before?

A. I have.

Q. Would you approve this paper?

A. So as a journal article, this doesn't meet the criteria for an academic journal article. You know, this was issued as a report, and as I said before, I am not familiar with general report structures in different worlds. I just have not personally worked on them. So I was approaching this and continued to push for the method I was familiar with, which was a transparent process, where methods are explain, where all the analysis methods are explained, what kind of tests are run, full limitation sections, and I think for every draft of this that we saw, the group I was working with at the DOH made edits to that effect, um, and not all were accepted in the final project.

Like Dr. Adams, Dr. Malatras testified that the July 6 Report was not peer-reviewed.<sup>77</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. ...[We] will get into more particulars of the Department of Health study; but in the middle of it, he said the DOH study, which was peer reviewed by experts at Northwell Health and Mount Sinai. You've had a long career in academia. Does peer review have an established definition?

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<sup>77</sup> Malatras TI, at 196.

A. ...I have said this before: This was – I believe – came from the governor saying it should be peer reviewed. It was reviewed, but this wasn't an academic study. Peer review has a very specific connotation. Peer reviews has comments. The author has to go back and redo comments based in an academic setting. This was a review. It was not a peer review.

According to witness testimony, numerous Executive Chamber officials were involved with the July 6 Report, including Ms. DeRosa, Ms. Lacewell, Dr. Malatras, Ms. Garvey, Ms. Baldwin, and Mr. Robert Mujica—the former New York State Budget Director.<sup>78</sup> In response to questions related to the Executive Chamber's involvement with the July 6 Report, Ms. Lacewell testified to the Select Subcommittee staff that the report would not have existed without her.<sup>79</sup>

**Linda Lacewell (May 31, 2024)**

Q. It reads, “The aides who were involved in change the report included Melissa DeRosa, the governor’s top aide, Linda Lacewell, the head of the state’s Department of Financial Services, and Jim Malatras, a former top advisor to Mr. Cuomo brought back to work on the pandemic. None had public health expertise.” You mentioned all of you being involved in the report, so I believe you would agree with the listing of your three names as being involved in the report?

A. That’s not what the paragraph says. It says the aides were involved in changing the report, right? That’s what it actually says.

Q. And --

A. I was involved in helping draft the report.

Q. Okay.

A. Right? The whole premise of the article is mistaken. It was not a DOH report that landed in the executive chamber and was then changed.

Q. If you were responsible for the report, why was it issued as a DOH report?

A. I didn’t say I was responsible for a report.

Q. Okay. What word would you use?

<sup>78</sup> Dr. Zucker TI; Dr. Malatras TI; Garvey TI; Lacewell TI; DeRosa TI.

<sup>79</sup> Lacewell TI, at 63-64 (emphasis added); See J. David Goodman & Danny Hakim, *Cuomo Aides Rewrote Nursing Home Report to Hide Higher Death Toll*, N.Y. TIMES (Mar. 4, 2021).

A. That's really your question. I described what I did with respect to the report.

Q. You mentioned –

A. But I'm not McKinsey doing the data and I'm not DOH weighing in and I'm not Dr. Zucker weighing in and I'm not a statistician.

Q. But you said the report wouldn't have happened but for you?

A. Correct, and it wouldn't have happened but for McKinsey, but my point there was, I'm executive chamber. I'm executive chamber.  
*The DOH report wouldn't exist without me...*

Dr. Malatras testified that Ms. DeRosa was “very active” with the July 6 Report and directed what points she wanted the report to make.<sup>80</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. Was that the extent of [Melissa DeRosa's] involvement in the report?

A. No, she was very active, sending information; things like that. She actually at one point sent an e-mail. This was prior to that meeting, but indicative of the process. She laid out the points that she wanted to have touched upon in the report.

In addition, witnesses have testified that individuals and organizations outside the government played a role in the report.<sup>81</sup> According to Dr. Malatras, Mr. Kenneth Raske, the President of the GNYHA and Mr. Michael Dowling, the Chief Executive Officer of Northwell Health, were involved in the July 6 Report.<sup>82</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. While the July 6<sup>th</sup> report was being drafted, do you recall Raske having any input or involvement?

A. Yes, I was on – Ms. DeRosa was the one communicating with Mr. Raske on that report, and I believe she forwarded me. I mean, this is my recollection from four years ago. She forwarded me some comments. I do not remember the sum or substance of what those comments were.

<sup>80</sup> Malatras TI, at 161.

<sup>81</sup> Malatras TI, at 29, 162-163, 197; DeRosa TI, at 235.

<sup>82</sup> Malatras TI, at 29 & 197.

**Dr. Jim Malatras (May 20, 2024)**

Q. --Northwell Health. Are you aware of them making any edits to the report, or just reviewing stuff and providing comments?

A. They did. I remember there were e-mails that came back, where they did make recommendations for changes, of which I do believe some of them make it. Let me give you an example. I don't remember everything. Mr. Dowling from Northwell had not substantive to the facts or data, but he thought the executive summary should be clearer and rewritten, and I believe some of that was incorporated...

In response to an article by The New York Times reporting the Executive Chamber's involvement in the July 6 Report,<sup>83</sup> Dr. Malatras issued a statement saying that he was not involved in altering the nursing home numbers.<sup>84</sup> Thereafter, Dr. Malatras testified that he received a call from Executive Chamber Officials, including Ms. DeRosa, Ms. Lacewell, Ms. Garvey, and others, asking him to "put out a statement suggesting otherwise" because they believed the New York Times reporting and his statement to be misleading.<sup>85</sup> Dr. Malatras refused.<sup>86</sup>

**Finding:** Governor Cuomo reviewed and edited the July 6 Report, and his edits were to make the Report's findings more causal.

Mr. Cuomo testified that he did not have any involvement with the drafting of the July 6 Report. He further stated that he did not recall reviewing or editing the July 6 Report.<sup>87</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. Were you involved in the drafting of this report in any capacity?

A. No.

**Mr. Andrew Cuomo (June 11, 2024)**

Q. In the minority hour, did you testify that you had no role in the July 6 Report?

A. I do not recall seeing the July 6 report prior its issuance. It was Howard Zucker's report. He then presented it numerous times. I then

<sup>83</sup> Goodman, supra n. 74.

<sup>84</sup> See Bernadette Hogan & Bruce Golding, *Cuomo official Malatras appears to throw cohorts under bus in nursing home denial*, N.Y. POST (Mar. 5, 2021).

<sup>85</sup> Malatras TI, at 212-214; Lacewell TI, at 63-64.

<sup>86</sup> *Id.*

<sup>87</sup> Cuomo TI, at 173 & 285-286.

spoke to it numerous times, because it came up at every press briefing afterwards.

Q. And to clarify your testimony, you did not recall reviewing the report?

A. I do not recall reviewing.

Q. Did you edit the report?

A. I don't recall seeing it.

However, Mr. Cuomo's testimony is directly contradicted by other witnesses and the Impeachment Report. In a transcribed interview with Select Subcommittee staff, Dr. Malatras testified that then-Governor Cuomo reviewed and edited the July 6 Report.<sup>88</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. ...[The Impeachment Report] says that the governor reviewed and edited the draft [July 6 Report] on multiple occasions....is that true?

A. Yes.

Dr. Malatras testified that the Governor's edits were communicated via handwritten notes or via the Governor's assistants and testified that Mr. Cuomo edited the language of the July 6 Report to be more causal.<sup>89</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. How were the edits communicated?

A. The edits were communicated in a number of ways. Sometimes people received handwritten notes back on the printed-out piece of paper. Other times, like through messages from Ms. Benton or Ms. Walsh, who were the main, primary conduits for sending comments back. Sometimes from Ms. DeRosa herself.

Q. Do you recall what areas of the report the governor made edits to?

A. It was largely around language. It wasn't – actually, I don't recall any discussion of the numbers, but it was a – around language. And as this person in this paragraph of the impeachment report stated,

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<sup>88</sup> Malatras TI, at 207-208.

<sup>89</sup> Malatras TI, at 208-209



there was a lot more – when it came back from him, a lot more causality...

Dr. Malatras testified that the former Governor—along with Ms. DeRosa—would have had final approval on the report.<sup>90</sup>

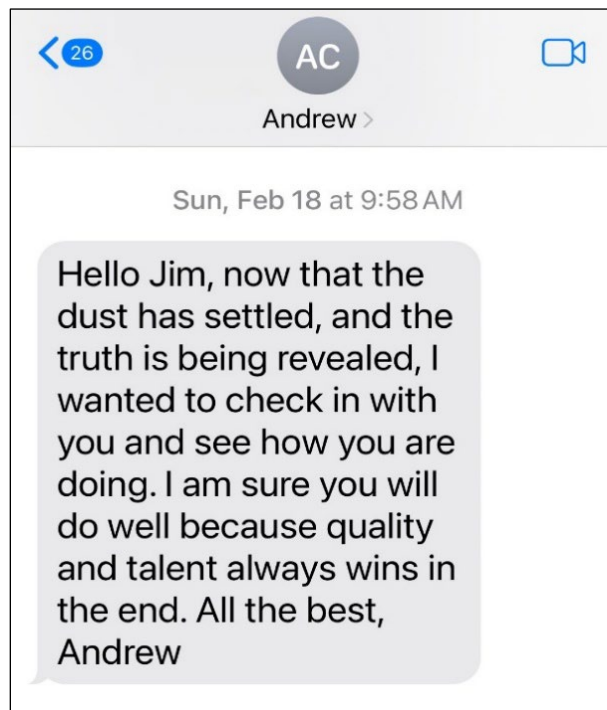
**Dr. Jim Malatras (May 20, 2024)**

Q. Who had final approval on the report before it's released?

A. For me, it was mostly DeRosa; but ultimately, it would probably be Governor Cuomo.

Dr. Malatras was the only Executive Chamber official to testify to the former Governor's involvement in the July 6 Report. Senior Executive Chamber officials involved with the July 6 Report, including Ms. DeRosa, Ms. Lacewell, and Ms. Garvey, testified to the Select Subcommittee that they had no knowledge or recollection of Mr. Cuomo being involved.<sup>91</sup>

Furthermore, less than two days after the Select Subcommittee invited Dr. Malatras to testify,<sup>92</sup> Mr. Cuomo sent him a text message to “check in.”<sup>93</sup>



<sup>90</sup> Malatras TI, at 165.

<sup>91</sup> Garvey TI, at 163; Lacewell TI, at 58; DeRosa TI, at 238.

<sup>92</sup> Letter from Brad Wenstrup, D.P.M., Chairman, Select Subcomm. on the Coronavirus Pandemic & Nicole Malliotakis, Member of Congress, to Dr. James Malatras, former Advisor to the Governor (Feb. 16, 2024).

<sup>93</sup> Text from Andrew Cuomo, former Governor of New York, to Dr. Jim Malatras, former Advisor to the Governor (Feb. 18, 2024).

Dr. Malatras testified that, prior to this text message, he had not spoken to Mr. Cuomo since 2021.<sup>94</sup> In his transcribed interview, Mr. Cuomo testified that “it’s just a nice note” and that he was not aware of the Select Subcommittee’s letter to Dr. Malatras.<sup>95</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. [The text was sent] 48 hours after Dr. Malatras received an invitation to testify before us.

A. I hadn’t spoken to Jim. I don’t think I spoke to him since this period of time period. I think this was just saying – he went through a very tough time and was forced to resign from the state university system, and I think I’m saying to him – I think that’s what this is in reference to...There was also ongoing conversations with Jim and litigation with him and I’ve known him a long time. He’s a great fellow and he was getting beaten up, and I think I was just saying to him, you know, you’re a good man.

Q. To the best of your recollection, when was the last time you contacted Dr. Malatras before this text?

A. I don’t think I’ve spoken to Jim since I left as governor.

Q. I guess it’s just a coincidence that Dr. Malatras got this text message within two days of getting an invitation to testify on nursing homes.

A. I didn’t know that Jim – I haven’t had – I haven’t had conversations with Jim. Jim never told me he was coming here to testify.

Q. Were you aware that he received a letter, though?

A. No.

Q. So this text wasn’t – you weren’t trying to influence his testimony in any way by sending this text message?

A. No.

Q. Have you attempted to influence the testimony of any witness providing information concerning your administration’s response to this Select Subcommittee?

A. No. By the way, this is just a nice note to a person.

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<sup>94</sup> Malatras TI, at 30.

<sup>95</sup> Cuomo TI, at 47-50.

...

A. I don't ask to speak with him. I don't suggest anything. It's just a nice note.

Despite Mr. Cuomo's testimony, this text message raises concerns that Mr. Cuomo may have been trying to influence Dr. Malatras' testimony and obstruct the Select Subcommittee's investigation.

### ***Removal of Out-of-Facility Death Data***

**Finding:** The Executive Chamber made the decision to remove out-of-facility death data from the July 6 Report.

In a transcribed interview with Select Subcommittee staff, Dr. Adams testified that the NYSDOH analysis included both in-facility and out-of-facility nursing home fatalities.<sup>96</sup>

#### **Dr. Eleanor Adams (April 8, 2024)**

Q. ...[W]ould that number [of out-of-facility deaths] have been in the scientific report you working on?

A. Yes. In our draft – well, I should rephrase. I'm not sure if this answers your questions but in our draft paper, we included the numbers of in and out of nursing home, deaths of nursing home residents...

According to witness testimony, the initial drafts of the report analyzed in-facility and out-of-facility nursing home deaths.<sup>97</sup> Accordingly, the initial drafts of the report cited the total nursing home deaths as approximately 10,000.<sup>98</sup>

In a transcribed interview with Select Subcommittee staff, Dr. Malatras testified that the decisions to not include out-of-facility deaths occurred on a phone call on June 27, 2020.<sup>99</sup>

#### **Dr. Jim Malatras (May 20, 2024)**

Q. Who was on that call?

A. It was – I believe it was me, Beth Garvey, Linda Lacewell, Howard Zucker, Melissa DeRosa, and there could have been some others. I don't know. . .

<sup>96</sup> Adams TI, at 98.

<sup>97</sup> Malatras TI, at 160-161; Lacewell TI, at 115; Garvey TI, at 163.

<sup>98</sup> *supra*, n. 30.

<sup>99</sup> Malatras TI, at 106-107.

Q. Why was that call called?

A. It was about the nursing home report.

Further, Dr. Malatras testified that the decision was made after Ms. DeRosa “aggressively” questioned Dr. Zucker on out-of-facility death data.<sup>100</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. You mentioned earlier a call on June 27<sup>th</sup>, I believe, with Ms. DeRosa and a variety of other people about the numbers going into the report. And you said Ms. DeRosa made some demands related to those numbers. If we could just reiterate what she said on that call?

A. The call in question was the data that we were provided from McKinsey, that she forwarded to us after that initial e-mail from Stephanie Benton, or Governor Cuomo through Stephanie Benton. It had a whole bunch of data in it, and including the curves and everything like that in the charts; that included the full in-the-facilities health care – in the hospitals and in the nursing home facilities with fatalities. That continued to be the report through all of those charts, through the June 27<sup>th</sup> call. I don’t know what precipitated the change in Ms. DeRosa – something happened. She talked to somebody. Something triggered a response, which she then called a meeting, and was very aggressive about questioning the numbers, why those numbers. Mostly aimed at Dr. Zucker, but we were – none of us were immune from the – I would say – passionate interaction. And then, thereafter, she said she does not trust the numbers. She wants it to be continually be – the numbers that were publicly reported until, you know, they could do a review on the numbers.

Dr. Malatras testified it was Ms. DeRosa’s decision to not include out-of-facility nursing home fatalities.<sup>101</sup> He testified that he believed out-of-facility death data should have been included in the report.<sup>102</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. Do you believe those numbers should have been included in the report?

<sup>100</sup> Malatras TI, at 160-161.

<sup>101</sup> Malatras TI, at 106 & 206.

<sup>102</sup> Malatras TI, at 168-169.

A. I would have – if I had the authority to do so, I would have included them, again, so that we wouldn't be sitting together right now.

Q. Was that discussed among the people who were working on editing the report?

A. Most people thought the numbers should be out, and that was – should be the end of it. That's why they were in the report until the June – they were in the – all the charts had these numbers until June 27<sup>th</sup>.

Q. You talked about being directed by Ms. DeRosa to make that change. Did anyone else agree with her –

A. No.

Q. --or was it just she's the top of the chain, I'm going to listen?

A. Well, Mr. Zucker – if I remember the call correctly – was trying to push back a little bit. I think at one point, Ms. Garvey did. There was some ire turned my way about it, but there – sometimes, as you know with the principal, there's not – there's certain discussions – certain decisions made of which you don't – they have ultimate authority and that was that.

Q. Sure.

A. I followed up with an e-mail afterwards because I was frustrated.

Q. An e-mail saying that you thought –

A. No, let me share this. I was the one in the impeachment report that said no one should have been shocked or surprised by the 10,000 number. You guys gave me – the report with those numbers came from you. We synthesized the information in the report. We gave you the report, and now you are criticizing us for things that you gave us. So I was frustrated at that moment very much so. And I was frustrated by the tone on the call very much so. We were all pretty exhausted by that point...

However, Ms. DeRosa testified that it was Dr Zucker's decision to remove out-of-facility nursing home deaths.<sup>103</sup> Dr. Zucker testified that he stood by the findings of the July 6 Report.<sup>104</sup>

**Ms. Melissa DeRosa (June 23, 2024)**

<sup>103</sup> DeRosa TI, at 245.

<sup>104</sup> Zucker TI, at 200.

Q. Is the penultimate conversation the June 27<sup>th</sup> phone call?

A. I don't know the actual date, but there was that conversation which was like the big group conversation which has been reported and discussed previously. But the questions to DOH not just from me, but from others including Linda. Including Beth, including other people, that were looking at this report, because it, was data that had never been previously published was, has this been vetted or verified? No. In looking at the cursory numbers, we've all agreed previously that this information has to be audited because it's incorrect. Has anything changed? No. Have you done anything to figure out which information is incorrect? No. How certain are you of the numbers that are reported from outside facilities that they are correct? Silence. Are you seriously proposing using numbers in a report to back a conclusion that the March 25<sup>th</sup> guidance didn't influence bringing COVID into nursing homes, knowing that the numbers are wrong? Not thinking that they could be wrong but knowing that they're wrong? Silence. What do we want to do here, guys? What do you want to do here? And Zucker said, it doesn't alter the conclusion, the ultimate conclusion is the same, so let's use the vetted verified numbers, be clear that's what we're doing and we will audit them later. And so it was Zucker's call. Zucker had to defend it, Zucker had to put his name on it. As Zucker told the Assembly, if he disagreed with it, he would not say it out loud. His name was one it. It was his call...

In response to questions related to the Executive Chamber's decision to remove out-of-facility deaths from the July 6 Report, Mr. Cuomo remarked "[w]ho cares."<sup>105</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. Do you – and Ms. Lacewell confirmed this as well, that drafts of the report before the phone call had the 9,844 number in it, and drafts of the report after the phone call had 6,432. Do you recall any conversations about that?

A. No, but I don't know how to express – let's say there's a 3,000 differential, 2,500. Who cares? What difference does it make in any dimension to anyone about anything? Do you know what I'm saying?

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<sup>105</sup> Cuomo TI, at 289.

#### IV. THE CUOMO ADMINISTRATION’S HANDLING OF NURSING HOME FATALITY DATA

In his transcribed interview with the Select Subcommittee, Mr. Cuomo testified that his Administration “could not have been more transparent” as it related to reporting nursing home fatalities to the public.<sup>106</sup> In relation to the decision to not report out-of-facility deaths, he remarked “[s]o what?”<sup>107</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. Do you think your administration was fully transparent regarding the data throughout the pandemic?

A. We could not have been more transparent.

Q. Do you think your administration was fully transparent regarding the amount of nursing home residents who died of COVID-19 during the pandemic?

A. It could not have been more transparent. There was nothing more transparent than total deaths. Then we got into this political discussion of deaths at home, presumed deaths, out-of-facility deaths, President Trump saying I’m inflating the number. Also, to recount the irregularities. Double counting, because if you’re counted as an out-of-facility death you’re not deducted from the hospital death. And this was very public every day. They said “And how about the out-of-facility deaths?” I said, “As soon as we have an accurate number, I will give it to you.” But the difference between – I’ll say to you what I said to your Democratic colleagues. 6500 in facility, 2500 out of facility. So what? Well, you were trying to make the number look lower so you didn’t add the out-of-facility. There is no difference between 6500 or 6500 plus 2500...

Mr. Cuomo testified that out-of-facility nursing home deaths only became an issue when the Administration’s handling of nursing homes became political.<sup>108</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. ...Do you recall – while reviewing the slides [for daily briefings], do you recall any conversations regarding the categorization of the nursing home deaths?

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<sup>106</sup> Cuomo TI, at 245-246.

<sup>107</sup> *Id.*

<sup>108</sup> Cuomo TI, at 249-250.

A. No. Just that they were very clear, total deaths, hospital, nursing home. The out-of-facility did not develop until the politics of nursing homes. That's when they then, with all this political intensity, how many, what's the real nursing home number. And whenever you came up with a definition, they added to the definition. Well, it should be people who were at the hospitals. It should be people who were in nursing homes who went to the hospital and died should be added to the nursing home count...

According to witness testimony and public reporting since the beginning of the pandemic, Mr. Cuomo's characterization of the series of events is demonstrably false.

The Cuomo Administration—through the NYSDOH—began collecting data related to nursing home fatalities beginning in March 2020.<sup>109</sup> Contrary to Mr. Cuomo's testimony, his Administration changed the methodology in which nursing home fatalities were accounted and publicly reported.<sup>110</sup> His Administration initially categorized out-of-facility deaths as nursing home fatalities but stopped reporting those numbers as nursing home fatalities on May 3, 2020.<sup>111</sup>

**Finding:** The Executive Chamber made the decision to change the methodology of nursing home fatalities to not include out-of-facility deaths

In a transcribed interview with Select Subcommittee staff, Dr. Malatras testified that Ms. DeRosa made the decision to change the methodologies in which nursing home fatalities were accounted.<sup>112</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. But to be clear, what you're testifying is that Melissa DeRosa was involved in the decision to change the methodology that was used throughout the pandemic?

A. It was her decision.

Dr. Malatras testified that Ms. DeRosa did not "trust the numbers" related to reporting out-of-facility fatalities and made the decision to exclude them.<sup>113</sup>

**Dr. Jim Malatras (May 20, 2024)**

<sup>109</sup> See OFFICE OF THE N.Y. STATE COMPTROLLER, REPORT 2022-S-55, USE, COLLECTION, AND REPORTING OF INFECTION CONTROL DATA, 13(Mar. 2022), available at <https://www.osc.ny.gov/files/state-agencies/audits/pdf/sga-2022-20s55.pdf>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Malatras TI, at 143-144.

<sup>113</sup> Malatras TI, at 147.



Q. ... Do you know what necessitated the administration making this change?

A. This is a question of location?

Q. Yes.

A. Yeah, this is – this is the same issue. My understanding was even after the audit – I don't know. You have to ask them about why they didn't do it after the audit. But prior to the audit conducted by Gareth Rhodes, Ms. DeRosa said she didn't trust the numbers.

Q. ...This decision to change the methodology to exclude nursing home deaths would have been approved by Ms. DeRosa?

A. Correct.

According to witness testimony, the Executive Chamber was advised by numerous officials to release the full accounting of nursing home fatalities. In a transcribed interview with Select Subcommittee staff, Mr. Gareth Rhodes, formerly the Deputy Superintendent of DFS, testified that he was ordered by Ms. DeRosa to conduct an audit of NYSDOH data following a hearing in August 2020.<sup>114</sup> Mr. Rhodes testified that Ms. DeRosa was concerned with double counting.<sup>115</sup>

**Mr. Gareth Rhodes (May 3, 2024)**

Q. But isn't it true . . . that after this hearing you were ordered to conduct an audit of the Department of Health's data?

A. I recall it like a common sense review of a data set that I was asked to, you know, go over and sit down with their staff and go through it line by line and make sure there were no discrepancies or any inconsistencies.

Q. ...[W]ho ordered you to conduct this audit?

A. Melissa asked me to go over there and do this review.

Q. Did she explain why?

A. I don't recall really the conversation, just, you know, can you – what – you know, do you mind going there and taking a look at this. I think there was – I think she – I remember she mentioning like

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<sup>114</sup> Rhodes TI, at 116-117.

<sup>115</sup> *Id.*

double-counting or like she wanted me to make sure that the numbers didn't have inaccuracies or inconsistencies.

Mr. Rhodes testified that it took no longer than a week to complete his audit of the nursing home fatality data and that he flagged “maybe 600” entries as “inconsistent.”<sup>116</sup>

**Mr. Gareth Rhodes (May 3, 2024)**

Q. ... [C]an you just provide a general summary of what you found?

A. To the best of my recollection, this was some time ago, there was like an Excel spreadsheet on a DOH computer. For every fatality there was like a line that had like the initials, it had the facility, it had date of admission, date of death, like the comorbidities. I had like – like ran some like Excel formulas. Was really looking to see is there anything here like – I am not a data scientist. I was more looking at this like a commonsense kind of approach. And I was looking for things like – you know, anything that looked inconsistent. And I think I flagged maybe 600 or so entries that had some sort of thing that could be considered inconsistent. Like someone had been marked as having passed away like before they had been admitted. There were like some cases of people who were confirmed to have died of COVID before COVID had been reported in New York.

Mr. Rhodes identified himself as the Task Force member in the Impeachment Report that advised the Executive Chamber to release the full data set.<sup>117</sup> Mr. Rhodes testified that he believed his audit to be sufficient and believed that the full data set should have been released with a disclaimer related to the inconsistencies.<sup>118</sup>

**Mr. Gareth Rhodes (May 3, 2024)**

Q. But for the record, you are testifying today that you did support releasing the numbers in August of 2020?

A. Yes.

Q. And do you recall why you supported releasing the numbers?

A. In my view – as part of my kind of review of these numbers, I thought maybe my review, you know, was – you know, I thought I had done my job. I found kind of any discrepancies, I identified them. We could – Department of Health could maybe follow up on

<sup>116</sup> Rhodes TI, at 118-119.

<sup>117</sup> Rhodes TI, at 121.

<sup>118</sup> Rhodes TI, at 122-123.

the discrepancies and that would be – you know, if there were any concerns, you know, about the inconsistencies like maybe my review had helped resolve those, I was not sure, but like at least maybe provided some – some input or helpfulness on that side. And that – you know, there’s mention here about the legislature had written a letter requesting the numbers and, you know, I thought that it made sense to put those – put the numbers in that letter and then maybe add an asterisk that said, you know, review had found maybe there were 600 that were continued to be follow up on. Those – just as a note that those were being validated. That’s what I thought just made sense based on what my review was.

Similarly, Dr. Zucker testified to the Select Subcommittee that he was the Senior NYSDOH Official in the Impeachment Report that prepared a letter in August 2020 that reported the full number of nursing home fatalities to the legislature.<sup>119</sup> He testified that he also prepared a second letter in October 2020 that was never approved.<sup>120</sup>

**Dr. Howard Zucker (December 18, 2023)**

Q. So based on the Impeachment Report, does it follow that there were nursing home numbers that included residents that were transferred to the hospital that the Executive chose not to release in August of 2020?

A. But the numbers – I’m unclear. I’m unclear what the question is. What I’m reading here says that the letter that we put together, which had all the numbers, and it did not go back to the legislature. That’s how I determine it. I’m not sure about what you asked me about August 20, 2020. Right, that was the letter. Right, there were letters that were sent over there. There were, I think, two letters. Well, there was one official letter, and I think that was information that went over there as well, saying these are the number of deaths, and that came from the Department, you know, from the Department probably prior to – put together prior to my August testimony.

Q. At this point were you comfortable when you sent the letter over, were you comfortable with the numbers?

A. The letter that I sent over in October, I was totally comfortable with. That was the number of deaths at that time.

Dr. Zucker believed that the numbers did not need to be audited further, and by not releasing the data the Cuomo Administration was simply “delaying.”<sup>121</sup>

<sup>119</sup> Zucker TI, at 179-180.

<sup>120</sup> Zucker TI, at 180-181.

<sup>121</sup> Zucker TI, at 181.

**Dr. Howard Zucker (December 18, 2023)**

Q. Do you believe that [the number of deaths] needed to be audited further?

A. No. No. I felt that this letter should go.

Q. And again, this is your personal opinion. At this point any delay in releasing the numbers was just a delay?

A. Yeah, I felt it was a delay. I felt it should go out, and I will be the first to say that I raised it multiple times about getting them out, and had some days that I thought if they were so worried about something then they should put it out on X day or Y day. So like Thanksgiving.

Mr. Cuomo testified that he neither recalled Mr. Rhodes nor Dr. Zucker advising him to release the full data set. In response to Mr. Rhodes' audit, the former Governor noted that Mr. Rhodes "wasn't an auditor."<sup>122</sup> He said that Mr. Rhodes would not have advised releasing the numbers.<sup>123</sup>

In response to the letters that Dr. Zucker drafted releasing the full data set, Mr. Cuomo denied ever reviewing it, saying that those letters would have been reviewed by the attorneys responding to the Department of Justice (DOJ) inquiry.<sup>124</sup> Mr. Cuomo testified that the Executive Chamber had notified the legislature that they would release out-of-facility death totals in January.<sup>125</sup>

**Mr. Andrew Cuomo (June 11, 2024)**

Q. It's been widely reported that on a phone call with the legislature, Ms. DeRosa said the state froze in response to the DOJ's request. Is that the situation you're referencing?

A. Froze meaning we had to make sure everything was careful. We had to be careful and make sure everything was right. That's what she was referring to. They both made requests at about the same time. The legislature made a request about August, the DOJ letter comes in about August. We called the legislative leaders and say, Can we do it in January because we have to be very careful because we have this purely political witch hunt going on at the Department of Justice run by two really bad guys. And that's what she's referring to.

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<sup>122</sup> Cuomo TI, at 275.

<sup>123</sup> Cuomo TI, at 276.

<sup>124</sup> Cuomo TI, at 279.

<sup>125</sup> Cuomo TI, at 282.

...

Q. You mention that you asked the legislature if you could pause responding...[W]ho specifically spoke to the legislature from your office?

A. It would have been the governmental person, it could have been Beth or if it was the counsel or it could have been Melissa.

Q. You're saying that in August of 2020, you asked to wait until January 2021?

A. Somewhere around there, yeah.

Ms. DeRosa similarly testified that because of the ongoing DOJ investigation there was an agreement with the legislature to delay releasing the numbers until January of 2021.<sup>126</sup>

**Ms. Melissa DeRosa (June 23, 2024)**

Q. What happened to [Dr. Zucker's] letter? Did it make its way to the legislature?

A. No, the plan stayed the same. We were going to get back to [the legislature] in January with the hearing with the agreement that we had reached with the leaders.

Q. Why?

A. Well, I can give the reason I believe. I don't remember, like – I don't remember having any thought towards this in realtime. But after the Jeff Clark letter came in on October 28<sup>th</sup>, it was sort of like back to square zero, if that makes any sense. We were now in a situation where we were dealing with the Department of Justice, they had a fresh inquiry, and we needed to be responding to them. And while we did that, we were waiting on the legislature. We had every intention of keeping our word to the legislature, which was to get back to them by their first hearing when they came back and resumed session in January. But that was not our priority. Our priority was getting back to DOJ.

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<sup>126</sup> DeRosa TI, at 83.

**Finding:** The Cuomo Administration was reluctant to correct incomplete nursing home data

In his transcribed interview with Select Subcommittee staff, Dr. Malatras testified that Executive Chamber officials had been resistant to correcting “a bona fide undercounting” of nursing home deaths.”<sup>127</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. Do you recall some examples of –

A. There was one example. I can’t – I believe it was in May, where there was actually – there’s many different questions. How you categorize the actual deaths, that’s up for – that’s a policy call. The secretary doesn’t have to deal with that. There was actual a bona fide undercounting in the nursing-home death report that Ms. Baldwin called me about. I remember this – I don’t remember the day, but I was running because it was the first day that I was taking a run. And she called and said there was this issue, and Ms. Lacewell isn’t listening about this. So I raised with Ms. Lacewell, and then I ultimately went to Ms. DeRosa and said these are actual numbers that you have to report. These are fatalities, we have them. You have to add them to the public report. This is a – we did it as a retrospective. We put them all back to those dates – put them in the same exact dates, but I went in and said you have to change the numbers. I made a recommendation very strongly they have to change the numbers.

Dr. Malatras testified that the undercounting occurred as a result of the nursing home fatality data not accounting for deaths occurring after 5 p.m.<sup>128</sup>

**Dr. Jim Malatras (May 20, 2024)**

Q. Do you recall the administration being – becoming aware that those deaths after 5:00 p.m. weren’t being included [in the nursing home fatality data]?

A. This is the issue that the Minority question, asked about the under-reporting. This is what Megan Baldwin called me about, where this wasn’t a categorization where the number’s the same. We were actually under – the deaths were actually being under-reported because of the time. She raised it with me because she was getting resistance from Ms. Lacewell to address the issue. I brought it – I made this an issue to correct this, to get this redone and posted in a

<sup>127</sup> Malatras TI, at 88-89.

<sup>128</sup> Malatras TI, at 149-150.

correct way. So this is the actual issue. They were under-reporting. It was time – I forgot there was the timing. So 5:00 o'clock would come. If you came in at 5:15, it's fell into a no-man's land. It wasn't part of that day, it wasn't part of the next day. They figured out there was a series of those fatalities. We became aware of this. Ms. Baldwin called me and said I'm running into this. I said something in sum and substance of you really have to work this out with Linda. This is not my – you know, I think I said shit show to her in a colorful way at the time, but she walked me through it. And I said this is something that I have to raise, and I raised it with Ms. DeRosa. And I raised it with – I think there were other people, like I mentioned. Beth Garvey was in the room and Robert Mujica – and we did update the numbers to include those fatalities in the retrospective. So every day got the actual numbers added to them...

## V. THE HOCHUL ADMINISTRATION'S FAILURE TO COOPERATE WITH THE SELECT SUBCOMMITTEE'S INVESTIGATION

**Finding:** The Hochul Administration has not cooperated with the Select Subcommittee's legitimate document requests.

On November 6, 2023, the Select Subcommittee requested pertinent documents and information from the Executive Chamber related to its investigation into the Cuomo Administration's decision to send COVID-19-positive patients into nursing homes.<sup>129</sup>

The Select Subcommittee's November 6 requests came after the Executive Chamber had ignored two previous letters requesting similar information.<sup>130</sup> Rather than responding to the Select Subcommittee's initial letters, the Executive Chamber deflected responsibility to the NYSDOH. The Executive Chamber failed to produce any documents until February 2024—more than eight months after the original request. While the Select Subcommittee has since received three separate productions amounting to 373,999 documents, it is apparent that the Executive Chamber has not been fully cooperative with our requests and not produced pertinent documents for potentially erroneous reasons.

The documents produced by the Executive Chamber are incomplete and substantially redacted—often, inconsistently and without apparent legal basis. Furthermore, there are responsive documents the Select Subcommittee knows exist—through public reporting and witness testimony—that were not included in the productions.

Additionally, the Executive Chamber only informed the Select Subcommittee that certain responsive documents were intentionally withheld after all other documents were produced. It is not clear whether the Executive Chamber would have ever disclosed its decision to withhold these documents if the Select Subcommittee did not request a privilege log based on concerns about the adequacy of the production and excessive redactions.

The Select Subcommittee is charged with conducting oversight to inform legislative solutions to address deficiencies and ingrain proficiencies within the federal government. The Select Subcommittee may use this investigation to recommend legislative solutions regarding state implementation of federal public health guidance, the use of federal funds to respond to a public health emergency, and the appropriateness of current federal statutes protecting nursing home residents, including the Civil Rights of Institutionalized Persons Act (CRIPA). Documents currently in possession of the Executive Chamber but wrongly withheld from the Select Subcommittee are necessary to inform these possible legislative solutions.

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<sup>129</sup> Letter from Brad Wenstrup, D.P.M., Chairman, Select Subcomm. on the Coronavirus Pandemic & Nicole Malliotakis, Member of Congress, to Kathy Hochul, Governor of New York (Nov. 6, 2023).

<sup>130</sup> Letter from Brad Wenstrup, D.P.M., Chairman, Select Subcomm. on the Coronavirus Pandemic & Nicole Malliotakis, Member of Congress, to Kathy Hochul, Governor of New York (May 19, 2023); Letter from Brad Wenstrup, D.P.M., Chairman, Select Subcomm. on the Coronavirus Pandemic & Nicole Malliotakis, Member of Congress, to Kathy Hochul, Governor of New York (Oct. 10, 2023).