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4 INTERVIEW OF: MELISSA DeROSA

5 FRIDAY, JUNE 21, 2024

6 COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY,

7 SELECT SUBCOMMITTEE ON THE CORONAVIRUS PANDEMIC,

8 U.S. HOUSE OF REPRESENTATIVES,

9 WASHINGTON, D.C.

10 The Interview commenced at 10:02 a.m. at 5480 O'Neill

11 House Office Building.

12

Appearances:

13

14 For the SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS:

15 MITCH BENZINE, Majority Staff Director

16 JACK EMMER, Senior Majority Counsel

17 ERIC OSTERHUES, Majority Counsel

18 ANNA BLAKE LANGLEY, Majority Professional Staff

19 Member

20 LIZ LYONS, Majority Professional Staff Member

21 [REDACTED] Minority Counsel

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23 [REDACTED] Minority Staff Director

24

25 For the WITNESS:

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32 Also Present:

33 SHARILEIGH GORDON

34 JACKSON MORVILLO

35 Exhibits:

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70 P R O C E E D I N G S

71 Mr. Emmer. We can go on the record.

72 This is a transcribed interview of Ms. Melissa DeRosa
73 conducted by the House Select Subcommittee on the
74 Coronavirus Pandemic, under the authority granted to
75 it by House Resolution 5 and the rules of the
76 Committee on Oversight and Accountability.

77 Further, pursuant to House Resolution 5, the Select
78 Subcommittee has wide-ranging jurisdiction, but
79 specifically to investigate the implementation or
80 effectiveness of any federal law or regulation
81 applied, enacted, or under consideration to address
82 the coronavirus pandemic and prepare for future
83 pandemics.

84 Can the witness please state her name and spell her
85 last name for the record?

86 The Witness. Sure. Melissa Dina DeRosa, D as in
87 David, E, capital R, O-S as in Sam, A, and there's no
88 space.

89 Mr. Emmer. Thank you, Ms. DeRosa. My name is Jack
90 Emmer and I am senior counsel for the Majority staff
91 of the Select Subcommittee. I want to thank you for
92 coming in today for this interview. The Select
93 Subcommittee recognizes that you are here voluntarily
94 and we appreciate that.

95 Under the Select Subcommittee and Committee on
96 Oversight and Accountability's rules, you are allowed
97 to have an attorney present to advise you during this
98 interview. Do you have an attorney representing you
99 in a personal capacity present with you today?

100 The Witness. I do.

101 Mr. Emmer. Will counsel please identify themselves
102 for the record?

103 Mr. Morvillo. My name is Gregory Morvillo from
104 Morvillo PLLC. I represent Ms. DeRosa. With me today
105 is Sharileigh Gordon and Jackson Morvillo.

106 Mr. Emmer. Thank you.

107 For the record, starting with the Majority staff, can
108 the additional staff members please introduce
109 themselves with their name, title, and affiliation?

110 Mr. Benzine. Mitch Benzine, staff director for the
111 Republican side.

112 Mr. Osterhues. Eric Osterhues, chief counsel for the
113 Republican side.

114 Ms. Langley. Anna Blake Langley, professional staff
115 member for the Republicans.

116 Ms. Lyons. Liz Lyons, Republican Majority staff
117 member.

118 [REDACTED] [REDACTED] senior counsel for the
119 Democratic staff.

120 [REDACTED] Democratic counsel.

121 [REDACTED] Democratic staff
122 director.

123 Mr. Emmer. Thank you, all.

124 BY MR. EMMER.

125 Q Ms. DeRosa, before we begin, I would like to go
126 over the ground rules for this interview.

127 The way this interview will proceed is as follows:

128 The Majority and Minority staff will alternate asking
129 questions, one hour per side per round, until each
130 side is finished with their questioning. The Majority
131 staff will begin and proceed for an hour, and then the
132 Minority staff will have an hour to ask questions. We
133 will then alternate back and forth in this manner
134 until both sides have no more questions.

135 If either side is in the middle of a specific line of
136 questions, they may choose to end a few minutes past
137 an hour to ensure completion of that specific line of
138 questioning, including any pertinent follow-ups. In
139 this interview, while one member of the staff for each
140 side may lead the questioning, additional staff may
141 ask questions.

142 There is a court reporter taking down everything I say
143 and everything you say to make a written record of the
144 interview. For the record to be clear, please wait

145 until the staffer questioning you finishes each
146 question before you begin your answer, and the staffer
147 will wait until you finish your response before
148 proceeding to the next question.

149 Further, to ensure the court reporter can properly
150 record this interview, please speak clearly,
151 concisely, and slowly. Also, the court reporter
152 cannot record non-verbal answers, such as nodding or
153 shaking your head, so it is important that you answer
154 each question with an audible verbal answer.

155 Exhibits may be entered into the record. Majority
156 exhibits will be identified numerically and Minority
157 exhibits will be alphabetically.

158 Do you understand?

159 A I do.

160 Q We want you to answer our questions in the most
161 complete and truthful manner possible, so we will take
162 our time. If you have any questions or do not fully
163 understand the question, please let us know and we
164 will attempt to clarify, add context to, or rephrase
165 our questions.

166 Do you understand?

167 A I do.

168 Q If we ask about specific conversations or events in
169 the past, and you are unable to recall the exact words

170 or details, you should testify to the substance of
171 those conversations or events to the best of your
172 recollection. If you recall only a part of the
173 conversation or event, you should give us your best
174 recollection of those events or parts of conversations
175 that you do recall.

176 Do you understand?

177 A I do.

178 Q Although you are here voluntarily and we will not
179 swear you in, you are required pursuant to Title 18,
180 Section 1001 of the United States Code to answer
181 questions from Congress truthfully. This also applies
182 to questions posed by congressional staff in this
183 interview.

184 Do you understand?

185 A I do.

186 Q If, at any time, you knowingly make false
187 statements, you could be subject to criminal
188 prosecution.

189 Do you understand?

190 A I do.

191 Q Is there any reason you are unable to provide
192 truthful testimony in today's interview?

193 A No.

194 Q The Select Subcommittee follows the rules of the

195 Committee on Oversight and Accountability. Please
196 note that if you wish to assert a privilege over any
197 statement today, that assertion must comply with the
198 rules of the Committee on Oversight and
199 Accountability.

200 Pursuant to that, Committee Rule 16(c)(1) states: For
201 the Chair to consider assertions of privilege over
202 testimony or statements, witnesses or entities must
203 clearly state the specific privilege being asserted
204 and the reason for the assertion on or before the
205 scheduled date of testimony or appearance.

206 Do you understand?

207 Mr. Morvillo. We understand that that's what you're
208 saying. We're not going to agree with that. We're
209 going to assert whatever privileges we need to assert,
210 and we can have some fun as we talk about it.

211 Mr. Benzine. Okay.

212 BY MR. EMMER.

213 Q Ordinarily, we take a five-minute break at the end
214 of each hour of questioning, but if you need a longer
215 break or a break before that, please let us know and
216 we will be happy to accommodate. However, to the
217 extent that there is a pending question, we would ask
218 that you finish answering the question before we take
219 the break.

220 Do you understand?

221 A I do.

222 Q Do you have any questions before we begin?

223 A Can you remind me of your name?

224 Q Jack Emmer.

225 A Jack, okay.

226 Q So let's get started by discussing your educational
227 experience. Where did you attend undergraduate
228 school?

229 A Cornell University.

230 Q And what degree did you graduate with?

231 A A bachelor's in industrial labor relations.

232 Q Who is your current employer and what is your
233 current job title?

234 A I have my own consulting firm. So I'm founder and
235 CEO.

236 Q Can you briefly go through your professional career
237 up until now?

238 A Sure. Graduated from Cornell University undergrad,
239 then worked briefly as a fashion publicist. Then went
240 and worked on a number of campaigns, a Bond Act
241 campaign as press secretary, then comms director, a
242 congressional campaign in Brooklyn as comms director.
243 This is all on the Democratic side, obviously.
244 Then I worked for Nydia Velazquez as her press

245 secretary here in Washington, DC. Then I left and
246 worked for Organizing for America, which was the
247 subset of Obama for America set inside the DNC. I was
248 their New York state director, so I was like the New
249 York State political director during that period.
250 Then I left and I was deputy chief of staff, and then
251 subsequently chief of staff to the New York State
252 Attorney General under Eric Schneiderman.
253 Then I left and became communications director to
254 Governor Cuomo in 2013, subsequently communications
255 director and strategic adviser, subsequently chief of
256 staff, subsequently secretary to the governor. And
257 then I left, started my own firm. I'm also a
258 contributor for the Daily Beast and do commentary on
259 CNBC.

260 Q Let's discuss your role as secretary to the
261 governor. Was that an appointed position?

262 A Yes.

263 Q I believe you just said it, but when were you
264 appointed?

265 A 2017, sorry.

266 Q Thank you.

267 A 2017.

268 Q Can you briefly describe your duties and
269 responsibilities as secretary to the governor?

270 Mr. Morvillo. Briefly? Can you take that word out?

271 Mr. Emmer. I'll be happy to take "briefly" out of the
272 question.

273 BY MR. EMMER.

274 Q Can you please describe your duties and
275 responsibilities as secretary to the governor?

276 A You're number two to the governor. You oversee the
277 Executive Chamber chiefly. And within the Executive
278 Chamber, there are different levels.

279 So, for example, commissioners report up to deputy
280 secretaries, who report up to the operations director,
281 who reports up to the secretary. And so it's
282 just -- it's the top constitutional role under
283 governor. Well, I shouldn't say top. It's equal to
284 counsel, counsel and secretary.

285 And so also in my role, because I came out of the
286 communications world, I played a large part in the
287 communications, in intergovernmental affairs.

288 Whatever is important to the governor is in your
289 purview. Depending on the day, that changes.

290 Q Who did you report to?

291 A The governor.

292 Q And I might jump around a little bit here. What
293 was your day-to-day interaction with the governor as
294 secretary to the governor?

295 A I mean, I would wake up and talk to him first
296 thing. He would be first meeting, first thing in the
297 morning. And then just throughout the day constantly,
298 until the end of the day.

299 Q Who reported to you as secretary to the governor?

300 A I mean, if you had the org chart. It was the
301 communications director, it was the state operations
302 director. There were -- the chief of staff certainly.
303 There was a formal org chart, I'm sure we can get you
304 to enter for the record, but there is a formal org
305 chart of who reported up to me.

306 Q Thank you. Prior to the pandemic, how much
307 interaction would you have as secretary to the
308 governor with Dr. Zucker or the Department of Health?

309 A Intermittent. It depended on the issue or the day.
310 There was Legionnaires, for example, and so during
311 that period much more, because we were dealing with a
312 health crisis. There was an Ebola scare briefly, so
313 there was a lot more during that.

314 But then day-to-day, the commissioners and agencies
315 sort of run themselves and they report up to the state
316 operations director. But unless it's something
317 critical, either from a policy or operational
318 perspective, it wouldn't bubble up to me.

319 Q And I know you're not going to be able to answer

320 this briefly, but how did your day-to-day change as a
321 result of the pandemic?

322 A I'm sure you guys have copies of my book where I
323 write about this extensively. But it was literally,
324 it became an all-hands-on-deck, 20 hour a day, up at
325 3:30 in the morning working until midnight. And it
326 was putting out fires, dealing with evolving crises,
327 flying in and out of Washington to meet with President
328 Trump and Jared Kushner. It was dealing with Bill de
329 Blasio and New York City. It was PPE shortages.

330 In the month of March, which people forget, the last
331 ten days of that critical month of March, which was
332 the first month that we knew COVID was in New York, I
333 actually was spending 80 percent of my time not on
334 COVID at all. We were trying to negotiate a budget
335 with the legislature.

336 So I was spending, I would say 80 percent of my time
337 from March 20th until the budget was completed at the
338 beginning of April, negotiating the budget with the
339 legislature, along with counsel and Robert -- counsel
340 Beth Garvey and Robert Mujica, who was the budget
341 director. And so it just -- it depended. It was
342 ever-evolving. You know, it was a crisis-to-crisis
343 situation.

344 Q Thank you. Now, I would like to ask you if you

345 communicated with any of the following people
346 regarding COVID-19 and nursing homes between January
347 1st, 2020 and when you left the Cuomo administration.

348 Mr. Morvillo. Do you want both COVID and nursing
349 homes, or do you want them separate in her answer?

350 Mr. Emmer. Both.

351 Mr. Morvillo. So it's either/or?

352 The Witness. So nursing homes in the context of
353 COVID.

354 BY MR. EMMER.

355 Q Yes. And right, now you can answer yes or no, and
356 we will come back and discuss each one.

357 A Okay.

358 Q So first, Governor Andrew Cuomo?

359 A Yes.

360 Q Ms. Linda Lacewell?

361 A Yes.

362 Q Mr. Gareth Rhodes?

363 A Yes.

364 Q Dr. Jim Malatras?

365 A Yes.

366 Q Mr. Rich Azzopardi?

367 A Yes.

368 Q Mr. Peter Ajemian?

369 A Yes.

370 Q Ms. Beth Garvey?

371 A Yes.

372 Q Ms. Judith Mogul?

373 A Yes.

374 Q Ms. Megan Baldwin?

375 A Yes.

376 Q Mr. Larry Schwartz?

377 A Yes.

378 Q Mr. Robert Mujica?

379 A Yes.

380 Q Ms. Jill DesRosiers?

381 A You know, I don't know. I don't have a specific

382 recollection of speaking to her about COVID and

383 nursing homes, but maybe.

384 Q Ms. Stephanie Benton?

385 A Yes.

386 Q Dr. Howard Zucker?

387 A Yes.

388 Q Dr. Eleanor Adams?

389 A Yes.

390 Q Ms. Sally Dreslin?

391 A Again, Sally was -- Sally had left sometime in the

392 spring, so I don't have, like -- which was so long ago

393 in the gist of things, I don't have a specific memory

394 of having a conversation with her, but I can't rule it

395 out.

396 Q Mr. Gary Holmes?

397 A Yes.

398 Q Mr. Kenneth Raske?

399 A Yes.

400 Q Mr. Lee Perlman?

401 A Yes.

402 Q Mr. Michael Dowling?

403 A Yes. Actually, Lee Perlman, I'm not sure. He
404 should go in the category of I'm not ruling it out,
405 but I don't have a specific recollection.

406 Q Thank you. To repeat myself, Mr. Michael Dowling?

407 A Yes.

408 Q President Donald Trump?

409 A I don't remember if I spoke to the President
410 specifically about nursing homes. Certainly COVID.

411 Q Mr. Jared Kushner?

412 A The same. I mean, I remember obviously distinctly
413 a lot of conversations about COVID, but I'm not sure
414 about nursing homes as well.

415 Q Dr. Anthony Fauci?

416 A The same.

417 Q Dr. Francis Collins?

418 A I'm not sure who that is.

419 Q Mr. Alex Azar?

420 A I don't think about nursing homes, just COVID. I
421 don't mean to say "just COVID."

422 Q Ms. Seema Verma?

423 A Can you remind me who that was?

424 Q She was the administrator to CMS.

425 A I don't remember having specific conversations with
426 her.

427 Q Dr. Deborah Birx?

428 A The same. I don't remember having specific
429 conversations with her.

430 Q Dr. Robert Redfield?

431 A The same.

432 Q Dr. Michael Osterholm?

433 A Can you remind me who that is?

434 Q He was an epidemiologist at the University of
435 Minnesota that I believe advised the governor.

436 A Not me, but others in the administration.

437 Q And, finally, David Grabowski?

438 A Yes.

439 Q So let's start first with the governor.

440 Do you recall having any discussions with him related
441 to the March 25th order prior to its issuance?

442 A No.

443 Q What were the nature of your conversations related
444 to the March 25th order with the governor?

445 A At what point?

446 Q Let's start with -- well, first, I guess when did
447 you learn about the March 25th order?

448 A The first time I remember learning about the March
449 25th order was at a press conference on April 20th.

450 Q Did you discuss the order with the governor after
451 that press conference?

452 A I did.

453 Q And he did not know about that order, either?

454 A So it was nationally televised. You can pull up
455 the video. He was asked -- and the New York Post
456 wrote about this at this time. He was asked at the
457 press conference specifically, and it was the first
458 time it had come up in a press conference and he
459 clearly said, "I don't know. Dr. Zucker."
460 Dr. Zucker jumped in and answered the question.
461 The press conference concluded. We walked into his
462 inner office which was connected to that press
463 conference room, and the governor turned to Dr. Zucker
464 and said, what was that in there? This is not
465 verbatim, obviously. This is my recollection of that
466 conversation. What was that in there with the nursing
467 homes? And Dr. Zucker explained what the March
468 25th -- and it wasn't an order, it was guidance from
469 his perspective of what it was.

470 Q We'll return to more specifics regarding the order.

471 We'll move on from the governor right now.

472 Mr. Morvillo. You guys, you called it an order now

473 twice. It was not an executive order, right? It's an

474 advisory issued by DOH. So I don't want the record to

475 be anything but clear. This is not an order. We

476 don't agree that it's an order.

477 So if you could call it guidance or advisory, that's

478 going to make it easier because every time you say

479 order, I'm going to say it wasn't an order. So if we

480 can agree that that's a standing objection or that

481 you're acknowledging it was not an executive order,

482 that would be helpful.

483 Mr. Emmer. We can agree to a standing objection. I'm

484 probably going to call it a directive, guidance, and

485 order throughout today's questions.

486 Mr. Benzine. We can agree that it wasn't an executive

487 order, though.

488 Mr. Morvillo. An order from whoever. I order lunch

489 all the time, no one gets it right, so that's fine.

490 BY MR. BENZINE.

491 Q In that conversation after the press conference,

492 did Dr. Zucker tell you when he learned about the

493 order, directive, guidance, advisory, whatever we want

494 to call it today?

495 A He didn't act as if he didn't know, if that makes
496 sense. He just went into answer mode and he's -- I'll
497 stop there. You can ask your question.

498 BY MR. EMMER.

499 Q What were the nature of your discussions related to
500 the order with Ms. Lacewell?

501 A I mean, I don't -- I can't -- there were -- at what
502 point?

503 Q Did you have any discussions about where the order,
504 directive, order, guidance, originated from?

505 A After the -- Linda was sort of playing point with
506 DOH, and so I would often go to her to ask her to run
507 things down that were going down in DOH.

508 And after that press conference, it became clear
509 pretty quickly that this was going to become an issue
510 that continued to bubble up in the press, based on the
511 tone and tenor of the question we received on April
512 20th.

513 And so Dr. Zucker explained to us -- unless you guys
514 want me to go through it, I don't need to go through
515 how he explained it.

516 Mr. Benzine. We can later.

517 Mr. Morvillo. But you guys have questions about this?

518 The Witness. But so one of the people I spoke to

519 right afterwards was Linda Lacewell, and I want to say

520 Jim Malatras. It may have been the same
521 conversations, separate conversations, but I was sort
522 of, like, guys, we need to understand what this is, we
523 need to be able to explain it a lot more clearly than
524 he just did in that press conference, because it
525 sounds confusing to me.

526 So I need to be able to explain this, so could you
527 find out what this is, and how we can explain it, and
528 where it came from. And so we can be able to make
529 sure the public clearly understands it? And, to the
530 extent that there is confusion amongst the health care
531 community, more importantly, that they can understand
532 it.

533 BY MR. BENZINE.

534 Q Did she ever tell you where it came from?

535 A I don't recall if it were she or Malatras, but at
536 some point, one of them came back to me pretty
537 quickly -- this was happening in realtime -- pretty
538 quickly, and said the Department of Health says that
539 they put this out based on the March 23rd, I think it
540 was -- it was either CMS or CDC guidance that had come
541 out on March 23rd. And that that was the basis for
542 it. That the hospitals needed guidance on how and
543 when it was appropriate to discharge nursing home
544 patients who were no longer infectious and medically

545 stable.

546 They kept repeating this term, medically stable, which
547 from what I understood, then, based on what they were
548 telling me and understand today, was medically stable
549 was a defined term of art that I believe either CMS or
550 CDC put in a guidance that they issued that was
551 essentially like -- sorry, I used the word, I hate
552 when I do that -- that essentially said, you know,
553 there's a couple of different definitions of medically
554 stable.

555 One is if you're not showing symptoms and you test
556 negative. Or in the absence of tests, because tests
557 at that point were very limited. There was almost no
558 testing at that point. It had to have been X number
559 of days since you demonstrated symptoms, Y number of
560 days, like, since that period was over. And
561 therefore, your viral load was so low that you were
562 not infectious.

563 And it was done and it was written in a way that it
564 empowered individual physicians to make individual
565 calls, based on what they knew about their patients
566 being medically stable, and it was, you know, mayhem
567 at that point.

568 No one knew what they were doing. Everyone was
569 concerned the health care system was going to

570 collapse. And there was obviously the fear around
571 nursing home patients who people knew because of what
572 was going on in Oregon were susceptible to illness
573 because their immune system is, by definition,
574 compromised and because they were older.
575 So it was either CMS or CDC, I apologize for not
576 remembering which one, issued this guidance on the
577 23rd, and that this came after that. This was based
578 on that at the request of hospitals and nursing homes
579 on, we need -- we need uniform guidance, so that our
580 doctors know how and when it's appropriate to
581 discharge.

582 Q Do you know who the drafter was at the Department
583 of Health?

584 A I don't. What I since have heard is that there was
585 somebody who was, like, a mid-level person who was in
586 the public health group, which I think was -- like,
587 there's different subsections within -- someone in,
588 like, the public health nursing home group.

589 And I don't know if they did it with Sally Dreslin,
590 but it was someone at that level who drafted it and
591 edited it with someone more senior. And I don't want
592 to say with 100 percent certainty it was Sally,
593 because I'm not sure, but it was, like, someone at
594 Sally's level who they worked on it with.

595 Mr. Morvillo. But you didn't know that at the time?

596 The Witness. No, this is all after the fact.

597 BY MR. EMMER.

598 Q So -- and I'll frame it as after you learned about
599 it, the March 25th order, what were the nature of your
600 discussions with Ms. Beth Garvey about the directive?

601 A At which point?

602 Q After you learned about it. Because I know --

603 A You mean, like, in that exact moment?

604 Q Let's -- from the time that you learned about it to
605 May 10th, when the order was --

606 A Superseded?

607 Q -- superseded.

608 Mr. Morvillo. Unless there is a privileged
609 communication.

610 The Witness. Well, this will be easy for you, because
611 I don't remember anything specifically.

612 BY MR. BENZINE.

613 Q What was Ms. Garvey's role in kind of, like,
614 checking the box or reviewing guidances prior to
615 issuance?

616 A So -- and this is something that's very important,
617 because I think people don't really understand it.

618 There were two buckets. There was executive orders
619 and then there was health guidance.

620 Executive orders, Beth Garvey went through with a fine
621 tooth comb. She obviously wasn't drafting everything
622 herself, no human being could. We basically rewrote
623 the entire law in a period of three months during the
624 height of COVID.

625 And then that would go through me, and she would go
626 through them with me, you know, line by line, because
627 my signature went on them, the governor's signature
628 went on them. I would then have a recommendation to
629 the governor based on what Beth presented to me, I
630 think we should do this, I don't think we should do
631 this.

632 The Health Department was issuing health guidance at a
633 clip that was, according to that Olson report that
634 came out last week, something like over 400 pieces of
635 health guidance came out during the height of the
636 COVID pandemic. So they were issuing them daily, if
637 not multiple times a day.

638 And it was constantly being done on ever-changing
639 information coming from the federal government,
640 because I'm sure everybody in this room remembers,
641 maybe not as intimately as I do, how quickly that
642 information was changing. And as a result, the advice
643 that we were giving to people were changing. One day,
644 it's scrub your groceries. Just, in retrospect,

645 insane things because we didn't know how it spread.
646 But in any event, so they were empowered to put out
647 their guidance. They didn't have to go through that
648 same process in the Executive Chamber.
649 Now, from what I understand after the fact, they I
650 think -- I believe they went through counsel's office,
651 but not necessarily Beth. Beth had under her, as I'm
652 sure it's the same case federally, there's counsel and
653 then there's health counsel and there's environmental
654 counsel, and there's this counsel. Health counsel has
655 a team.
656 So Beth had a team of people who were empowered under
657 her to work with the Department of Health. So I don't
658 know if it came across Beth Garvey's desk
659 specifically, or if it was one of her deputies.
660 And, again, it's important when you put this in
661 context, because people forget, the last ten days of
662 March of 2020, Beth Garvey, Robert Mujica, and I were
663 essentially -- the governor essentially said to us,
664 we've got to focus on -- this side of the group has to
665 focus 100 percent on COVID, you guys need to go close
666 the budget. And so we were spending 80 percent of our
667 time during that pivotal ten days in the beginning of
668 April working on trying to close down the state's
669 budget.

670 So it wouldn't surprise me if it came across Beth's
671 desk. It would also not surprise me if it came across
672 one of her deputies' desks. But when it did,
673 counsel's office for the governor was not weighing in
674 on health policy. What do they know about what
675 doctors should and shouldn't be doing?
676 Clearly, they could pose questions if they saw
677 something that they thought looked off or didn't make
678 sense to them, but really their reviews, as I
679 understand it today and understood it after the fact,
680 was, does this conform with the four corners of the
681 law? Are you violating anyone's civil rights? We
682 just signed these executive orders. Does anything
683 you're doing conflict with what we just did? So that
684 was primarily their role.

685 Q And for much of this, it's been after the fact. I
686 assume after the April 20th press conference, you kind
687 of went through and was, like, where does this come
688 from, and asked a whole bunch of questions. Is that
689 accurate?

690 A That's essentially -- yes.

691 BY MR. EMMER.

692 Q Let's talk about Mr. Larry Schwartz. What was his
693 role in the response to the pandemic?

694 A Larry essentially played two roles. Early on, he

695 came in the middle of March, I want to say, and he was
696 sort of deputized to be the governor's point on surge
697 and flex, which was -- the hospital system in New York
698 with its fiefdoms, you know, 382 individual fiefdoms.
699 And the job of surge and flex was to unify that
700 hospital system.

701 It happened because of Elmhurst in Brooklyn. I don't
702 know if you remember that. It was a city-run hospital
703 in Brooklyn that essentially collapsed. And the
704 governor had this moment where he called a bunch of us
705 into his office and said, why am I reading about this
706 in the paper, that this hospital is collapsing in
707 Brooklyn? Because they don't talk to each other.
708 He's like, that ends today.

709 So Larry's job was essentially to get all of the
710 hospitals to start talking to each other. They came
711 up with a system whereby they reported daily how much
712 PPE they had, how many beds they had, how many
713 ventilators they had, what the intake numbers were.
714 And he made -- it's incredible what he did. He
715 basically made it one statewide hospital system, so
716 that if a call was coming in from Queens that said
717 I've got a 55-year-old woman showing symptoms, we
718 think she could have COVID, and that hospital next to
719 her didn't have the ability to take the patient, they

720 could say we can't, but go to this one. And they
721 would give that hospital a heads up that the patient
722 was being rerouted there, because they knew that they
723 had the staff and supplies to be able to deal with it.
724 So that was essentially what Larry was dealing with in
725 the first wave of COVID. He left at some point over
726 the summer, came back as we were preparing to do the
727 vaccine distribution, and he became sort of the
728 vaccine czar. And his job was to make sure that the
729 vaccines that we were getting provided from the
730 federal government were getting to the people, that
731 we've sort of prioritized how they should go, nursing
732 home patients first, health care workers, police,
733 fire, school teachers, on down, to be able to get
734 people vaccinated and get things reopened. So those
735 were his two roles.

736 Q Did you ever discuss the March 25th order with
737 Mr. Schwartz?

738 A Not that I recall.

739 Q And I believe you would have answered this in your
740 previous questions, but for the record, you never
741 discussed the origin of the order with Mr. Schwartz?

742 A Not that I recall.

743 Q And just really quick, is it true that Mr. Schwartz
744 lived at the mansion during the pandemic?

745 A It is.

746 Q Did anyone else live at the mansion?

747 A Yes.

748 Q Who else?

749 A I lived at the mansion, Stephanie Benton lived at
750 the mansion, Matt Cuomo, who was the governor's
751 cousin, who is a brilliant lawyer who volunteered for
752 the pandemic lived at the mansion. The governor's
753 three children moved in, one of the daughter's
754 boyfriends moved in. It was like basically our pod of
755 people.

756 Q And was there a reason? Was that just quarantining
757 and making sure the governor wasn't --

758 A We tried to limit -- there was an instance, I
759 believe it was on March 20th, where Caitlin, and I'm
760 not going to use her last name for HIPAA purposes, but
761 a person in the office got COVID, and there was a big
762 scare.

763 And, like, overnight, we changed the protocols at the
764 office, because the fear was that if the governor got
765 COVID or any of us, the senior staff, got COVID, that
766 it could simply hamper our state's response. And so
767 only certain people were allowed to come in to see the
768 governor in person. And you've got to remember, there
769 was, like, no testing at this point.

770 Stephanie Benton had been living in Saratoga, which
771 was like a 50-minute drive from Albany. It didn't
772 make sense. Like, we were working around the clock.
773 Larry moved in because he basically resettled his life
774 from Westchester, where he lived full time, to be in
775 Albany full time, working 24/7.
776 I had been -- I lived in the city -- New York City,
777 primarily. Sorry, I know people who are not from New
778 York disdain when New York people say the city as if
779 it's the only city. I lived in New York City
780 primarily, and I had been -- I had moved up, literally
781 packed a bag for two weeks, and it sat in my apartment
782 for six months.
783 I had originally been staying with family until there
784 was a scare where my father had been in a meeting with
785 somebody who literally dropped dead three days later.
786 And there was this scare that, did my dad have COVID,
787 first and foremost? That was my personal fear. But
788 then did I have COVID and was I taking it to work with
789 me? It was clear I could no longer stay with family.
790 So it sort of evolved until, like, it became
791 essentially like a work forum, if that makes sense.
792 Q Do you recall having discussions related to the
793 March 25th order with Mr. Raske?
794 A I remember having conversations with Raske when we

795 were -- when the Department of Health was getting
796 ready to issue the July report.

797 Q Do you recall whether -- and Mr. Raske, what's his
798 background?

799 A He is the head of the trade association, the
800 Greater New York Hospital Association, which is an
801 umbrella group of all -- I don't want to say all,
802 because I'm not sure if they all opted in, but the
803 majority of the state's hospitals.

804 Q So did Mr. Raske, on behalf of the Greater New York
805 Hospital Association, ever express support for the
806 March 25th order throughout your conversations with
807 him?

808 A No, it wasn't support for the March 25th order.

809 Q So to be clear, your conversations were related
810 just to the July 6th report?

811 A Sorry, I'm just trying to answer your questions as
812 specifically as you're asking them.

813 BY MR. BENZINE.

814 Q So not support, but what did Mr. Raske say about
815 the March 25th order?

816 A He, as well as a number of other health care
817 professionals, maintained from day one that it was the
818 staff that was bringing COVID into the nursing homes.
819 And he knew that we were working -- that the

820 Department of Health was working on a report that was
821 going to be looking at this specific issue.

822 And I don't recall if he formally weighed in on the
823 report, but I know others who worked closely with him,
824 like Michael Dowling, I believe, was at the press
825 conference.

826 But it was others -- it was in the context of, this is
827 a red herring, it was the staff, everyone knows it was
828 the staff. You're seeing this in every state in the
829 country, and in every country on the globe. You know,
830 and so those were the conversations that I recall.

831 BY MR. EMMER.

832 Q You already partly answered my next question, but
833 besides the conversations about the July 6th report,
834 did you have any other conversations with Mr. Michael
835 Dowling related to the March 25th order?

836 A Very similar to what I just said with Ken. And you
837 would have to look, because my memory is failing me a
838 little bit here, but I think Michael Dowling was at
839 the press conference when Dr. Zucker released the
840 report.

841 Q And we'll discuss the report in more detail later.
842 Since January 2023, have you had any conversations
843 with any former members of the administration about
844 this Select Subcommittee's investigation?

845 Mr. Morvillo. What was the timeline? January 2023?

846 Mr. Emmer. Yes.

847 The Witness. Did I have conversations with whom?

848 BY MR. EMMER.

849 Q With any former members of the Cuomo administration
850 regarding our investigation.

851 A Yes.

852 Q Can you list the people you would have discussed
853 our investigation with?

854 Mr. Morvillo. Other than lawyers.

855 The Witness. Other than lawyers. Well --

856 MR. BENZINE.

857 Q Well, other than your lawyer.

858 A Right. I would say Rich Azzopardi, the
859 governor -- former governor, Stephanie Benton. And
860 we're saying just the Cuomo administration? Was that
861 the question?

862 Q Yeah.

863 A I think that's it. I remember -- yeah, I
864 remember -- you guys have a tendency to tweet things
865 and to leak things to the media before people actually
866 get them formally.

867 And so there was a point when you guys tweeted out
868 that you were calling in Linda, Gareth, Jim, a group
869 of people. And I picked up the phone and called Linda

870 Lacewell and just said, heads up, I don't know if you
871 saw this. Because she's in California, and in, like,
872 a totally different world than the rest of us at this
873 point, so I didn't want her to be blind-sided.

874 Q And I will say that emails with the letters go out
875 before any press goes out.

876 A Fair enough. Sometimes people don't get to their
877 inbox before they hit Twitter.

878 Q I understand.

879 BY MR. EMMER.

880 Q Have you discussed the substance of your testimony
881 today with any of them?

882 A No.

883 Q Have you had any conversations with -- scratch
884 that.

885 Have you reviewed notes of former Governor Cuomo's
886 testimony from his transcribed interview before the
887 Select Subcommittee on June 11, 2024?

888 A Only the ones you guys issued.

889 Q Has anyone discussed or described the substance of
890 former Governor's Cuomo's testimony before the Select
891 Subcommittee on June 11th, 2024 to you?

892 Mr. Morvillo. That's privileged.

893 BY MR. OSTERHUES.

894 Q Has anyone other than your counsel discussed it

895 with you?

896 A No.

897 BY MR. EMMER.

898 Q Have you had any conversations with Ms. Benton
899 since June 11, 2024?

900 A In general?

901 Mr. Morvillo. You mean substantively about the
902 governor, or do you mean any?

903 Mr. Benzine. Substantively about this investigation.

904 The Witness. No.

905 BY MR. EMMER.

906 Q Now, similar to the first prompt, I want to ask you
907 if you had any interactions with any of the following
908 institutions related to COVID-19 and nursing homes
909 between January 1st, 2020 and the present.

910 Mr. Morvillo. January 1st, 2020 to present.

911 Mr. Benzine. Yes.

912 BY MR. EMMER.

913 Q First, U.S. Centers for Medicare and Medicaid
914 Services.

915 A I'm sorry, I'm not sure I understand the question.

916 Q The question is whether you had any conversations
917 related to nursing homes and COVID-19 between January
918 1st, 2020 and present.

919 A But with these broad institutions?

920 BY MR. OSTERHUES.

921 Q With any official from these institutions.

922 A Okay.

923 BY MR. EMMER.

924 Q First, U.S. Centers for Medicare and Medicaid

925 Services.

926 A I don't recall.

927 Q U.S. Department of Health and Human Services.

928 A I don't recall.

929 Q U.S. Centers for Disease Control and Prevention.

930 A I don't recall.

931 Q The Office of the New York State Attorney General.

932 A Yes.

933 Q And to be clear, that was related to their

934 investigation into nursing homes in 2020?

935 A If you want to call it an investigation, sure.

936 BY MR. BENZINE.

937 Q That's a good segue into -- I think you had a phone

938 call with the former chief of staff to the former

939 Attorney General?

940 A Sure did.

941 Q The morning of their release?

942 A Many. We had many calls that morning.

943 Q Okay. I'm going to read one into the record.

944 A Okay.

945 Q And --

946 A This has been publicly reported, too.

947 Q Yes.

948 A Yeah.

949 Q So according to the public reporting --

950 Mr. Morvillo. You got this from the public reporting.

951 You haven't gotten it from the AG, is what you're

952 saying.

953 Mr. Benzine. Correct.

954 The Witness. Go ahead. Some of my finest work.

955 BY MR. BENZINE.

956 Q "How the fuck can you do this to us without a
957 conversation? Are you crazy? By the way, who the
958 fuck? If you actually gave a damn about the substance
959 and the facts, you would have these conversations and
960 you would sit with our commissioner and you would go
961 through the God damn numbers and you wouldn't fucking
962 blind side us with something where I don't even know
963 where the fuck you're getting your information.

964 "And, no, I don't trust your fucking pencil pushers
965 who did this, because I used to work with them, and
966 when I worked in the Attorney General's office. Don't
967 tell me that you can't do it right now and your hands
968 are fucking tied. You're a fucking liar and you
969 fucking think I'm not going to remember this, you and

970 Tish. Are you out of your fucking mind?"

971 Does that sound about right?

972 A That sounds about right.

973 Q Okay. Why did you have that phone call with the
974 Attorney General's office?

975 A So first of all, you have to remember, this is with
976 Ibrahim Khan, right, who since had to resign as being
977 sued for sexual assault and he's not the most standup
978 character. But putting that aside for a moment.

979 They called that morning to tell us they were issuing
980 this report, where they were putting out numbers and
981 saying that we had undercounted nursing home deaths by
982 approximately 50 percent. And they said that
983 they -- that there was a certain number of nursing
984 homes. And I'm blanking on it, sitting here today,
985 but let's call it 300, it was a big number. Nursing
986 homes had never had COVID positive patients until the
987 March 25th guidance was put into effect.

988 We had -- the DOH had spent -- New York State DOH had
989 spent months preparing to release the actual numbers
990 of the out-of-facility deaths, as well as looked at
991 the -- you know, the impact of the number of COVID-19
992 patients who had been discharged into nursing homes.
993 And the actual number was not 300, it was three. It
994 was astronomically wrong. And when you drilled down

995 even further, the more offensive thing was they hadn't
996 even done the homework to get the actual numbers of
997 each of the nursing homes. What they did was they
998 called, let's call it, 25 nursing homes and then they
999 extrapolated, based on those 25, and they said
1000 approximately. And this was all approximate.
1001 And they had gone that morning and handed this over to
1002 the New York Times, embargoed for let's called it
1003 10:00 a.m., and they called our office around 8:00
1004 a.m. They called our head of intergovernmental
1005 affairs. Heads up, this is coming out. It says March
1006 25th may -- may not have been impacted.
1007 And we were -- and they knew we were preparing the
1008 following week for Dr. Zucker to go appear before the
1009 legislature, where he was going to go through all of
1010 the numbers, present everything fully and
1011 transparently. It was something we had given our word
1012 to from the legislative leaders the September prior.
1013 And they knew we were doing it, and so they jumped in
1014 front of us. They were furious with us over unrelated
1015 political issues involving Bill de Blasio and the
1016 NYPD, which I am not going to bore you with. But it
1017 was a cheap political move. They were politicizing
1018 something that had weaponized real people's pain, and
1019 all of their information was incorrect. So that was

1020 what prompted that call that morning.

1021 And then subsequently, they acknowledged that what

1022 they published was wrong, and they had to revise their

1023 report, and they just dropped a little footnote in,

1024 being like, oopsy, our bad, as the Attorney General of

1025 the State of New York, we released incorrect

1026 information.

1027 So I was very heated that morning. I know, like all

1028 of us sitting in this room, politics ain't beanbag.

1029 Sometimes we get heated. I read last week that Donald

1030 Trump was screaming at the Speaker of the House,

1031 dropping F bombs every other word. My good pal, Elise

1032 Stefanik, I witnessed personally on the street

1033 screaming at Kirsten Gillibrand's finance director,

1034 Ross Offinger, using F bombs every other word.

1035 Sometimes we do these things and we regret it, because

1036 we would all like to keep our cool in the moment. But

1037 I was not cool in that moment. And I was right, and

1038 they were wrong. And I would just find it ironic if

1039 Congress would say that Tish James is anything other

1040 than a political hack, but that's a story for another

1041 day.

1042 Q That's not what I said. I just read back the

1043 transcript.

1044 Mr. Morvillo. You read back what Rebecca Traister

1045 says is the transcript.

1046 The Witness. Look, I don't doubt it. Sometimes I get
1047 hot. You know, it is what it is.

1048 BY MR. BENZINE.

1049 Q And definitely appreciate the explanation.

1050 How did the Attorney General's office know to jump out
1051 in front?

1052 A They knew because the following week was supposed
1053 to be the hearing with -- Gottfried was his name. The
1054 Assembly Senate Health Committee joint meeting. And
1055 they knew that the day before, we were scheduled to go
1056 through all the numbers with them and then publicly
1057 release them. So it was a total cheap shot.

1058 And not only a total cheap shot, and this is the thing
1059 that I think gets lost in all this. They were wrong.
1060 They were indisputably wrong. And they were playing
1061 games with numbers that we had spent months making
1062 sure that were correct and air tight, that the public
1063 was demanding and the press was demanding.

1064 And it was on a topic where real people were rightly
1065 pained. It was about people's parents and
1066 grandparents who died. So to play games like that on
1067 something like that was especially egregious.

1068 And in the conversations I had with them that morning,
1069 I said I'm not asking you to never put out this

1070 report. I'm asking you to wait, like, 24 hours and
1071 sit with our people and make sure before you unleash
1072 numbers into the world that then get reported as fact,
1073 that they're actually factual.

1074 But what I didn't know in that particular moment, but
1075 came to learn very quickly after, was they had already
1076 given it out to the press.

1077 Q And I have no idea how New York State government
1078 works, but my understanding from having done a couple
1079 of these now is that obviously the Attorney General is
1080 independently elected, but also serves as the primary
1081 lawyer for the State of New York and needs the
1082 governor's permission, or like a commission in order
1083 to do an independent investigation. Is that close?

1084 A In what context? They don't need the governor's
1085 permission to do any kind of investigation unless it's
1086 a 63-8, where it's into a specific government entity.
1087 They were not given 63-8 authority.

1088 Q That's what I was asking, is that this was into,
1089 theoretically, a specific government entity's,
1090 Department of Health numbers.

1091 A Yeah.

1092 Q And they were not given the governor -- the legal
1093 permission in order to do it?

1094 A Correct, although I am not -- what they did doesn't

1095 even qualify as an investigation. They literally
1096 called, like, 20 nursing homes and asked them numbers.
1097 And then they extrapolated statistically, based on
1098 that and projected out.

1099 And so I'm not even sure that what they did could
1100 classify as any kind of investigation, so I'm not sure
1101 they would have needed 63-8 authority in order to do
1102 what they did there.

1103 What they had originally been charged with doing was,
1104 there had been all of these complaints from families
1105 that were saying, we're calling the nursing homes, the
1106 nursing homes are not getting back to us with
1107 information about our loved ones. We were told that
1108 my grandmother is still alive, but I've since heard
1109 she died three days ago. Egregious, horrific things
1110 that I can only imagine what it would be like to be on
1111 the other end of that.

1112 We asked her to investigate that. She has MFCU under
1113 her, which is the Medicaid Control Unit -- Fraud
1114 Control Unit. So MFCU is empower to look at -- and
1115 obviously so much of nursing homes is done through
1116 Medicaid -- look at what was going on there, and if
1117 there were violations, she was empowered to hold them
1118 accountable.

1119 But instead of doing that work, she produced this

1120 political report which was provably false, which then
1121 had to be updated. And that was that.

1122 Q Thank you. I appreciate it.

1123 BY MR. EMMER.

1124 Q Continuing on with the list of whether you had
1125 conversations with entities between January 1st, 2020
1126 and the present. So moving on.

1127 The next one, the Manhattan District Attorney's
1128 Office?

1129 A No.

1130 Q The New York State Comptroller?

1131 A No.

1132 Q The New York State Assembly Judiciary Committee?

1133 A I've lost track. This is about this investigation?

1134 BY MR. BENZINE.

1135 Q Nursing homes and COVID.

1136 A Okay, no.

1137 BY MR. EMMER.

1138 Q Do I need to repeat the last?

1139 A No, no, no. I haven't been talking to people from
1140 those places since January 1 of this year.

1141 BY MR. BENZINE.

1142 Q No, this is going back to 2020.

1143 A I'm sorry.

1144 BY MR. EMMER.

1145 Q I'll repeat the prompt, and then we'll go through
1146 the last few.

1147 A Okay.

1148 Q So whether you had any interactions with any of the
1149 following institutions related to COVID-19 and nursing
1150 homes between January 1st, 2020 and present.

1151 A Okay.

1152 Q So the Manhattan District Attorney's Office?

1153 A No.

1154 Q The New York State Comptroller?

1155 A No.

1156 Q The New York State Assembly Judiciary Committee?

1157 A No.

1158 Q The U.S. Department of Justice?

1159 A No.

1160 Q Northwell Health?

1161 A Could I -- I didn't with the U.S. Department of
1162 Justice, but I know that they did an investigation and
1163 the documents were turned over, but I didn't have any.

1164 BY MR. BENZINE.

1165 Q We're just asking about you, personally.

1166 A Just to clarify for the record.

1167 BY MR. EMMER.

1168 Q Northwell Health.

1169 A Northwell Health. That would be Michael Dowling,

1170 so yes.

1171 Q McKinsey & Company?

1172 A Not that I recall.

1173 Q And then finally, already sort of answered, but the
1174 Greater New York Hospital Association?

1175 A Yes.

1176 Q And let's just focus on the Greater New York
1177 Hospital Association really quick before we move on.
1178 What was your relationship with the Greater New York
1179 Hospital Association?

1180 A I wouldn't say I had a relationship with them.
1181 They were an umbrella organization that represented
1182 private hospitals in New York. And so from time to
1183 time, we would -- I would interact with them, not
1184 really on anything that much, that I can even recall
1185 specifically until COVID. Most of their interactions
1186 would happen through the budget office.

1187 BY MR. BENZINE.

1188 Q Did you have a recusal agreement in place with
1189 Bolton-St. Johns?

1190 A Yes.

1191 Q What was it?

1192 A So in 2017, when I became secretary to the
1193 governor, rightly, there was a lot of scrutiny around
1194 the fact that my father was a lobbyist in Albany. And

1195 so we worked with JCOPE -- what was JCOPE at the time,
1196 which was the Ethics Committee. And essentially put a
1197 wall up between any of my father's clients and myself.
1198 And my father's firm took the extraordinary step of
1199 changing their profit-sharing structure, so that my
1200 father and his team, which included my brother and
1201 sister, could only financially benefit from clients
1202 they themselves served. So there was -- so they
1203 didn't touch anyone else's clients, and they couldn't
1204 make any money from anyone else's clients at the firm.
1205 And so I was recused from any of his specific clients.
1206 And in some instances, I took the extraordinary step
1207 of recusing on an entire issue area if I thought it
1208 could appear that there was a conflict. Casinos, for
1209 example, I would walk out of rooms during meetings
1210 with the legislative leadership. And so that's how
1211 the recusal worked.

1212 Despite what has been reported in the media, my father
1213 did not represent the Greater New York Hospital
1214 Association. At one point, his name was listed on a
1215 lobbying -- lobbying thing, like, pre-2017, back when
1216 the firm would just list every person at the firm
1217 under every client.

1218 But in 2017, when I became secretary, that changed.
1219 My father's name never appeared under Greater New

1220 York. So in 2017, forward, he never had anything to
1221 do with health care.

1222 Q And the recusal agreement was consistent throughout
1223 the pandemic?

1224 A Correct.

1225 BY MR. EMMER.

1226 Q And just for the record, one of -- something that's
1227 been publicly reported was Greater New York Hospital
1228 Association having a role in this immunity clause that
1229 was included in the budget. Was that something that
1230 you would have worked on?

1231 Mr. Morvillo. What immunity clause? Before you ask,
1232 I want to define.

1233 Mr. Emmer. And we can return to it later. I actually
1234 don't have it in front of me.

1235 Mr. Morvillo. Can you just give us a general
1236 description?

1237 Mr. Benzine. It was, like, immunity for hospitals and
1238 nursing homes. It was pretty much an expansion of
1239 good Samaritan laws, is how I read it.

1240 The Witness. I had nothing to do with that. But,
1241 again, and I want to make sure it's super clear for
1242 the record, I interacted with Greater New York, but it
1243 wasn't my father's client. And the Ethics Committee
1244 was aware of this, and this was something we worked

1245 out with them.

1246 Mr. Emmer. We can go off the record.

1247 (Recess.)

1248 [REDACTED] We can go back on the record.

1249 BY [REDACTED]

1250 Q Good morning, Ms. DeRosa.

1251 A Good morning.

1252 Q Thank you for your voluntary participation in
1253 today's interview. My name is [REDACTED] I am
1254 counsel with the Minority. We'll start with an
1255 exhibit.

1256 A Sure.

1257 (Minority Exhibit A was identified
1258 for the record.)

1259 BY [REDACTED]

1260 Q Exhibit A is a February 12, 2021 statement you
1261 released regarding comments you made on a February 10
1262 Zoom call with Democratic members of the state
1263 legislature.

1264 Mr. Morvillo. What year was it, 2021 or 2020?

1265 [REDACTED] The statement is February 12, 2021.

1266 Mr. Morvillo. I just didn't hear the last digit.

1267 Thank you.

1268 BY [REDACTED]

1269 Q Do you recall the February 10th Zoom call?

1270 A Yes.

1271 Q What led to that Zoom call?

1272 A So we had -- as I previously explained, we had an
1273 agreement with the legislature going back to the
1274 previous fall that once they came back to session,
1275 they had a whole list of questions that
1276 out-of-facility numbers was just one of them, but that
1277 we would get them all those answers when we came back.
1278 And they had their first legislative hearing. And
1279 when Tish jumped out in front of us with her
1280 incorrect, factually wrong report, we had to change
1281 everything very quickly.

1282 And so we told them -- I called the legislature and
1283 said, I'm really sorry, we can't wait until our
1284 previously planned meeting next week. We've got to
1285 put our issues -- we've got to put the numbers out
1286 now, which were prepared and done, so that the public
1287 is getting the right numbers in the same media cycle
1288 that the wrong numbers are coming out.

1289 And so we did that, and they were annoyed because they
1290 were like, we had a plan, you guys had a commitment,
1291 you were going to brief us the day before, and then we
1292 were going to have this open hearing. And you told us
1293 this in the fall, and now you jumped out with these
1294 numbers and our members are unhappy.

1295 So we worked it out that we would do a closed door
1296 Zoom with the legislators pretty quickly there
1297 afterwards, totally candid, fluid conversation with
1298 the senior most staff, where they could ask questions,
1299 we could give answers in advance of Dr. Zucker going
1300 and testifying, because things had gone sideways with
1301 what Tish had done. So that was what prompted that
1302 meeting.

1303 Mr. Morvillo. Tish, meaning Tish James, the Attorney
1304 General.

1305 The Witness. Yeah.

1306 BY [REDACTED]

1307 Q If you could go to page 2 of the exhibit.

1308 A Yeah.

1309 Q And the Chronology section.

1310 A Mm-hmm.

1311 Q You wrote that on August 3, Dr. Zucker testified
1312 before the state legislature regarding COVID-19 in
1313 nursing homes.

1314 We spoke to Gareth Rhodes, and he told us that at some
1315 point after that hearing, you had asked him to go to
1316 the Department of Health, which I'll call DOH, and
1317 review nursing home death data.

1318 A Yes.

1319 Q Did you do that?

1320 A Yes.

1321 Q Why?

1322 A Because one of the questions that the legislature
1323 had asked in that August 3rd hearing with Dr. Zucker
1324 was for these out-of-facility nursing home deaths.
1325 And the Department of Health, at some point in the
1326 late spring, had begun asking in their surveys for
1327 those numbers.

1328 But by a cursory review of those numbers, it was very
1329 clear that the numbers were wrong. It wasn't you
1330 thought they were wrong. They were wrong. Some
1331 nursing homes had reported every death in their
1332 facility since March 1st -- or every death out of
1333 their facility from March 1st forward.

1334 Some nursing homes had that a patient left their
1335 nursing home that day, and they predicted they were
1336 going to be dead four days later in the hospital
1337 before that date even came. Some of the nursing homes
1338 put every death outside of the facility from the prior
1339 December when we didn't even know COVID was here.

1340 So a cursory review of their out-of-facility
1341 reporting, the one thing everyone agreed on was the
1342 numbers were wrong. So we had been honest in the
1343 spring about the fact that, yes, we have asked for
1344 these numbers, but these numbers have to be audited.

1345 There was concerns around double count, there was
1346 concerns around accuracy. And the overall number was
1347 never in question.

1348 In that August 3rd hearing, the legislature really
1349 wanted that out-of-facility number. They followed up
1350 with this letter asking for the out-of-facility
1351 number. And so I asked Gareth Rhodes to go work with
1352 the Department of Health in a good-faith effort to get
1353 them the information that they were looking for, and
1354 to do a real audit and say, okay, guys, we've been
1355 under 1 percent positivity for two months, we have a
1356 lull, let's take the time to actually try to get to
1357 the bottom of this and answer these people's
1358 questions.

1359 That's what prompted it.

1360 Q Those concerns about the accuracy of the data, how
1361 did you rule out those concerns?

1362 A What I just said. When they had done -- when DOH
1363 issued -- they issued over a dozen surveys in the
1364 spring of 2020. They were poorly worded in some
1365 instances, incomplete in other instances. It was no
1366 one's fault. Everyone was doing their best on very
1367 little sleep, but ultimately, there was a point -- I
1368 don't know if it was mid-May, end of May, early June,
1369 that period all sorts of runs together.

1370 But there was a point when they asked about the
1371 out-of-facility deaths. And like, overnight, there
1372 was this data dump. And people at DOH looked at the
1373 data, spoke to Linda Lacewell and Jim Malatras, and
1374 they reported up to me exactly what I just
1375 articulated. The numbers are wrong. We don't know
1376 how high the error rate is, but there's no way that
1377 they're correct.

1378 And what we had decided, at some point subsequent to
1379 that, was at some time, we're going to go over to DOH,
1380 we're going to actually audit these. What you're
1381 looking at is not what happened in your facility,
1382 which is how the state law requires you to report
1383 deaths.

1384 We're asking for what happened after a person left the
1385 facility, which really, in order to make sure the
1386 information is correct, requires you to find out where
1387 that person went, and then see how where the person
1388 went recorded that person's death.

1389 Does that make sense? Am I making sense to you guys?

1390 Q You're describing what the law was?

1391 A No. I'm saying what the process would be in order
1392 to audit. You would have to say Greg Morvillo was a
1393 patient in my facility, Greg Morvillo left, and went
1394 to Mount Sinai. I believe on this date, Greg Morvillo

1395 died, and I believe it was a COVID death.

1396 In order to confirm that, what you would have to do is

1397 somebody would have to call Mount Sinai, find out if

1398 Greg Morvillo was, in fact, admitted to Mount Sinai.

1399 If he did, in fact, die at Mount Sinai, and what Mount

1400 Sinai recorded the cause of death to be.

1401 And this was another issue that was a complete and

1402 total debacle, which was the nursing homes, this

1403 concept of probables came up -- and I don't need to

1404 get bogged down in this.

1405 But the concept of probables came up in the spring.

1406 One of the things the nursing homes did when we asked

1407 about the out-of-facility numbers was they listed

1408 almost everyone who left their facility as a probable

1409 death in the hospital, without knowing whether or not

1410 the person had COVID.

1411 Now, the hospitals were not counting probable deaths

1412 because the hospitals at that point had testing

1413 capacity. So they weren't guessing, they were

1414 actually testing to say, Greg Morvillo died? Did he

1415 die of COVID? Give him a test. No, he died of a

1416 heart attack. It wasn't COVID at all.

1417 And the concept of probables is not amorphous, I think

1418 you died from it and therefore we're going to call it

1419 a COVID death. It was actually what was listed on the

1420 death certificate. So this is, like, real data that
1421 existed in the world, but it took legwork to try to
1422 run it all down. And so that's how we knew the
1423 information that we had been initially submitted was
1424 wrong, and that there was a need to do an audit at
1425 some point in the future.

1426 There was a lull in August, the legislature really
1427 wanted that information. And so in a good-faith
1428 effort to respond to them, I said to Gareth, who is a
1429 Harvard-trained lawyer and one of the smartest people
1430 I know, can you please go over and work with DOH, do a
1431 real audit, and come back, so that we can get these
1432 people this information.

1433 Q Back on the chronology. On August 20, you wrote
1434 about the Assembly and Senate each sent letters to
1435 DOH.

1436 A Yes.

1437 Q Did you ask Mr. Rhodes to conduct his audit before
1438 or after receiving those letters from the legislature?

1439 A I don't remember. It was all in that same time
1440 period. But the prompt of the audit was in reaction
1441 to the legislature. I don't remember if it was right
1442 after the hearing or if it was right after that letter
1443 came in, but it was because the legislature was
1444 pushing for the information.

1445 Q And on August 26th, you wrote that the DOJ sent
1446 letters to Democratic governors about COVID and
1447 fatalities in nursing homes. Do you know if you asked
1448 Mr. Rhodes to conduct his audit before or after
1449 receiving that August 26th letter?

1450 A It was before.

1451 Q Is it your understanding that Mr. Rhodes reviewed
1452 data from all roughly 613 nursing homes?

1453 A Yes, that is my understanding.

1454 Q Was your request for Mr. Rhodes to review the data
1455 in order for the administration to determine if that
1456 data could be released to the legislature?

1457 A That is correct. Not if it could be released to
1458 the legislature. I would just tweak that. Get the
1459 correct information that then could be released to the
1460 legislature, because we knew that the current dataset
1461 sitting there was wrong.

1462 Q Mr. Rhodes told us that after he started his
1463 review, it took him about a couple of days to complete
1464 it. Is that the same as your understanding?

1465 A I don't doubt Gareth's memory.

1466 Q After his review, did you speak with Mr. Rhodes
1467 about what his review found?

1468 A Yes.

1469 Q What did he tell you?

1470 A So he was really looking at a subset of about -- I
1471 want to call it 3,000 out-of-facility deaths-ish.
1472 Don't hold me to that, maybe 2800, maybe 3200, but in
1473 that range.

1474 And he came back and told me that he had flagged 600
1475 that were obviously either wrong or in need of
1476 necessary additional investigation at first blush.

1477 And again, this was a very rushed, you know, I asked
1478 him to get this, he tried to move quickly. This is
1479 what they found in a very cursory level review.

1480 And so 600 on let's call it 3,000, as I wrote in my
1481 book, is like a 20 percent error rate, maybe even
1482 higher than that at the time. And he said, this is
1483 what I found, I think we would be on okay ground to
1484 release the other ones that I think are okay from the
1485 cursory review, and hold back these ones to do
1486 additional investigation or just determine that they
1487 are, in fact, wrong. And so that's what he said.

1488 Q His review only was over the out-of-facility
1489 deaths?

1490 A We felt confident, as confident as you could during
1491 COVID dealing with nursing homes, on the in-facility
1492 deaths, which we had been reporting on a daily basis
1493 going back to April, including the probables. And
1494 this was specifically the out-of-facility deaths that

1495 he was looking at, is my memory, if I'm -- that's my
1496 memory.

1497 Q Who else was involved in this conversation between
1498 you and Mr. Rhodes?

1499 A I don't recall. Maybe Beth at a point, maybe Judy
1500 at a point.

1501 Q And this conversation with Mr. Rhodes about what
1502 was found, was that before or after receiving the
1503 August 26th DOJ letter, if you can recall?

1504 A My memory is it was prior.

1505 Q And I think earlier you were talking about your
1506 view about whether the error rate suggested that the
1507 data could or could not be released, and I think you
1508 said that maybe perhaps it needed more review. Is
1509 that a fair characterization of your testimony?

1510 A Correct.

1511 Q Did Mr. Rhodes express a view about whether or not
1512 the data should be released?

1513 A Well, that's what I just said.

1514 He said, I feel okay about this group, but I don't
1515 feel okay about this 600. I think right now we could
1516 release let's call it 1800, whatever the number is,
1517 2,000, and then hold back these 600 and either
1518 conclusively rule them out as being wrong or do
1519 additional review to see if they are right. And then

1520 over time, we can add them back in.

1521 Q What happened next after that?

1522 A The governor gave a speech at the Democratic
1523 National Convention supporting President Biden's
1524 election. The centerpiece of his speech was around
1525 COVID and Trump's terrible, disastrous ability to lead
1526 the nation through the COVID pandemic, and that when
1527 Americans were casting their ballot, they needed to
1528 consider that.

1529 Jared -- the President was furious. That night he
1530 tweeted something like 12 times at the governor and
1531 into the following wee hours of the morning. I got a
1532 furious phone call from Jared Kushner that morning.
1533 Previously, we had flown down to Washington, DC to the
1534 White House in July of 2020 to meet the President and
1535 Jared. And basically, the President's attitude was,
1536 if you stop criticizing me, I'll give you these
1537 infrastructure projects. And it was a naked quid pro
1538 quo. And we had been working on trying to get the
1539 Second Avenue subway extension, the Gateway tunnel
1540 train into La Guardia.

1541 And essentially, an agreement was reached where the
1542 governor would stop criticizing the President for his
1543 COVID management. And in return, they would
1544 fast-track those projects. And they viewed the

1545 governor's convention speech in August of 2020 as a
1546 blatant violation of that agreement. Jared called, to
1547 the extent that he raises his voice, raising his
1548 voice, said the President was furious, said the deal
1549 was off.

1550 I said very clearly back to him, we don't mix politics
1551 and government in this building. Are you telling me
1552 because of the convention speech, you're pulling your
1553 support for these major infrastructure projects? And
1554 Jared essentially hung up on me.

1555 And then within 48 hours, we find out from the New
1556 York Post that the President and DOJ were doing an
1557 investigation into New York, Michigan, New Jersey, and
1558 Pennsylvania for their nursing home admission
1559 policies, this despite the fact that there were a
1560 dozen states in the country, including Republican
1561 states, that had very similar admissions guidance all
1562 issued around the same time. They were just going
1563 after these four.

1564 And in the press release issued by the Department of
1565 Justice, he specifically praised the response of
1566 Florida and Texas.

1567 It was maybe one of the more bizarre press releases
1568 I've ever seen put out from something that is supposed
1569 to be a Department of Justice independent body that's

1570 doing things not on the politics, but on the facts.

1571 And so all of this sort of collided at once at the end

1572 of August of 2020.

1573 Q As for the -- let's say -- I think you used the

1574 number 1800 that Mr. Rhodes was comfortable with. Do

1575 you know if those numbers were ever released at that

1576 time?

1577 A So in that moment, we paused, and there was an

1578 acknowledgement amongst people that what the DOJ was

1579 doing was a highly politicized investigation, and that

1580 we had to put aside the legislature's request for this

1581 information and focus on getting back fully and

1582 accurately to the Department of Justice, which the

1583 legislature understood when we spoke to them and said

1584 this is now a different thing. We know your members

1585 want this information, we know the public wants this

1586 information, we want to get it out there, too. We

1587 have to turn our attention to dealing with this DOJ

1588 request from this highly politicized and weaponized

1589 Department of Justice.

1590 And so we set aside the legislature's request and

1591 instead turned our attention to DOJ and responded

1592 fully, truthfully, and accurately to the Department of

1593 Justice.

1594 Q I believe earlier you testified that your

1595 conversation with Mr. Rhodes following his review was
1596 before you had received the August 26th DOJ letter; is
1597 that correct?

1598 A I don't remember specifically. It was all in that
1599 same, like, two-week period. So I don't want to say
1600 something incorrect.

1601 Q As for the 600 inconsistencies or so that
1602 Mr. Rhodes found, what happened next to those?

1603 A I believe the Department of Health continued to do
1604 additional work into the fall auditing the numbers.

1605 At one point, I know that they were looking at if
1606 someone went from the hospital and died in a nursing
1607 home, is that now a nursing home death that you
1608 contribute to the nursing home numbers and not the
1609 hospital numbers?

1610 They had continued to do auditing work on the numbers
1611 into the fall, is my understanding. But the request
1612 from the legislature was put on pause while we
1613 responded to DOJ.

1614 Q How did you come to the understanding that DOJ had,
1615 in some way, continued an audit of the numbers?

1616 A The --

1617 Mr. Morvillo. You want to rephrase the question?

1618 BY [REDACTED]

1619 Q How did you come to the understanding that DOH had

1620 continued an audit into those numbers?

1621 A I remember in October of that year, there was a
1622 discussion about rerunning the numbers to say, if
1623 you're going to properly attribute them to either
1624 hospitals or nursing homes, do you have to take the
1625 numbers out of the -- if they had been a nursing home
1626 person who went to the hospital, I'm like -- you're
1627 getting what I'm saying.

1628 There was more work that was done in October. That
1629 much, I am sure. I know that separately from
1630 that -- I'm not sure what additional work was done on
1631 the 600, or ultimately, if they were ever even
1632 reported or if they were just put aside.

1633 But I know that during that time in the fall, this was
1634 the Department of Justice, you couldn't get anything
1635 wrong, they would pounce on it if you did. This was
1636 all political. And so -- and the legislature was
1637 aware and understood, and we put it aside and
1638 responded to DOJ.

1639 And the one thing I want to make super clear for the
1640 record, which I think I'm sure you guys know at this
1641 point, but I need to say it anyway. The overall
1642 number was never in question. The overall -- this is
1643 like a subset of a number of hospital -- of people
1644 that died in hospitals.

1645 And from day one, they reported the way that they were
1646 reported because New York state law dictates that when
1647 you record a death, you record it by facility in which
1648 they expired. Not to sound crass, but that's their
1649 word.

1650 [REDACTED] Just to follow up on that.

1651 BY [REDACTED]

1652 Q So after Mr. Rhodes finished his review, had his
1653 600, then the Executive Chamber COVID Task Force got
1654 diverted. Did anyone from Executive Chamber COVID
1655 Task Force continue to look at those 600 numbers at
1656 that point in time?

1657 A I don't know.

1658 Q Okay.

1659 BY [REDACTED]

1660 Q A couple minutes ago, you mentioned an October
1661 conversation. Can you tell us more about that?

1662 A So I actually wasn't part of the conversation, but
1663 I knew about it after the fact. That there was a
1664 conversation about, again, the numbers, and there was
1665 a group conversation about, if we are going to
1666 properly, really attribute these numbers, is it fair
1667 to say something is a hospital death if it was a
1668 person who came in off the street not from a nursing
1669 home, into a hospital, got COVID in the hospital, went

1670 to a nursing hospital and died, should that person be
1671 a hospital death if you're using the theory
1672 consistently.

1673 And so I know that during October, they looked at
1674 those scenarios as well while they continued to audit
1675 the numbers.

1676 Q If you know, is this the Columbus Day meeting --

1677 A Yes.

1678 Q -- that's been reported?

1679 A Yes, that's been reported in the press.

1680 Q Okay. If we could turn to the third page in the
1681 exhibit.

1682 A Mm-hmm.

1683 Q Which has a transcript of some of your comments on
1684 the February 10th Zoom call. If we could go to the
1685 third full paragraph.

1686 A Mm-hmm.

1687 Q Midway through to the sentence beginning with "We
1688 since have."

1689 A Yes.

1690 Q So in reference to a DOJ inquiry, on the February
1691 10 Zoom call you commented, "We since have come
1692 through that period. All signs point to, they are not
1693 looking at this. They dropped it. They never
1694 formally opened an investigation. They sent a letter

1695 asking a number of questions and then we satisfied
1696 those questions and it appears that they're gone. But
1697 that was how it was happening back in August."

1698 In those comments, is it correct that you are
1699 referring to the August 26th DOJ letter?

1700 A Correct. And I would just like to say all of the
1701 comments during this call were inartful at best. I
1702 wasn't testifying, I wasn't speaking to a member of
1703 the media. A lot of this is shorthand. I literally
1704 hadn't slept in a year. I was not nearly as
1705 articulate as I generally am and was -- nor was I as
1706 careful as I should have been in specific words that
1707 could later then be taken out of context. But that
1708 was the DOJ letter that I was referencing.

1709 Q Are there any specific words that you said on this
1710 call that may have been taken out of context?

1711 A Yes.

1712 Q What were those words?

1713 A The word "froze." It was -- I used it
1714 interchangeably with the word "pause." And if I could
1715 get in a time machine and do it all over again, I
1716 would have just used the word "pause," and said, we
1717 paused getting back to the legislature and set it
1718 aside.

1719 And if you look at the context of the dialogue, I

1720 actually used the words interchangeably. But froze
1721 suggested something more nefarious or like there was
1722 something that -- something other than what it was,
1723 which was that we paused the legislature's request and
1724 put it aside, so that we could deal with the hyper
1725 politicized DOJ inquiry, which we did, and which
1726 later, in July of 2021, was formally and publicly
1727 closed.

1728 Q I think that is consistent with the wording and the
1729 chronology of the statement. Does anything else come
1730 to mind about what could have been taken out of
1731 context?

1732 A That was the biggest one.

1733 Q And that August 26th letter, the requested data
1734 related to public nursing homes; is that correct?

1735 A Correct.

1736 Q And the letter requested an accounting of nursing
1737 home deaths that included out-of-facility deaths; is
1738 that correct?

1739 A Correct.

1740 Q And that letter referred to a
1741 potentially -- referred to a potential CRIPA
1742 investigation; is that correct?

1743 A Correct.

1744 Q So back to page 2 of the exhibit now. You wrote

1745 that in September 2020, the governor's office asked
1746 legislative leaders to pause their response time to
1747 letters the legislature sent on August 20 requesting
1748 information about COVID-19 in nursing homes.

1749 What can you tell us about that ask at the time you
1750 made it back in September 2020?

1751 A So it was me and it was the Office of
1752 Intergovernmental Affairs. We spoke to our
1753 counterparts and just said, quite plainly, look, guys,
1754 I know that your members want this information. It's
1755 obviously important that we get them the information
1756 that they want. They have a role to play in all of
1757 this, too.

1758 We just received this letter from Trump's DOJ going to
1759 us and four other Democratic states, again, despite
1760 the fact that a dozen states had nearly the exact same
1761 or very similar guidance. The Republican states are
1762 being left out of this. This is clearly not a
1763 fact-finding mission. This is a farce. It's a
1764 political investigation. And we can't do anything, or
1765 we don't want to do anything that could potentially
1766 give them an opening to go after us for something
1767 benign.

1768 So we need to make sure that we get -- focus our
1769 efforts and resources on getting to the bottom of the

1770 numbers they asked for, answering them fully and
1771 truthfully, and then we will come back to you guys.
1772 And they said, okay, that's fine. We're back -- they
1773 were out of session at this point. We are back in
1774 January. We want your word that you will have answers
1775 to all these questions for that first health hearing
1776 that happens in January. And we said you have our
1777 word.

1778 Q And I may be asking you to repeat yourself here,
1779 but in your mind, at the time of the ask of the
1780 legislature, what specific actions or events needed to
1781 occur before you felt that DOJ's inquiry had been
1782 dealt with?

1783 A We needed to answer their request, but at that
1784 point, it wasn't as simple as answering their
1785 question. And like those numbers were scrubbed,
1786 scrutinized. We had to make sure that what we gave
1787 them, we were 100 percent confident no one could flick
1788 anything at it. It had to be right.

1789 So they went through that process. DOH with counsel's
1790 office went through that process, answered the
1791 request. But it wasn't as simple as like, oh, that
1792 request is done, because we were anticipating
1793 follow-ups and, you know, what else would they come
1794 with, what else would they do.

1795 And then, boom, lo and behold, Jeff Clark who has
1796 since been indicted, I think lost his law license for
1797 his role in the January insurrection, put his name on
1798 a letter in October to us wanting the information on
1799 the out-of-facility deaths in the private hospitals.
1800 And, again, we learned of this from the New York Post.
1801 They called us, DOH didn't get the letter. Unlike the
1802 subcommittee who apparently does send it before they
1803 Tweet it, DOJ did not send that letter to the Health
1804 Department for four days. So we're talking October
1805 28th at, like, 8:00 at night, we get a phone call from
1806 the New York Post saying, Jeff Clark is going after
1807 you.

1808 He, by the way, had nothing to do with nursing homes,
1809 he had nothing to do with CRIPA. He was just a hack
1810 who was in there to do the political bidding of the
1811 White House. And this comes, and it was four days go
1812 by after that until they finally send the letter.
1813 Just so you guys can get an understanding of while
1814 trying to manage a once in a century pandemic, the
1815 politics that we were dealing with coming out of the
1816 Justice Department.

1817 And so, again, we get that letter and now we've got a
1818 new set of issues we've got to look at and respond to.
1819 BY ██████████

1820 Q I believe you just said October, the letter came?

1821 A Mm-hmm.

1822 Q I just want to make sure.

1823 A Yeah, it was the end of October. And the reason I
1824 remember is because it was, like, six days before the
1825 election. It was -- we were, like, coming down to the
1826 wire, and the strategy, as we understood it, was that
1827 the White House was looking for a way to deflect from
1828 its poor management of COVID by going after Democrats.
1829 And Andrew Cuomo, at that point, was the poster child
1830 for good leadership during the pandemic. And so they
1831 were going -- targeting him specifically.

1832 Gretchen Whitmer and Pennsylvania were two swing
1833 states -- you have Michigan and Pennsylvania in the
1834 mix. And then they were also really angry at Murphy,
1835 because Murphy had gotten really vocally opposed to
1836 Trump, which he played the game for a little while,
1837 too, and tamped down his criticism of Trump early on,
1838 because it was communicated to us pretty clearly that
1839 if you were criticizing Trump, you weren't going to
1840 get any federal support in terms of any help with PPE
1841 or ventilators or anything else.

1842 So he walked the line for a while, but during the
1843 summer, he started to become critical of Trump. So
1844 those were the four that were sort of in their

1845 cross-hairs. Newsom, interestingly, was in and out.

1846 They went after Newsom sometimes, sometimes they

1847 didn't.

1848 So that was what was going on. And we received the

1849 inquiry about that letter on October 28th from the New

1850 York Post, signed by Jeff Clark. But then the letter

1851 didn't show up for four days after the fact, so we

1852 didn't even know what we were answering to. But this

1853 was all happening sort of in the background of all of

1854 this.

1855 BY [REDACTED]

1856 Q I think you described the political environment at

1857 the time of all these letters. But why was it

1858 necessary to pause the response to the legislature

1859 because of those DOJ matters?

1860 A Look, in retrospect, you can say maybe you could

1861 have walked and chewed gum, but we were making the

1862 feds the priority. It's one thing to get a letter

1863 from your colleagues in the legislature who are asking

1864 a number of questions. It's another thing when DOJ is

1865 potentially opening an inquiry, civil or criminal,

1866 into you. You put the other stuff aside and you deal

1867 with DOJ, and that was the decision we made at the

1868 time.

1869 Q In your mind, what was the relationship between the

1870 legislature's letters and the DOJ's letters?

1871 A I'm sorry, can you clarify the question?

1872 Q Were other requests for information to your

1873 administration also paused in response to the DOJ's

1874 letters?

1875 A Not that I'm aware of, but they were specifically

1876 asking for the same thing or subsets of the same

1877 thing. The original letter was public nursing homes,

1878 we had to focus our energy and attention on making

1879 sure that the out-of-facility numbers were properly

1880 vetted, verified, put on the front burner. And we

1881 were deferring to the feds.

1882 Q And at the time of making the ask in September to

1883 the legislature for a pause, was a specific deadline

1884 set for a response to the legislature?

1885 A Yes.

1886 Q And when was that deadline?

1887 A The first Health Committee hearing when the

1888 legislature came back in January of 2021.

1889 Q Do you have a date in mind?

1890 A I don't remember the specific day, but that

1891 was -- that they said, my two counterparts said both

1892 to me and the head of Intergov, we'll do this, it's

1893 fine, we understand it. But we -- when they come

1894 back, and they have that first hearing, they need

1895 these answers.

1896 And we said, absolutely, and we'll do a session the
1897 day before where you can get Dr. Zucker to yourself to
1898 grill him, ask him all the questions you want, so that
1899 you feel like you have that dialogue and you have that
1900 information. And then he'll do the public hearing.

1901 But that was our word that we gave them.

1902 Q Are you sure it was in January of 2021?

1903 A It was supposed to be in January 2021. It ended up
1904 being moved to February, after Tish did what she did.
1905 Tish James, for the record.

1906 Q So on September 9th, 2020, the administration
1907 responded to DOJ with the data requested in DOJ's
1908 August 26th letter. Does that sound right?

1909 Mr. Morvillo. What date did you say?

1910 [REDACTED] September 9th, 2020.

1911 The Witness. I take you at your word.

1912 BY [REDACTED]

1913 Q Did the September request to the legislative
1914 leaders for a pause occur before or after the
1915 administration's September 9 response to DOJ?

1916 A Before. My memory is before.

1917 Q Is it correct that in July of 2021, DOJ informed
1918 the administration that it was closing the CRIPA
1919 inquiry?

1920 A That is correct.

1921 Q If DOJ ultimately closed the CRIPA inquiry in July
1922 of 2021, what led you to say six months earlier in
1923 February that, on DOJ's end, all signs point to they
1924 are not looking at this and that they dropped it?

1925 Mr. Morvillo. I'm sorry, I didn't understand the
1926 question. Can you repeat it?

1927 The Witness. I understood the question.

1928 BY [REDACTED]

1929 Q So DOJ closed the inquiry in July 2021. Six months
1930 earlier, in February 2021, Ms. DeRosa said on the
1931 February 10th Zoom call that all signs point to that
1932 the DOJ had dropped the inquiry.

1933 I'm just asking how she came to that conclusion on
1934 February 10th.

1935 A So it was an assumption. But after they had done
1936 the first round of questions and we responded to them
1937 beginning middle of September, September 9th, I don't
1938 believe we had gotten any additional questions. And
1939 so it felt sort of like we satisfied their request.
1940 They looked at it, the numbers were correct, and they
1941 didn't have anything additional.

1942 Then they hit us on October 28th with the Jeff Clark
1943 letter. And so that was, once again, sort of a live
1944 issue. But the belief internally was there's

1945 obviously no basis for this investigation, none, zero,
1946 and this is all political. And if there was some
1947 there, we would have heard about it.

1948 And then at this point, Trump is out of office, and so
1949 we assumed if something -- if they were going to try
1950 to do anything rightly or wrongly, it would have
1951 happened with Trump's DOJ because every lawyer I spoke
1952 to said the same thing.

1953 Mr. Morvillo. No, no, we're not talking about
1954 lawyers.

1955 The Witness. Sorry.

1956 The overwhelming reaction as well as from what I heard
1957 from my counterpoints in Michigan, Pennsylvania, and
1958 New Jersey was they have no clear basis for any of
1959 this. It's all obviously political.

1960 So I believed, and it was an assumption, clearly,
1961 because they didn't formally close it until July, that
1962 once Trump's henchmen were out of DOJ, it was over.

1963 BY [REDACTED]

1964 Q Also on page 2 of the exhibit, you wrote that, on
1965 October 28th, DOJ sent letters. I believe you
1966 referred to this letter from Clark, I believe?

1967 A On the October 28th? Yeah, that was from Jeff
1968 Clark, yes.

1969 Q Was this inquiry different in any way from the

1970 August 26th inquiry?

1971 A Yes.

1972 Q In what ways?

1973 A It asked for a different group. The August letter
1974 was public hospitals, which -- I'm sorry, public
1975 nursing homes, which was the basis of a potential
1976 CRIPA investigation, which at least had some
1977 legitimate basis.

1978 In reality, like, you could conceivably look at
1979 a -- go through CRIPA if it was a public facility.
1980 This one asked for private facilities, in which case,
1981 no one could come up with a legal theory whatsoever
1982 for why or how it could possibly be justified. But
1983 that was the difference. It was private nursing
1984 homes.

1985 Q Between September 9th and October 28th, now that a
1986 response had been provided to DOJ on the CRIPA
1987 inquiry, were there discussions about whether the
1988 administration could provide a response to the
1989 legislature ahead of the January 2021 deadline?

1990 A I believe after the Columbus Day conversation,
1991 which has been reported, where they were continuing to
1992 audit the numbers and look at, like, various
1993 accounting, that sometime in November, the Health
1994 Department -- and this is based on my refreshing of my

1995 recollection, based on looking back at documents. I
1996 just want to be clear on that. This is not my
1997 immediate forethought.

1998 That Dr. Zucker did a response to the legislature, I
1999 think it was sometime around Thanksgiving or
2000 something, answering the questions the legislature had
2001 asked.

2002 Q Could you explain that a little bit more,
2003 Dr. Zucker providing a response?

2004 A So the letter that came -- I'm sorry, I didn't mean
2005 to speak over you.

2006 The letter that we were responding to was a letter
2007 that came from the health chairs from the legislature.
2008 So I believe after the additional -- some additional
2009 work had been done in September and October,
2010 Dr. Zucker prepared a response to that initial August
2011 inquiry from the legislature.

2012 Is that more clear?

2013 Q And the inquiry meaning -- like, what was asked?

2014 A They had asked, like, a catalog of questions, one
2015 of which was the out-of-facility number. But they
2016 were like -- sorry, there were approximately, you
2017 know, 20 questions, let's call it.

2018 Q So Dr. Zucker provided a response to the
2019 legislature. How did you know about that?

2020 A He -- and again, this is from refreshing my memory
2021 from reading articles. I don't remember this from
2022 realtime. He apparently submitted it -- emailed it
2023 over to the chamber. I may have been a recipient on
2024 it, I may not have been a recipient on it. But he
2025 sent that over at some point. I think it was around
2026 Thanksgiving.

2027 Q What happened to that letter? Did it make its way
2028 to the legislature?

2029 A No, the plan stayed the same. We were going to get
2030 back to them in January with the hearing with the
2031 agreement that we had reached with the leaders.

2032 Q Why?

2033 A Well, I can give you the reason I believe. I don't
2034 remember, like -- I don't remember having any thought
2035 towards this in realtime. But after the Jeff Clark
2036 letter came in on October 28th, it was sort of like
2037 back to square zero, if that makes any sense.

2038 We were now in a situation where we were dealing with
2039 the Department of Justice, they had a fresh inquiry,
2040 and we needed to be responding to them. And while we
2041 did that, we were waiting on the legislature. We had
2042 every intention of keeping our word to the
2043 legislature, which was to get back to them by their
2044 first hearing when they came back and resumed session

2045 in January. But that was not our priority. Our
2046 priority was getting back to DOJ.

2047 Q The numbers that Dr. Zucker had sent in that email,
2048 were they consistent with the numbers that were
2049 ultimately provided to DOJ?

2050 A I don't remember. I'm not even sure I looked at
2051 the Dr. Zucker prepared letter at that time.

2052 Q Okay. When did the administration provide to DOJ
2053 the data requested in the October 28th letter?

2054 A I don't think we ever did.

2055 Q Why not?

2056 A Because -- you know what? I think that that's a
2057 question for counsel.

2058 Mr. Morvillo. So if there was advice given from
2059 counsel, she is not going to answer that.

2060 The Witness. That decision wasn't made by me. That
2061 decision was with counsel's office, and outside
2062 counsel dealt with DOJ. So that's a question for
2063 them. And I could be wrong. Perhaps they did, but
2064 this is the best of my recollection, but that was
2065 handled by outside counsel and counsel.

2066 BY [REDACTED]

2067 Q Did the administration provide a response letter to
2068 the October 28th DOJ letter?

2069 A I don't recall. I know there was a lot of shooting

2070 at each other in the press, but --

2071 Q Did you ever speak with Dr. Zucker about the August
2072 20 legislature letter?

2073 A I'm sure at some point, but I don't have a specific
2074 memory of it.

2075 Q Do you remember if he ever expressed to you that
2076 pausing the response time to those letters was
2077 necessary?

2078 A I'm sorry, can you rephrase the question?

2079 Q Did he ever tell you that the ask for a pause in
2080 responding to the August 20 letters was necessary in
2081 light of the DOJ letters?

2082 A I don't recall.

2083 Q Who said it was necessary to you?

2084 A Those were conversations had with counsel.

2085 Q Do you know how Dr. Zucker felt about the pause?

2086 A I don't.

2087 Q What is your understanding of how the numbers that
2088 were in the Thanksgiving letter from Dr. Zucker came
2089 to be verified as accurate?

2090 A I can't speak specifically to the numbers in that
2091 letter, because as I said to you, I'm not sure I ever
2092 even opened that letter. I can tell you that the way
2093 they audited the numbers was that they would go
2094 through -- and I say they, which I know is a

2095 frustrating term -- but I know it was some combination
2096 of people of DOH, and I know Gareth Rhodes was
2097 involved in some points and not involved in other
2098 points.

2099 But essentially, when the data was initially entered
2100 into HRS, I think it was HRS. There are a few
2101 different surveys, but one of them was HRS. It was
2102 done -- it was done by initial, not by names. And so
2103 they would put into -- I'm sorry.

2104 Mr. Benzine. You can keep answering. When you exert
2105 a privilege, please exert the privilege. Don't just
2106 say it was a conversation with counsel. Actually
2107 assert the privilege.

2108 Mr. Morvillo. I do this my way.

2109 The Witness. Sorry about that.

2110 Mr. Benzine. No problem.

2111 The Witness. They entered it by initial. So for
2112 HIPAA purposes, if Greg Morvillo died, it would go in
2113 GM, and then some sort of identifying detail. I don't
2114 know if it was DOB or what.

2115 But that was -- so they would have to go through and
2116 then track that against what was put into the hospital
2117 system. And in some instances where the nursing homes
2118 were putting in what they believed to be probable
2119 deaths in hospitals, you actually had to go and pull

2120 the death certificate to see if that was what was
2121 actually listed as cause of death, and I believe 95
2122 percent of the time it was not.

2123 So I am pretty sure, although I was not directly
2124 involved in this process, much of the error rate came
2125 from those reported probables out of facility, which
2126 because the hospitals were doing the testing and were
2127 not recording as probables because they knew one way
2128 or another, that's where much of the error in that
2129 number came from.

2130 But it was a process. They had to track down a human
2131 being attached to initials based on numbers. And mind
2132 you, this is all -- and I know sitting here today, we
2133 forget. But this was while we were trying to get kids
2134 back in school, while we were trying to stand up a
2135 vaccine program, while we were still dealing with the
2136 second wave that was coming.

2137 And there was actually an article I read recently
2138 while I was prepping for this and taking a trip down
2139 memory lane, where all the nursing homes were
2140 complaining about the amount of data we were asking
2141 them to try to report in realtime, and how of course
2142 the error rates were high, and how the questions were
2143 poorly written.

2144 So, like, there was baked into all of this an error

2145 rate. And the thing that mattered when we were
2146 putting out numbers, in general, but specifically when
2147 you're answering a requests coming from DOJ is that
2148 they are right. It has to be right.

2149 BY [REDACTED]

2150 Q That audit you've been mentioning, do you know who
2151 was involved in running that audit?

2152 A I'm not sure who at DOH. Gareth was my point
2153 person in August when I asked him to go over and work
2154 with them on it. But I don't know who he specifically
2155 worked with, and I don't know who was working on it
2156 afterwards.

2157 Q Do you know if any members of the Executive Chamber
2158 or the COVID Task Force were working on the audit?

2159 A I don't think so. At that point, Jim Malatras was
2160 gone. He was the head of the SUNY system. Linda had
2161 returned to her role at DFS. Larry Schwartz was back
2162 at his full-time job. So it was really at that point
2163 DOH.

2164 Q Is it correct that on the morning of February 10th,
2165 2021, the administration ultimately responded to the
2166 legislature's letters?

2167 A I will take you at your word. I don't remember
2168 the -- the date is not ingrained in my brain, but that
2169 sounds approximately correct.

2170 Q Were you involved in preparing that response?

2171 A I am sure I weighed in on that response.

2172 Q That response had an accounting of nursing home
2173 deaths that included out-of-facility deaths, correct?

2174 A Correct. Oh, is this the day Tish's report comes
2175 out?

2176 Q No, it's the date of the Zoom call.

2177 A Oh, it's the date of the Zoom call. But I think we
2178 had previously released those numbers. The date
2179 of -- the date Tish dropped her report, we released
2180 the audit. We released those numbers in the same news
2181 cycle.

2182 What we did on February 10th, the day of the Zoom
2183 call, was respond fulsomely to their whole list of
2184 questions, as I noted. It wasn't just that one
2185 question. And that was part of it.

2186 Mr. Morvillo. The "they" in that situation being the
2187 Assembly?

2188 The Witness. The legislature. It wasn't just the
2189 Assembly. It was both houses. But those numbers had
2190 been released earlier.

2191 BY [REDACTED]

2192 Q So back to the February 10th response.

2193 A Yes.

2194 Q Do you know when the administration began preparing

2195 that response?

2196 A I can't be certain. I assume it was based on the
2197 letters that Greg prepared around Thanksgiving.

2198 [REDACTED] We can go off the record.

2199 (Recess.)

2200 Mr. Emmer. We can go back on the record.

2201 BY MR. EMMER.

2202 Q So before we move on, I want to ask you some just
2203 general operational questions, how the governor's
2204 office operated, yourself.

2205 Ms. DeRosa, did you ever conduct business via personal
2206 email?

2207 A Official business via personal email?

2208 Q Correct.

2209 A I tried not to. If I did, it was incidental.

2210 Q Did you ever conduct official business via personal
2211 cell phone?

2212 A Official business via personal cell phone. I would
2213 say, yes, because we had Blackberries. I mean, this
2214 is getting into a -- it doesn't matter. Yes.

2215 Q Let's just start with a more general question. How
2216 did the governor's team typically communicate with
2217 each other?

2218 A Verbally, in person. We all tried to be in the
2219 same space when we were working, or email, or pin.

2220 Q Can you explain pin messaging for some of us who
2221 don't have Blackberries.

2222 A Sure.

2223 Mr. Morvillo. That's not cool, okay? It's like
2224 ageist against the Blackberry community here.

2225 The Witness. Pin was just a device-to-device. So you
2226 sent a message, it didn't go through a server, it
2227 would go directly from me to you. It was the most
2228 secure forum, at least at that time. I'm sure there's
2229 many more secure forums now, especially since it's
2230 outdated, of communicating.

2231 BY MR. EMMER.

2232 Q To be clear, did the governor use pin messaging as
2233 well?

2234 A Yes.

2235 Q And as far as non-verbal communication, was that
2236 typically how you would communicate with the governor?

2237 A In non-verbal, yes.

2238 BY MR. BENZINE.

2239 Q He didn't have an email or --

2240 A He did not have an email. He didn't text with us,
2241 either.

2242 BY MR. EMMER.

2243 Q Do you recall ever conducting official business by
2244 any other internal messaging app or service?

2245 A No.

2246 Q And did you have a state-issued cell phone?

2247 A Yes.

2248 Q More than one?

2249 A At a point, I had two. We were trying to

2250 transition to iPhones, and so at one point, there was,

2251 like, training wheels, like we had a Blackberry and an

2252 iPhone, and they were trying to get us to change.

2253 Q Did you have a state-issued email?

2254 A Yes.

2255 Q Did you have more than one state-issued email?

2256 A No.

2257 BY MR. BENZINE.

2258 Q Did you change emails during the pandemic?

2259 A I believe so, because -- I believe so.

2260 Q Because the governor put your email on a PowerPoint

2261 slide?

2262 A No, I -- no, I don't think, no. I went through a

2263 period of time where I had, like, legitimate stalkers.

2264 And so it was, like, in consultation with the state

2265 police that we changed my email address.

2266 BY MR. EMMER.

2267 Q Did you ever instruct anyone to conduct official

2268 business via personal email or phone?

2269 A Not that I recall.

2270 Q Did you ever instruct anyone from the
2271 administration to delete emails or other official
2272 records?

2273 A Did I ever instruct anyone to delete emails or
2274 other officials records. Only if it was something
2275 that shouldn't have been conducted on email.

2276 Mr. Emmer. At this time, I would like to introduce
2277 what will be marked as Majority Exhibit 1.

2278 (Majority Exhibit No. 1 was identified for
2279 the record.)

2280 BY MR. EMMER.

2281 Q This is an email thread.

2282 Mr. Morvillo. Just a one-pager?

2283 Mr. Emmer. Yes.

2284 BY MR. EMMER.

2285 Q This is an email thread between yourself, Linda
2286 Lacewell, Judith Mogul, Gareth Rhodes, Beth Garvey,
2287 Rich Azzopardi, and other Executive Chamber and Health
2288 Department officials. I will give you a moment to
2289 look it over.

2290 A Mm-hmm. I remember this.

2291 Q So we are focused just on your email at 8:43 a.m.,

2292 where you wrote in all caps, "DELETE THIS

2293 CHAIN - DON'T RESPOND TO IT."

2294 Why did you request that this email thread be deleted?

2295 A Because I, like a dumb-dumb, accidentally copied a
2296 reporter onto the prior chain. And so Taylor Antrim
2297 at condenast.com, I accidentally added when I expanded
2298 the chain and added assistants and other things, I
2299 accidentally added a reporter. And I didn't want
2300 someone to inadvertently respond to a chain with 30
2301 people on it and accidentally respond to a Conde Nast
2302 reporter.

2303 BY MR. BENZINE.

2304 Q Did you separately email Ms. Antrim? Taylor could
2305 go either way.

2306 A I don't remember. I don't remember if -- I don't
2307 remember.

2308 BY MR. EMMER.

2309 Q What was the administration's retention policy?

2310 A Well --

2311 Mr. Morvillo. At what point?

2312 The Witness. At what point?

2313 BY MR. BENZINE.

2314 Q During the pandemic. So January 2020 going
2315 forward?

2316 A So early on in March, as we began issuing executive
2317 orders, we pretty quickly started getting sued. And
2318 so at that time, counsel's office turned off the
2319 deletion, so literally everything during the pandemic

2320 from the time we left office was retained in email.
2321 There was nothing that was deleted.
2322 There used to be, prior to that, a 30-day auto delete.
2323 If something had been deleted in your trash, it would
2324 then be deleted from the server. But because of the
2325 litigation, and we knew pretty early on, there was
2326 going to be mountains of it, in order to be
2327 responsible, they turned that off. And so everything
2328 was retained on email during COVID.
2329 Mr. Morvillo. Like this.
2330 BY MR. EMMER.
2331 Q Well, all I'm going to say is, why that's
2332 interesting is because this was only produced by the
2333 Department of Health. We have similar emails from the
2334 Executive Chamber, but it does not include that email
2335 saying delete this chain. But we're only asking the
2336 question.
2337 Mr. Morvillo. So we can't comment on why the
2338 Executive Chamber did or didn't turn things over. We
2339 don't have access to that anymore.
2340 BY MR. OSTERHUES.
2341 Q When you said that counsel's office had issued like
2342 a litigation hold, we've heard in different
2343 interviews, there's lots of counsel obviously worked
2344 for the chamber or the administration. Was that the

2345 counsel's office that Beth Garvey was a part of?

2346 A Kumiki Gibson, who was actually technically
2347 counsel. Beth Garvey was special counsel and later
2348 promoted to counsel. She dealt primarily with
2349 litigation, so she took the extraordinary step of
2350 turning off the auto delete, so that everything was
2351 backed up to server.

2352 Q Okay.

2353 BY MR. BENZINE.

2354 Q What was the retention policy on physical papers?

2355 A If it was an official document, it had to be
2356 retained. Like, if it was a official report. There
2357 was a certain category of things. It's not every
2358 scrap of paper you write something on. But there were
2359 official documents that fell into certain categories,
2360 they had to be retained, and then put into historical
2361 records and sent over to the Department of State and
2362 museum.

2363 Q I know and agree it's not every scrap of paper you
2364 write notes on. But I know in the federal government,
2365 specifically, like the White House, if the President
2366 wrote notes on it, it gets retained and goes to the
2367 archives. Is that similar?

2368 A Nowhere near as stringent.

2369 Q Okay.

2370 A But again, I don't know how the Executive Chamber
2371 decided what to turn over to you guys. But it
2372 was -- the auto delete was turned off during COVID and
2373 everything was retained.

2374 Q Do you know if the pin messages were retained on
2375 the Blackberries?

2376 A I know that once -- once investigations started or
2377 if there was anything pertaining to active litigation,
2378 they were retained.

2379 BY MR. EMMER.

2380 Q Just to conclude this line of questioning, did the
2381 governor ever request that you delete emails or other
2382 official documents?

2383 A Not that I recall.

2384 Q Are you aware of any Executive Chamber Task Force
2385 officials deleting official documents?

2386 A I'm sorry, can you reask that question?

2387 Q Are you aware of whether any Executive Chamber Task
2388 Force officials deleted official documents?

2389 A Not that I am aware of.

2390 Q Did you, yourself, ever delete official documents
2391 or emails?

2392 A Not that -- the emails were all saved, and the
2393 documents were what they were.

2394 Q Thank you. Let's talk about the COVID Task Force.

2395 Can you briefly describe what role the Task Force
2396 played in the administration's response to the
2397 pandemic?

2398 A Sure. So there was the Department of Health, which
2399 was the driver of health policy, and then there was
2400 the COVID Task Force. The COVID Task Force primarily
2401 was to operationalize every aspect of government to
2402 deal with this unprecedented issue.

2403 For example, kids who were food insecure, but we were
2404 closing schools, had to eat lunch. The only way they
2405 would get food is if they went to school and they were
2406 provided free lunch. So you had to deal with that.

2407 We had to coordinate the National Guard going and
2408 picking up lunch from a secure facility, bringing it
2409 to the child's home, leaving it on the front door. We
2410 had to stand up testing facilities across the state.

2411 So that's an operational thing. DSHES came in and
2412 literally stood up and drivethrough testing
2413 facilities.

2414 You know, we stood up field hospitals. The Department
2415 of Labor collapsed, the unemployment system collapsed.
2416 We had to rebuild from the ground up the unemployment
2417 system.

2418 So it was two separate functions. DOH drove the
2419 health policy. The Task Force dealt with all the

2420 operational stuff that was associated with the
2421 pandemic.

2422 Q Do you recall who the members of the Task Force
2423 were?

2424 A They were mainly cabinet members. Most of the
2425 major agencies that would have been impacted were
2426 represented through their commissioners, and then some
2427 former top staff people, like Larry Schwartz, for
2428 example, who came back, Linda Lacewell, although she
2429 was on it in a dual capacity. She sort of was serving
2430 as an on-the-floor person.

2431 You know, she came back and embedded with us, but she
2432 was also the head of the superintendent in the
2433 Department of Financial Services. There were lots of
2434 insurance issues that came up during COVID, so they
2435 were doing it in a dual way.

2436 But it was often sort of misreported and misunderstood
2437 that the COVID Task Force was in some way crafting
2438 health policy. It had nothing to do with one another.
2439 That was purely operational, whereas the DOH was
2440 driving the health policy through Zucker.

2441 BY MR. BENZINE.

2442 Q When Ms. Lacewell was embedded back, was she
2443 appointed special counsel to the governor?

2444 A She was definitely special counsel to the governor,

2445 and she acted as special counsel to me. I relied on
2446 her regularly for legal advice.

2447 Q But that actually went through an appointment
2448 process?

2449 A I don't know how you guys work, but we don't really
2450 have a formal, you know, like, you're not like --

2451 Q No, so I'll give the example here. If there are
2452 staffers that are paid out of two buckets of money.

2453 A Yes.

2454 Q So you can be paid by the Speaker and paid by a
2455 committee.

2456 A That's nice that you do that.

2457 Q Well, there's still a cap on how much you can make.
2458 You can't go over the cap.

2459 Was there an agreement like that? Was she paid by DFS
2460 and by the governor's office?

2461 A No, nobody was paid -- everyone was doing multiple
2462 roles, and no one was receiving additional income for
2463 their time.

2464 Q Was there any kind of official agreement that she
2465 would serve as counsel to the governor?

2466 A I don't know that there was anything in writing.

2467 BY MR. EMMER.

2468 Q Did members of the Task Force have specific roles
2469 or areas of COVID policy that they were responsible

2470 for managing?

2471 A Sure. As I just said, for example, you know, the
2472 DSHES or the OEM -- like our OEM, they were
2473 responsible at the beginning, when we made New
2474 Rochelle a containment zone for going door to door and
2475 testing people, making sure that if something was
2476 closed, SLA had to go in and actually -- State Liquor
2477 Authority. They were represented on the Task Force.
2478 When we were reopening restaurants, and there were
2479 limitations on how many people could be inside, it was
2480 their job to go in to hand out tickets and do
2481 enforcement.

2482 So when you say COVID policy, I think of that much
2483 more broadly, in terms of all of the levers of
2484 government and how it impacted COVID, not just health
2485 policy which again was run through DOH.

2486 Q Were there any members that were responsible for
2487 managing nursing home-related issues?

2488 A Not on the Task Force, no.

2489 Q Was there anyone from the Task Force that was
2490 responsible for managing nursing home-related data?

2491 A I would say that the managing of the data, in
2492 general, was done through DOH. Linda Lacewell was
2493 sort of tasked with ensuring the quality of the data
2494 and making sure that the numbers DOH was giving to the

2495 governor to report were correct. So if that's what
2496 you mean, that's a function she played.

2497 Q Were there any members of the Task Force that had
2498 more authority to make decisions?

2499 Mr. Morvillo. More authority than what?

2500 BY MR. BENZINE.

2501 Q The others. Someone's got to make the decision.
2502 So, like, who was the decisionmaker?

2503 Mr. Morvillo. So you're asking if there was like a
2504 pyramid. Okay.

2505 The Witness. The only way that this could have worked
2506 was that people were empowered in the things that they
2507 were charged with to be able to make decisions in
2508 realtime, unless it was some massive decision like
2509 closing down the state. That obviously had to be done
2510 by the governor.

2511 So I would say that there were a lot of people who
2512 were empowered to make decisions in realtime based on
2513 their judgment and their elevated status.

2514 BY MR. EMMER.

2515 Q When we talked to Dr. Zucker this past December, he
2516 testified -- or effectively testified that, well, he
2517 was the only health care professional on the Task
2518 Force, and that he didn't have regular meetings with
2519 the governor. Do you agree with that

2520 characterization -- or his characterization?
2521 Mr. Morvillo. Just before she answers that, you're
2522 quoting -- not quoting, but you're representing
2523 something to her about someone else's testimony. It
2524 would be easier for us if you showed the testimony.
2525 But I don't want her to comment on your
2526 characterization of Dr. Zucker's testimony. I don't
2527 think that's fair to your record, I don't think it's
2528 fair to Melissa to do that.
2529 Mr. Benzine. I'll ask it.
2530 BY MR. BENZINE.
2531 Q Was Dr. Zucker the only medical doctor on the Task
2532 Force?
2533 A I don't know.
2534 Q Did Dr. Zucker have regular meetings with the
2535 governor during the pandemic?
2536 A On a daily basis.
2537 Q Were you a part of those meetings?
2538 A Yes.
2539 Q What were the contents of -- or like, was it a
2540 standard set meeting, or was it a "when things came
2541 up" kind of meeting?
2542 A It was both. But the standard set meeting
2543 certainly on an every day. As everybody around the
2544 table probably remembers, we did COVID briefings at

2545 11:30. And we would do a meeting for approximately an
2546 hour prior to those briefings that included me and
2547 Dr. Zucker 99 percent of the time.

2548 There were a few days when Dr. Zucker needed to be
2549 home with his family that he couldn't be there, but I
2550 would say 99 percent of the time, Dr. Zucker and I
2551 were always in the room, and then some iteration of
2552 Jim Malatras, Beth Garvey, Gareth Rhodes, whomever
2553 else was sort of plugged into that day's material.
2554 But it was literally for an hour every morning, we
2555 would all sit around the table, talk about the numbers
2556 that came in the night before, talk about the changing
2557 information we received, any shifting guidance, any
2558 shifting circumstances, what decisions needed to be
2559 made.

2560 We would sit and go through the PowerPoint as a group,
2561 including Dr. Zucker. Everyone had an opportunity to
2562 weigh in. The governor would say, am I missing
2563 anything? Am I getting anything wrong?

2564 We would do out, do the press conference. And much
2565 like how I described the meeting after the April 20th,
2566 we would then debrief the press conference in the
2567 governor's inner office.

2568 So at least for that first 111 days, Dr. Zucker was
2569 meeting with the governor on a daily basis for an

2570 extended period of time, and everyone had the floor.

2571 Q And were those meetings prior to the press

2572 conference, like the primary preparation for the

2573 governor for that day, or did he go home with a

2574 briefing book the night before?

2575 A You imagine a world that was much more organized

2576 than the one we were dealing in.

2577 No, it was literally overnight. We would -- we would

2578 wake up, I would get the numbers at 3:30 in the

2579 morning, I would get them texted to me, and I would

2580 send -- turn around and text them to the governor,

2581 like copy/paste -- pin, excuse me, pin them to the

2582 governor. Get to the office around 6:00 a.m.

2583 And it was sort of a mad scramble for

2584 overnight -- so-and-so called from Erie County, and

2585 this came up, and we need to address the fact that

2586 people can't pay their rent because they've all been

2587 laid off. So we need to put a moratorium on rent

2588 payments, so we need to add that to the PowerPoint.

2589 Run it through legal. What does this one say? You

2590 know what I mean? It was sort of that organized chaos

2591 of the moment that could only ever happen during a

2592 once in a century pandemic.

2593 But during those meetings, it was not like, oh,

2594 according to the briefing -- there was no briefing

2595 done the night before. It was all realtime. And in
2596 those meetings, the governor, when he would do a
2597 PowerPoint, would go around the table and say, you got
2598 anything? You got anything? You got anything?
2599 Anything to add? Okay, let's go.

2600 So there was daily interactions that were substantive,
2601 not merely like a formality.

2602 Q Do you recall one of those meetings before the
2603 press briefing where the governor received a phone
2604 call from Mr. Raske?

2605 A Not specifically.

2606 Q Okay.

2607 BY MR. EMMER.

2608 Q Did the governor seek advice from outside of the
2609 government on health care-related issues?

2610 A Yes.

2611 Q As best as you can describe, who was he talking to?

2612 A You know, he's someone who wanted to hear from as
2613 many people as possible. There was this guy, I think
2614 his name was Bruce Allred, I would have to double
2615 check it, who was WHO, who came in, like, the governor
2616 developed a rapport with. He came and actually
2617 embedded in Albany with us for a period of time during
2618 the height of the pandemic.

2619 He read an op-ed in the Wall Street Journal, I

2620 remember at the end of March, where a doctor said the
2621 cure is going to be worse than the disease. Get that
2622 guy on the phone. You know, he's talking to him, why
2623 do you say this? Explain to me your rationale. He
2624 was talking to Fauci. He was talking to anyone and
2625 everyone that he could get on the phone with and ask
2626 questions, because we were building the plane while we
2627 were flying it. We were receiving very little
2628 guidance from the federal government.

2629 So we wanted to make sure that while we were making
2630 these larger than life decisions, they were as
2631 informed as they possibly could be.

2632 Q Thank you. Can you explain how Health Department
2633 guidance was developed and issued during the pandemic?

2634 A I think I explained that a little bit earlier, but
2635 I can get a little bit more granular, so -- and I know
2636 about this because of one very specific example.

2637 But from what I understand, what would happen is local
2638 health departments, or like, subsets of medical
2639 professionals, let's use the example of EMTs, would
2640 call the Department of Health and say, what do we do
2641 when we show up to somebody's house, and they're
2642 passed out on the floor? Do we give mouth to mouth
2643 when we now know that COVID is a respiratory illness?
2644 And if I do that, am I endangering myself, am I going

2645 to get sick and die?

2646 So a lot of times, what I understand, retrospectively,
2647 DOH was constantly issuing guidance in response to
2648 questions it was getting from local governments, local
2649 health departments, Greater New York Hospital
2650 Association, the EMTs, whomever it was, to answer
2651 specific questions in a way that's uniform across the
2652 state. Everyone was lost and looking for, what do I
2653 do here in this specific instance, that no one has
2654 ever dealt with before, so -- and then also, as I'm
2655 sure you guys are aware, because you've been working
2656 on this for a while, CDC, CMS, WHO, they were
2657 constantly issuing revised guidance.

2658 One day masks don't work, one day masks do work. One
2659 day everyone should wear a mask, one day no one should
2660 wear a mask. Outside doesn't matter, outside does
2661 matter. It was just constantly evolving.

2662 So it was also in response to the ever-changing
2663 information that they were getting from the federal
2664 government and other top health officials to tweak
2665 prior guidance that came out, in order to make it
2666 representative of whatever the latest best practice
2667 was. If that makes sense.

2668 Q And just because you brought it up, and I believe
2669 that you touched on this in your book, but the example

2670 you used was the do not resuscitate order.

2671 A Mm-hmm.

2672 Q And I believe the administration rescinded that
2673 pretty quickly; is that right?

2674 A Yeah.

2675 Q Did you ever figure out where that order originated
2676 from?

2677 A Exactly what I just said, it was the EMTs had asked
2678 for advice through the Department of Health, what do
2679 we do in this specific instance? And so from what I
2680 understand, DOH consulted with their federal
2681 counterparts, and they issued guidance that they
2682 believed was adhering to best practices on what you
2683 should do in that situation.

2684 Q But guidance like that one, would the Task Force
2685 have been consulted on that?

2686 A Like, everyone's got to think of the Task Force as
2687 separate. Task Force is operational. The Health
2688 Department is making the health calls, the Task Force
2689 is standing up field hospitals and closing down
2690 restaurants that shouldn't be open, and getting food
2691 insecure kid lunches. Like, two totally different
2692 things.

2693 Q I just know in your book, you write, "But our
2694 Department of Health routinely issued directives

2695 independently in consultation with members of the
2696 COVID Task Force."

2697 So that's why I ask, would the standard practice be
2698 that Department of Health would develop the guidance,
2699 run it by the Task Force, and then run it by counsel's
2700 office?

2701 A It could or it couldn't. It depended. Like,
2702 sometimes it was Zucker. Sometimes, if it was an
2703 issue area that impacted kids in schools, they would
2704 talk to whoever the representative was representing
2705 K-12. Like, it was -- that was more like an
2706 either/or. Do you know what I mean? Like they could
2707 or they couldn't. They could do it on their own, they
2708 could do it in consultation with them and run it
2709 through counsel's office.

2710 BY MR. BENZINE.

2711 Q You said earlier they issued, like, 400 pieces of
2712 guidance in -- I don't remember the period of time,
2713 but a short period of time.

2714 A Yeah.

2715 Q And we're going to get more into the March 25th
2716 order. But where I think there's some confusion is
2717 obviously Dr. Zucker's the Commissioner of the
2718 Department of Health, but he didn't know that order
2719 came out, the governor didn't know that order came

2720 out, you didn't know that order came out. Would the
2721 Deputy Commissioner, Ms. Dreslin, be empowered enough
2722 to sign off on that on her own?

2723 A Yes. The same way that I was empowered and Kelly
2724 Cummings, who was our state operations director,
2725 Robert Mujica, were empowered by the governor to make
2726 certain decisions that fell within our bailiwick.
2727 From what I understood about how Dr. Zucker ran the
2728 Department of Health, he is the top deputy, and not
2729 just including Sally, but there were a few were
2730 empowered to make those calls. Otherwise, you would
2731 reach a bottleneck where nothing would happen and
2732 nothing would get done.

2733 BY MR. EMMER.

2734 Q Are you aware of guidance ever being issued
2735 independently from the Department of Health that is
2736 without their knowledge or consultation prior to
2737 issuance?

2738 A The Department of Health?

2739 Q Yes.

2740 A No.

2741 Q It's been reported that agencies, including the
2742 Health Department, needed permission from the
2743 Executive Chamber to issue guidance. Do you know if
2744 that's true?

2745 A That's not true.

2746 Q So let's pivot to the beginning of COVID-19. When
2747 did you learn about COVID-19?

2748 A Learned about it as a concept?

2749 Q Sure.

2750 A I think I read about it in the papers. You know, I
2751 don't remember if it was the end of December or early
2752 January -- end of December 2019 or early January 2020.

2753 Q When did you learn that elderly populations were
2754 vulnerable to COVID-19?

2755 A I want to say when it was in a nursing home in
2756 Seattle. So that timeframe, end of February, early
2757 March-ish, if that sounds right.

2758 Q Can you generally describe the initial acts that
2759 the administration took to protect nursing homes?

2760 A Yes. Early on in the pandemic, I believe we did,
2761 through executive order, we banned visitation, we
2762 mandated certain levels of PPE. I think that there
2763 was a mandate around dedicated staff, isolating people
2764 who were believed to be COVID positive or have COVID
2765 symptoms. I can't recite all of them, sitting here
2766 today, but --

2767 Mr. Emmer. At this time, I would like to introduce
2768 what would be marked as Majority Exhibit 2.

2769 (Majority Exhibit No. 2 was identified

2770 for the record.)

2771 BY MR. EMMER.

2772 Q This is the nursing home guidance entitled
2773 Advisory: Hospital Discharges and Admissions to
2774 Nursing Homes, issued by the New York State Department
2775 of Health on March 25, 2020.

2776 Ms. DeRosa, do you recognize this document?

2777 A I do.

2778 Q And I know we touched on it before, but I just want
2779 to ask to make sure the record is clear. Did you play
2780 any role in the development of this guidance?

2781 A No.

2782 Q And I believe that Mitch already brought up that
2783 Dr. Zucker testified that there was a phone call that
2784 the governor received from the Greater New York
2785 Hospital Association asking him to do something about
2786 nursing home residents that the hospitals wanted to
2787 discharge back into the nursing homes.

2788 You said you didn't recall a phone call, but do you
2789 recall the Greater New York Hospital Association
2790 asking the governor to do anything similar to what was
2791 asked in that phone call?

2792 A No.

2793 Q Do you recall what the primary concern of the
2794 Greater New York Hospital Association in March 2020,

2795 what that was?

2796 A I mean, in a sentence I would say it was the
2797 collapse of the hospital system.

2798 Q Based on that, do you think it's possible that this
2799 order may have been something that the Greater New
2800 York Hospital Association would have been interested
2801 in having the administration issue?

2802 Mr. Morvillo. Wait, are you asking her to speculate
2803 on what the Greater New York Hospital Association
2804 wanted, or what she was aware of?

2805 Mr. Benzine. If she was aware of it.

2806 The Witness. I was not aware of it.

2807 BY MR. EMMER.

2808 Q And I believe you may have already been asked this,
2809 but did you ask where the order originated from?

2810 A Yes.

2811 Q And to be clear, did you receive an answer on where
2812 the order came from?

2813 A After the press conference, when I was asking
2814 questions about what the order did, where it came
2815 from, what it was based on, et cetera, I recall being
2816 told that it was drafted initially by -- I want to say
2817 it was like a midlevel person in the public health
2818 group that worked in the nursing home group, in
2819 consultation with or alongside with someone senior at

2820 DOH. I'm using Sally's name, but I don't want to
2821 commit myself to saying it was Sally. But it was
2822 someone at Sally's level that they were working with.

2823 Q And the person who told you this, was that
2824 Dr. Zucker?

2825 A I think it was Dr. Zucker. It could have been
2826 Linda Lacewell. It was someone in that -- the room
2827 was a little interchangeable.

2828 Q After the press conference, when you learned about
2829 the order, when you asked for an explanation, do you
2830 recall whether there were any discussions about
2831 potentially rescinding the order at that time?

2832 A Not --

2833 Mr. Morvillo. Are you talking about on April 20th?

2834 Mr. Emmer. April 20th or the days following.

2835 Mr. Morvillo. Just a few days, okay.

2836 The Witness. Not at that time.

2837 BY MR. EMMER.

2838 Q When did you have discussions related to rescinding
2839 the order?

2840 A You're using the word rescinding. I would use the
2841 word superseding.

2842 Q Okay. And --

2843 BY MR. BENZINE.

2844 Q When did those discussions begin?

2845 A I believe we did the superseding order on May 10th.

2846 So in the days leading up to May 10th.

2847 Q We just talked a little bit about what you know

2848 about who drafted the order, and I think what you said

2849 in the first hour was that it originated based off of

2850 March 23rd CDC or CMS guidance.

2851 A Mm-hmm.

2852 Q So was it your understanding that it was Department

2853 of Health just kind of, like, independently putting

2854 out guidance, or were they being lobbied or asked for

2855 help?

2856 A My understanding, which I think I wrote in my book,

2857 was that it was issued at a time when the

2858 hospitals -- when they were concerned about the

2859 hospitals collapsing. And in response to questions

2860 from both hospitals and nursing homes about when and

2861 under what circumstance is it appropriate to discharge

2862 nursing home patients who had been in hospitals who

2863 had either been COVID positive or suspected to be

2864 COVID positive.

2865 Q And I don't want to testify for you, so if this is

2866 kind of the wrong sequence of events, let me know.

2867 But so sometime -- we'll go like mid-March-ish, DOH is

2868 getting those questions. They're like, how do we

2869 respond to this? Pull up CDC CMS guidance

2870 from -- March 23rd was the most up to date, I think it
2871 was CDC guidance. March 13th or 14th might have been
2872 the most up-to-date CMS guidance. And then DOH
2873 drafted the March 25th advisory.

2874 A I think it was later than that.

2875 Q Okay.

2876 A And the reason I say that is in preparation for
2877 today, I looked back at some press releases and tried
2878 to refresh my memory of what was going on day-to-day,
2879 because everything evolved so quickly. It sort of
2880 went from 0 to 60 like that, and it wasn't like, oh,
2881 we've got this problem we're learning about on the
2882 15th. And ten days later, we'll issue guidance.
2883 Like, the issue of the hospitals potentially
2884 becoming -- collapsing was a result of -- I don't
2885 remember if Elmhurst predated or came after it, but
2886 Elmhurst I know was a big factor. Italy was obviously
2887 a big factor. But Johns Hopkins, Columbia University,
2888 a lot of these started putting out these projections
2889 of, if it kept going the way it was going, we were
2890 going to need 150,000 hospital beds. Statewide, we
2891 only had something like 42,000 hospital beds and we
2892 were going to become Europe.
2893 But that wasn't -- like, we didn't close down, we
2894 didn't put New York on pause until March 20th. So if

2895 you think about that chronologically, March 13th, I
2896 think we closed the schools. And it wasn't even
2897 statewide, it was just the downstate schools.
2898 And then it was, like, all of a sudden -- and by the
2899 way, three days leading up to that the teachers union
2900 was, how dare you close schools. And then three days
2901 later, they were like, close the schools. This stuff
2902 was changing so rapidly.

2903 So I don't think that this was a middle of March
2904 discussion that then metastasized ten days later. I
2905 think it was a like a March 23rd or March 22nd
2906 discussion, you know what I mean, and turned around in
2907 a couple of days.

2908 Q That's what I was asking, what the timeline here
2909 was, if it was a 48-hour turnaround, a two-week
2910 turnaround.

2911 A Yeah.

2912 Q So it sounds like, based off of what you know, not
2913 being involved in the origination of it, it was like a
2914 March 22nd, 23rd, 24th --

2915 A Yes.

2916 Q -- and then issued on the 25th.

2917 A Yes. And then something was recently reported in
2918 the press, which I had never seen before, and which
2919 there was a denial, and so I don't put a whole lot of

2920 credence in it. But a reporter recently said it was
2921 done over two days. It was done on the 23rd and 24th
2922 and issued on the 25th.

2923 Again, like, I need to take everybody back to what I
2924 said to you prior. March 20th, we shut down the
2925 state, and that was essentially when the governor said
2926 to me, Beth and Robert, go close the budget. This
2927 side of the world is going to do COVID.

2928 So that was when -- like, especially why I say, like,
2929 I'm sure it went through counsel's office for some
2930 sort of, does this fit within the four corners of the
2931 law review. Do I think Beth Garvey was negotiating a
2932 \$151 billion budget stuffed with policy, and also, why
2933 am I looking at this stuff? No way. I think it was
2934 probably a deputy of hers who it came across their
2935 desk.

2936 Q Thank you.

2937 Mr. Emmer. At this time, I would like to introduce
2938 what will be marked as Majority Exhibit 3.

2939 (Majority Exhibit No. 3 was identified
2940 for the record.)

2941 BY MR. EMMER.

2942 Q This is the Impeachment Investigation Report that
2943 was issued by the New York State Assembly Judiciary
2944 Committee on November 22nd, 2021.

2945 Ms. DeRosa, do you recognize this report?

2946 A I do.

2947 Q And I may have already asked this, but were you
2948 interviewed by the Judiciary Committee?

2949 A No, I was not.

2950 Q So I just want to direct your attention --

2951 BY MR. BENZINE.

2952 Q Were you requested to be interviewed and just not
2953 interviewed, or not even requested?

2954 A No, they requested and declined.

2955 Q You declined or they declined?

2956 A I declined.

2957 Q Does the New York State Assembly Judiciary
2958 Committee not have subpoena power?

2959 A They do not. They no longer had legal standing
2960 because the governor was out of office. So this was
2961 just basically like a taxpayer kind of fishing
2962 expedition with no legal standing.

2963 BY MR. EMMER.

2964 Q So I want to direct your attention to page 41, and
2965 we're looking at subsection G, the second paragraph.
2966 And I'll give you a moment to read it.

2967 Mr. Morvillo. Subsection G, the second paragraph?

2968 Mr. Emmer. The second paragraph.

2969 The Witness. Okay.

2970 BY MR. EMMER.

2971 Q So it says, "During testimony before the New York
2972 State Senate in August 2020, a senior Executive
2973 Chamber official, who was in the room where a senior
2974 DOH official was remotely testifying, wrote a message
2975 on a whiteboard suggesting that the senior DOH
2976 official testify, in effect, that the March 25th
2977 directive was authored by DOH and that the Executive
2978 Chamber was not involved. This statement was not
2979 true, and the senior DOH official did not make such a
2980 statement in the testimony."

2981 I'm going to refer to Dr. Zucker's testimony, but he
2982 told us in December that he was the DOH official
2983 referenced here, and that you were the senior
2984 Executive Chamber official referenced. Do you recall
2985 this occurring?

2986 A I do not recall this occurring.

2987 Q Do you recall ever instructing Dr. Zucker to
2988 testify that the March 25th directive was authored by
2989 DOH and that the Executive Chamber was not involved?

2990 A I do not recall that.

2991 BY MR. BENZINE.

2992 Q I think I can guess the answer to this question,
2993 but I'll ask it anyway. The impeachment report said
2994 that the statement that the March 25th directive was

2995 authored by DOH and the Executive Chamber was not
2996 involved was not true. Asking you to speculate a
2997 little bit, but do you think the involvement that
2998 they're referencing is the counsel review or during
2999 your --

3000 A So here's what I will say about this. The
3001 impeachment report has -- they looked at many things,
3002 and the section on sexual harassment, for example, has
3003 since been completely discredited.

3004 I put zero credibility in this report whatsoever
3005 because, by definition, it's incomplete, right? They
3006 spoke to, like, a handful of people who said they
3007 would speak to them probably because they were still
3008 working for the state and didn't have a choice or felt
3009 there was some interest in protecting themselves,
3010 whatever it was. But this is an incomplete document.
3011 The whiteboard, there was a whiteboard. I was in and
3012 out of the room. People -- multiple people, including
3013 lawyers, were putting notes up on the whiteboard as a
3014 reminder, or there's this fact, you said this wrong,
3015 make sure this is correct.

3016 If this was put up on the whiteboard, and it could
3017 have been, could it have been me? Maybe. I don't
3018 remember it. As I sat there in August, as I sat there
3019 in April, when I said, where did this come from? As I

3020 sit here today, it is my understanding that the
3021 Department of Health drafted the order -- guidance,
3022 excuse me, now I'm using your language -- drafted the
3023 guidance and were charged with implementation and
3024 oversight of it.

3025 So I don't think that that's an incorrect statement
3026 either way. If someone wants to say, oh, because it
3027 went through counsel's office review, that somehow
3028 means that, then that's their interpretation. And so
3029 he said or disagreed with it or didn't say or
3030 disagreed with it, but there was no malintent.

3031 Q And just in your, for lack of a better phraseology,
3032 after-action review of where the order came from, you
3033 didn't learn anything of any Executive Chamber
3034 involvement beyond the possibility of counsel?

3035 A Correct. Here's what I will say. No one ever said
3036 to me, the governor got a call from Ken Raske before
3037 the meeting that you were in.

3038 BY MR. EMMER.

3039 Q Thank you. So now I want to return back to the
3040 guidance itself. And we're looking at the first
3041 sentence of the fifth paragraph that is underlined.
3042 It says, "No resident shall be denied readmission or
3043 admission to the nursing home solely based on a
3044 confirmed or suspected diagnosis of COVID-19."

3045 Can you briefly explain to us how nursing homes were
3046 to interpret that requirement?

3047 A Well, I'm not a doctor and I don't play one on TV,
3048 so I would defer to medical experts on that. The way
3049 I, as a layperson, interpret it, and as it was
3050 explained to me at the Department of Health, solely on
3051 the basis was so that you didn't end up in a situation
3052 like in the '80s, where they had to do similar
3053 guidance because of the AIDS epidemic, where all of a
3054 sudden, you had hospitals who said I'm not accepting a
3055 patient because they have AIDS.

3056 So anti-discriminatory language that was stating,
3057 unequivocally, you cannot discriminate against this
3058 person solely because of their confirmed or suspected
3059 COVID status. But the word solely does not take away
3060 their legal obligation under the law to only accept
3061 patients that you can provide care for, which in the
3062 context of COVID meant a whole host of things that we
3063 discussed earlier.

3064 BY MR. BENZINE.

3065 Q It would be the isolation, quarantine?

3066 A Yes, PPE.

3067 Q Proper PPE, and other kind of medical care that
3068 nursing homes may not normally be able to have?

3069 A Correct.

3070 BY MR. EMMER.

3071 Q So the very next sentence writes, "Nursing homes
3072 are prohibited from requiring a hospitalized resident
3073 who is determined medically stable to be tested for
3074 COVID-19 prior to admission or readmission."

3075 Do you know why nursing homes would be prohibited from
3076 testing admitted and readmitted residents?

3077 A So at that time -- and again, this was what was
3078 explained to me after the fact. Because there was
3079 such little testing available, they didn't want people
3080 who were no longer sick and they knew not to be sick
3081 because there had been a certain number of days that
3082 had gone by since they had shown symptoms. And the
3083 term medically stable is not a lay term, as we may say
3084 pass it around as government people or lawyers, but is
3085 actually a term of art in the medical community. And
3086 under that, there were several different components of
3087 what it meant to be medically stable.

3088 And the concern was, if you mandated people to have to
3089 take tests or if you required people to be testing
3090 negative, and there were no tests available, you would
3091 have recovered patients in beds in hospitals where
3092 they could end up getting things like sepsis and die.
3093 Like, you never want -- as it was explained to me by
3094 the folks at DOH, you never want to keep a nursing

3095 home patient who doesn't need to be in a hospital in a
3096 hospital, because then they are susceptible of getting
3097 something else that could end up compromising them
3098 further.

3099 And so that was to address the lack of testing that
3100 was available at the time.

3101 Q And you've mentioned a few times that this language
3102 was explained to you. But when you first learned
3103 about it, just reading it, did you have any concerns
3104 with how it was drafted?

3105 A Yes.

3106 BY MR. BENZINE.

3107 Q What were they?

3108 A As a -- again, as a layperson, and if you actually
3109 look back at press conferences -- which I don't know
3110 why anyone would want to. But I never spoke about
3111 nursing homes in press conferences until after that
3112 April 20th press conference, because I sort of asked
3113 the DOH folks to give me, you know, all of the
3114 information and explain it to me 17 different ways.
3115 Because I was like, I can understand reading this, as
3116 a layperson, how it could be confusing. So I need you
3117 to explain it to me, so we can explain it to the
3118 public, and make sure it's crystal clear for health
3119 providers.

3120 And so I was concerned that if I -- which I think of
3121 myself as a somewhat intelligent human being read this
3122 and was a little bit confused, how others can be
3123 confused. That's when they explained to me, no, no,
3124 no, medically stable isn't medically stable. It has a
3125 specific meaning. And solely, solely is based on this
3126 antidiscrimination stuff from the '80s with AIDS.
3127 So the more they explained it to me, the more I
3128 understood from their perspective why it was medically
3129 sound, and why it was consistent with the guidance
3130 they were getting from the federal government, and as
3131 Olson reported Friday, in keeping with the best
3132 practices.

3133 But I was concerned it wasn't being articulated in a
3134 way that people could understand it. And so I tried
3135 to educate myself as best as I could, so that in those
3136 press conferences where Dr. Zucker, who I think is a
3137 phenomenal medical professional, but maybe wasn't
3138 always as articulate as he could have been there, I
3139 tried to step in and explain some of these things so
3140 the public would be clear.

3141 Q And I think it's the CDC guidance does define
3142 medically stable. There's two different chunks,
3143 various days or a test-out program.

3144 A Yes.

3145 Q But neither CDC nor CMS prohibited the testing
3146 prior to transfer. And as we talked about, nursing
3147 homes had both CMS regulatory duties and New York
3148 state law duties to quarantine, isolate, or otherwise
3149 not take people that they can't care for.
3150 I guess in your conversations regarding the order, was
3151 the assumption that everyone leaving the hospital was
3152 COVID contagious and should be isolated and
3153 quarantined? If you're not able to test them, how do
3154 you know what protocols to follow?

3155 A So as it was explained to me, because it was
3156 medically stable, which meant X number of days since
3157 they demonstrated symptoms, and Y number of days since
3158 recovery, that their viral load was so low that they
3159 were no longer believed to be infectious.

3160 So when you were discharging people, they were
3161 both -- they were recovered. I would never use the
3162 word healthy to describe a nursing home patient,
3163 because if you're in a nursing home, by definition,
3164 there's some issue. But that they were medically
3165 stable and that they had recovered from whatever they
3166 were there for, and -- and more importantly, they were
3167 no longer contagious.

3168 So they were being sent back to their home which had
3169 skilled nursing capabilities that are unique to that

3170 population of people, many of which suffer from things
3171 like dementia, that you're not going to get anywhere
3172 else. So it was not only appropriate, but it was the
3173 right thing to do.

3174 BY MR. EMMER.

3175 Q You just mentioned how it was explained to you
3176 that, based on the viral loads, they wouldn't be
3177 contagious. Do you know, did they review information
3178 with you that would lead you to believe that the
3179 Department of Health knew that fact on March 25th when
3180 they issued the order?

3181 A Their explanation to me was that this was based on
3182 the guidance that was put out by CDC, CMS on the 23rd.
3183 And I think also, in keeping in line with, like,
3184 infectious disease protocols that had sort of been on
3185 the books for years and developed over time with how
3186 you deal with epidemiological disease and its spread
3187 and containment.

3188 And so, I mean, again, I'm not a doctor, I was doing
3189 my best to try to take them through their paces and
3190 get explanations, so that I could understand it. I
3191 understood why people could be confused. I thought
3192 clarity was really important, and so -- but I was also
3193 trusting the doctors around me.

3194 Q Can you explain the difference between an admission

3195 and a readmission for the purposes of this document?

3196 A So my understanding is an admission is someone who
3197 had not been in a nursing home prior, had been maybe
3198 gone from home to a hospital, been treated, and then
3199 admitted for the first time to a nursing home.

3200 A readmission was someone who was in the nursing home,
3201 got COVID, went to a hospital to be treated, and then
3202 was readmitted back home. That was my understanding.

3203 Q Do you know who would have facilitated new
3204 admissions into nursing homes?

3205 A I don't.

3206 Q When you learned of the March 25th order, did you
3207 ask how many admissions and readmissions had already
3208 occurred?

3209 A Guidance. Not -- not at that point, and I don't
3210 think we knew. I think we did a survey later.

3211 BY MR. BENZINE.

3212 Q I'll point out it says it's a directive right there
3213 in the first paragraph.

3214 A I understand. But I will also say -- and this is
3215 another very specific example that's worthy of note
3216 for the record. When, at the end of March of 2020,
3217 mid-March of 2020, there were complaints that
3218 hospitals were barring women who were giving birth
3219 from having a support partner in the room with them.

3220 PPE shortages, concerns about people in the hospital
3221 that don't need to be there. DOH put out something
3222 similar to this saying, you don't have a choice, you
3223 have to let them in the room.

3224 Hospitals were essentially ripping it up and throwing
3225 it in the trash, and we learned about this on press
3226 reports and on Twitter. So I went to the governor,
3227 and the governor issued an executive order which
3228 carries the force of law and carries a penalty, and
3229 very quickly they were allowing the support people
3230 into the room.

3231 So it's just important to note. I mean, health
3232 guidance carries no weight of law. Whether it has the
3233 word directive in there, it carries no weight of law,
3234 and it certainly does not supersede the underlying law
3235 of nursing homes, which is you cannot accept a patient
3236 you cannot care for.

3237 Q Were you ever aware of a nursing home resident
3238 being discharged from a hospital and readmitted to a
3239 nursing home which wasn't their home?

3240 A Can you say that again?

3241 Q A nursing resident leaves nursing home A, goes to
3242 the hospital, is discharged to nursing home B. Were
3243 you aware of a situation like that?

3244 A No, but I'm not sure that's something that would

3245 have bubbled up to me.

3246 BY MR. EMMER.

3247 Q You said that the administration wasn't collecting
3248 data, as far as how many admissions and readmissions
3249 occurred; is that right?

3250 A I don't think at that point. I think we asked that
3251 in a retrospective survey later.

3252 Q Do you have any idea when that retrospective survey
3253 would have taken place?

3254 A I don't want to put my feet in cement on a
3255 timeline, but I think it was in May.

3256 Q When you eventually received the numbers of
3257 admissions and readmissions, were you concerned?

3258 A I didn't know what to think because, like anything,
3259 a number is what on what. Do you know what I mean?
3260 Like anything in a vacuum. But everything is context.
3261 So the question is, what does this mean? How does it
3262 impact? At what point? At what time? So those were
3263 questions.

3264 Q And I believe that you already answered this, but
3265 did you have any role in the enforcement of the March
3266 25th order?

3267 A No. Guidance, with no force of law.

3268 BY MR. BENZINE.

3269 Q It's been reported that members of the Executive

3270 Chamber would call county executives and threaten to
3271 take vaccines or PPE. Do you recall anything like
3272 that, in conjunction with the March 25th -- call it
3273 directive?

3274 A No. And I think Steve McLaughlin is a little
3275 touched in the head.

3276 Mr. Morvillo. And by the way, I'll note it says
3277 advisory in the initial box.

3278 Mr. Benzine. Someone should make sure that it's
3279 consistent throughout.

3280 BY MR. OSTERHUES.

3281 Q It also uses words like "shall" in there a couple
3282 times, too. Those are not advisory words, at least
3283 where I come from.

3284 A No, I understand that, your position. I'm just
3285 articulating the fact, which is it has no force of
3286 law. In the header, it's an advisory, and it didn't
3287 supersede its underlying responsibility under the law,
3288 which is you can't accept a nursing home patient you
3289 can't care for.

3290 BY MR. EMMER.

3291 Q And we're going to talk about the May 10th
3292 superseding event. But were there ever discussions
3293 prior to the May 10th order to maybe reissue this and
3294 provide more clarification, as far as language that

3295 was used?

3296 A The Health Department did, the same week that the
3297 governor got the question at the press conference, the
3298 following day, I believe he went out and did a whole
3299 section of his PowerPoint, making sure people
3300 understood the underlying obligation under the law,
3301 that you couldn't accept somebody who you couldn't
3302 care for.

3303 And later that week, the Department of Health issued,
3304 like, clarifying guidance saying while, like, this is
3305 this, you also have to live up to your obligation
3306 under the law. And putting in writing that their
3307 legal obligation not to take patients they couldn't
3308 care for was never superseded by any guidance that was
3309 put out.

3310 Q Well, you brought up County Executive McLaughlin
3311 earlier.

3312 A For the record, that was a joke. It was a crass
3313 joke. He takes tons of shots.

3314 Q But you do recall him refusing to abide by the
3315 March 25th order?

3316 A I don't recall it in realtime, no.

3317 Q Do you recall how the administration responded to
3318 his refusal to abide by the order?

3319 A I don't.

3320 Mr. Emmer. We can go off the record.

3321 (Recess.)

3322 [REDACTED] We can go back on the record.

3323 BY [REDACTED]

3324 Q Ms. DeRosa, in our last hour of questioning, I
3325 believe you testified that you were unaware if the
3326 administration had ever responded to DOJ's October
3327 28th inquiry; is that correct?

3328 A That's correct.

3329 Q How did you, in your mind, reconcile that the
3330 apparent purpose of the pause by the legislature -- or
3331 for the legislature -- was not being fulfilled?

3332 A I'm sorry, can you ask that question differently?

3333 Q The purpose of the pause was so that the
3334 administration could respond to DOJ's inquiries; is
3335 that correct?

3336 A Yes.

3337 Q How did you, in your mind, reconcile that that was
3338 the purpose of the pause, but apparently the purpose
3339 of the pause was not being fulfilled in responding to
3340 DOJ's inquiries?

3341 A Well, we did respond to their first round of
3342 inquiries that came in sometime in the middle of
3343 September, and then we got the subsequent letter at
3344 the end of October. I'm not saying if we did or

3345 didn't, but at that point, I was deferring to the
3346 lawyers. I don't know if you guys have ever been
3347 involved in DOJ investigations, but you do what the
3348 lawyers tell you to do.

3349 Q Did anyone raise a concern that the administration
3350 apparently was not responding to the October 28th
3351 letter?

3352 A Not to me.

3353 Q To anyone else?

3354 A Not that I am aware of.

3355 Q And switching topics to the Thanksgiving letter
3356 that apparently Dr. Zucker sent to your inbox; is that
3357 correct?

3358 A I don't know if that came to my inbox or if it was
3359 put on my desk, or how it came. But let's say for
3360 purposes of the record, he drafted something, and I
3361 assume it reached me somehow.

3362 Q Do you know if it reached anyone else?

3363 A I don't.

3364 Q Okay.

3365 [REDACTED] I'll turn it over to my colleague.

3366 BY [REDACTED]

3367 Q Good morning, Ms. DeRosa. Just as an initial
3368 matter, you may have heard reports after Governor
3369 Cuomo's interview with this committee last week that

3370 he said something to the effect of, "who cares," when
3371 discussing nursing home death data.

3372 I want to make it clear and make sure it's on the
3373 record that Select Subcommittee Democrats do care very
3374 much about nursing home data, both the families that
3375 were impacted by COVID-19 in nursing homes and in
3376 terms of the need for public reporting of public
3377 health data to be transparent.

3378 While we understand that in the early days of the
3379 COVID-19 pandemic, the New York response was frenzied
3380 by the nature of being caught off guard by an emerging
3381 public health threat, this should have been even more
3382 reason to provide data transparently to the public.
3383 Just putting some context around what we're talking
3384 about.

3385 So I am going to ask you about the Department of
3386 Health report that came out on July 6th that's been
3387 referenced a couple of times. It is titled Factors
3388 Associated with Nursing Home Infections and Fatalities
3389 in New York State During the COVID-19 Global Health
3390 Crisis, and I am going to introduce this as Minority
3391 Exhibit B.

3392 (Minority Exhibit B was identified
3393 for the record.)

3394 BY ██████████

3395 Q As an initial matter, are you familiar with this
3396 report?

3397 A Yes.

3398 Q This was the first in-depth analysis of nursing
3399 home data publicly released by DOH, so I assume
3400 multiple people at DOH were involved with pulling this
3401 report together. Is that accurate?

3402 A I assume so.

3403 Q Do you know who at the Department of Health was
3404 involved in this report?

3405 A I don't.

3406 Q Do you know of anyone at the Department of Health
3407 who was involved in this report?

3408 A Certainly Eleanor Adams, Howard Zucker, Gary
3409 Holmes, and I assume others who worked under them.

3410 Q Were people outside of the Department of Health
3411 involved in drafting or editing this report?

3412 A Yes.

3413 Q Who was that?

3414 A Jim Malatras, McKinsey. I looked at a draft and
3415 certainly provided feedback. I -- and those are the
3416 people I would say I know for sure.

3417 Q Do you know at what point in the drafting process
3418 the Department of Health shared the report with the
3419 Executive Chamber?

3420 A I don't.

3421 Q And you mentioned reviewing a draft. Was that just
3422 a one-time occurrence?

3423 A No.

3424 Q Do you know how many drafts you did review?

3425 A I don't.

3426 Q Dr. Adams told us that there were two versions of
3427 the report. One was a data driven and academic
3428 version, and then the second was a public version that
3429 was released. She did not claim responsibility for
3430 the publicly released version. Dr. Zucker gave
3431 similar testimony.

3432 Are you aware of there being two versions of the
3433 report?

3434 A I'm sorry, what are you saying, Dr. Zucker claimed
3435 that he wasn't involved in this report?

3436 Q That there was a data driven report and then the
3437 public report, and the public report, he did not claim
3438 ultimate responsibility for?

3439 A The one with his name on it that he did a press
3440 conference?

3441 Q My question for you is, are you aware of there
3442 being two versions of the report?

3443 A No.

3444 Q So the drafts you saw, were they substantially

3445 similar to what was ultimately released?

3446 A Yes.

3447 Q When you were reviewing drafts, what were you
3448 looking for? What was your role in reviewing the
3449 drafts?

3450 A Again, not dissimilar to when I was asking about
3451 the March 25th order, there's medical speak and jargon
3452 which doesn't translate to lay people, and then
3453 there's, say what you're trying to say, but say it in
3454 a way that a layperson can understand it.

3455 And so I was reading it with a skeptical eye. Number
3456 one, I was very clear that whatever they put out,
3457 whatever the Department of Health put out had to be
3458 bulletproof and stand up to scrutiny because it would
3459 be very scrutinized.

3460 So if they were going to claim certain things around
3461 certain issues, it had to be bulletproof. Otherwise,
3462 forget it. This had to be done the right way. And if
3463 they were going to explain something, explain it in a
3464 way that someone like me, who's not a doctor, could
3465 understand it.

3466 And so I would read it and ask certain questions, what
3467 does this mean? What does this mean? Are you trying
3468 to say this? It was for that kind of thing.

3469 On the scientific report, it's not my understanding

3470 that there ever was a scientific report. It's my
3471 understanding that they had talked about wanting to do
3472 one, but that it would take six, nine, 12 months to do
3473 a real peer-reviewed study in a medical journal.

3474 And at the time, we were trying to answer questions
3475 from the press about how COVID got into nursing homes,
3476 and so that was a luxury that didn't exist. And doing
3477 one, then, didn't preclude doing another one later.

3478 Q We did speak to Dr. Malatras about this report as
3479 well, and he told us about his view of his involvement
3480 in the report. He also told us about a phone call
3481 that took place on June 27th, 2020, and he said you
3482 were on this phone call as well, and that you
3483 instructed those on the call about the specific
3484 numbers to include in the report.

3485 Do you recall a June 27th, 2020 phone call that
3486 included Dr. Malatras?

3487 Mr. Morvillo. You can answer that one. You can
3488 answer whether you recall a phone call.

3489 The Witness. I will take your word for the date.

3490 There were many calls around the report, but I don't
3491 challenge that there was a call that Jim was on around
3492 that time.

3493 BY [REDACTED]

3494 Q Did you give instructions on a call about what

3495 numbers to include in the report?

3496 Mr. Morvillo. We're not going to answer that question
3497 based on attorney-client privilege. She is not going
3498 to talk about what was said in that meeting.

3499 [REDACTED] Because there were attorneys on the call?

3500 Mr. Morvillo. Correct.

3501 BY [REDACTED]

3502 Q Do you recall who else besides Dr. Malatras and
3503 yourself was on this call?

3504 Mr. Morvillo. You can answer that question.

3505 The Witness. Again, there were many calls, but -- so
3506 there was some iteration of Beth, Linda, Dr. Zucker,
3507 Jim, myself, as a nucleus. There could have been more
3508 people.

3509 BY [REDACTED]

3510 Q Did you make decisions about what would go into the
3511 report?

3512 A No.

3513 Q So when you were reviewing drafts, how would you
3514 characterize your notes on the draft?

3515 A More like murder boarding, if that makes sense.

3516 You know, you read a section and then say, this
3517 doesn't make sense to me, answer this question, answer
3518 this question, answer this question. This sentence,
3519 the way it's written, it may make sense to you medical

3520 people, but it will never translate to the press or to
3521 real people who are trying to get at what you're
3522 saying, so say it a different way, or you may want to
3523 try it a different way. It was those sorts of edits.
3524 There were two major decision points on the report,
3525 both of which I went to Dr. Zucker and asked him to
3526 make the determination on, which he did.

3527 Q When you were just listing some of the folks who
3528 may have been included in some of these phone call
3529 conversations, to me, it sounded like Dr. Zucker was
3530 the only one from the Department of Health who was
3531 involved. Is that accurate?

3532 A No, it may -- he -- again, there were many calls.
3533 Sometimes Gary Holmes was on these conversations,
3534 sometimes Eleanor Adams was on these conversations,
3535 sometimes other folks that Dr. Zucker would tag in,
3536 tag out. I'm just saying those are the people I
3537 specifically recall.

3538 Q Do you know if Governor Cuomo reviewed a draft of
3539 this report prior to it being released?

3540 A I don't remember.

3541 Q Who had the final approval on the report before it
3542 was released?

3543 A Dr. Zucker.

3544 Q Was your level of involvement with this report

3545 usual for an agency report?

3546 A It depended on the kind of agency report. Agencies
3547 issue reports all the time, some of which are
3548 statutorily mandated, some of which are important,
3549 some of which are unimportant, some of which I know is
3550 going to get a lot of scrutiny. This report was going
3551 to get a lot of scrutiny. So when they were doing it,
3552 I wanted to make sure that they were able to answer
3553 the questions fully, truthfully, and in a way that
3554 stood up to scrutiny for the press and the public.

3555 Q Let's take a look at the actual report itself. I
3556 want to turn to page 7. There's one full paragraph on
3557 page 7, and in the middle of that paragraph, it gives
3558 numbers of fatalities in nursing homes in New York and
3559 neighboring states. Here, it says that New York's
3560 fatality number was 6,432. Do you see that number?

3561 A Yes.

3562 Q And was that your understanding at the time of the
3563 total number of nursing home deaths that New York
3564 state had experienced at that point?

3565 A That was my understanding at the time of the total
3566 number of deaths in nursing homes confirmed and
3567 probable.

3568 Q And what number was not included in that 6,432?

3569 A Out-of-facility deaths that we knew were wrong and

3570 unverified.

3571 Q And was that made clear in this report that there
3572 was a difference in those numbers?

3573 A Somewhere in this report, and I haven't looked at
3574 it in a long time, I know it makes clear that it's
3575 deaths in nursing homes, because this was something
3576 that was in the New York Times and also in the
3577 Assembly report, which says specifically they were
3578 clear about the fact that it was deaths in nursing
3579 homes. Like, that was something that they credited
3580 the Department of Health with, and the New York Times
3581 also had the same.

3582 Q And why were out-of-facility deaths not included in
3583 this report?

3584 A Because the out-of-facility deaths that had been
3585 collected at that point had not been audited and we
3586 knew were wrong. We knew there was an error rate
3587 associated with them.

3588 Q So you knew that even before Gareth Rhodes had gone
3589 and gone through --

3590 A Yes.

3591 Q -- the data.

3592 A As I previously testified, when they first were
3593 dumped, and people at the Department of Health and
3594 people like Linda and others did a cursory review, and

3595 it was clear that there were problems with the
3596 numbers. And it wasn't, oh, we think they could be
3597 wrong, it's we know that they're wrong. We don't know
3598 the extent to which they're wrong, but we know they're
3599 wrong.

3600 And so that was the two decision points with
3601 Dr. Zucker. One was, what do we do with the numbers?
3602 Do we use the one we've always used up until this
3603 point that we feel confident? And confident even is
3604 like a little bit of a shaky term, because in
3605 retrospect, I'm not sure how anyone can be in that
3606 probable number.

3607 But at least confidence that these were the numbers
3608 that were given to us in the place of death where it
3609 occurred versus these numbers that we're not
3610 speculating are wrong, we know are wrong, we just
3611 don't know how wrong they are.

3612 And Dr. Zucker's response was, it doesn't matter.
3613 We're looking at a different thing. We're looking at
3614 how it walked in. And so let's use the verified
3615 numbers that we've been using, and then we'll promise
3616 to do the audit later, which he also later extensively
3617 testified about in his Assembly testimony.

3618 So if Jim said that I relayed that information to him,
3619 I don't recall. Or if it was in a privileged

3620 conversation, I don't know. But that decision and the
3621 decision about whether or not we included admissions
3622 and readmissions or just admissions were both made by
3623 Dr. Zucker.

3624 Q And were there conversations about holding off on
3625 this report until all the deaths could be verified and
3626 audited?

3627 A I don't remember. At the time, we
3628 felt -- collectively, DOH, Dr. Zucker, everyone, this
3629 question kept coming up and we really felt the need to
3630 answer to the public.

3631 As I said, the DOH had this idea of doing this medical
3632 journal, peer-reviewed, but it would take six, nine,
3633 12 months. And the decision collectively was made,
3634 let's do this now, and it doesn't preclude us from
3635 doing that down the road at some point. Doing one
3636 now, it doesn't have to be an either/or.

3637 Q Did DOH ever do that report?

3638 A No.

3639 [REDACTED] I'm going to introduce Minority Exhibit C.

3640 (Minority Exhibit C was identified
3641 for the record.)

3642 BY [REDACTED]

3643 Q This is a New York Times article from originally
3644 March 4, 2021. There's some specific sections of this

3645 article I'm going to point to, but if you want to take
3646 a moment just to look it over, you are welcome to do
3647 so.

3648 A Yep, okay.

3649 Q So the first section I want to draw our attention
3650 to is at the very beginning of the article. It reads,
3651 "Top aides to Governor Andrew M. Cuomo were alarmed:
3652 A report written by state health officials had just
3653 landed, and it included a count of how many nursing
3654 home residents in New York had died in the pandemic.
3655 "The number - more than 9,000 by that point in
3656 June - was not public, and the governor's most senior
3657 aides wanted to keep it that way. They rewrote the
3658 report to take it out, according to interviews and
3659 documents reviewed by the New York Times."

3660 So this 9,000 number that the article uses, or more
3661 than 9,000, that would be the in-facility and
3662 out-of-facility deaths combined?

3663 A I don't know what number that would be.

3664 Presumably, it would be the in-facility and
3665 in-facility probables and out-of-facility and
3666 out-of-facility probables.

3667 Q So closer to the total universe of nursing
3668 home-related deaths?

3669 A Again, that -- the out-of-facility number ended up

3670 being wrong to the tune of over 20 percent. So it
3671 included an extra universe of people that hadn't been
3672 previously reported because there were concerns about
3673 the verification of the numbers.

3674 Q Was there a reason, other than accuracy, to keep a
3675 higher number of more than 9,000 out of public
3676 reporting with this July DOH report?

3677 A No.

3678 Q Turning to the next page, the paragraph right above
3679 the picture block. It reads, "The changes sought by
3680 the governor's aides fueled bitter exchanges with
3681 health officials working on the report. The conflict
3682 punctuated an already tense and devolving relationship
3683 between Mr. Cuomo and his Health Department, one that
3684 would fuel an exodus of the state's top public health
3685 officials."

3686 Were you aware of conflicts between Governor Cuomo and
3687 the Health Department?

3688 A Was I aware of conflicts in what context?

3689 Q Any context that was happening around the time of
3690 this release of this report.

3691 A Not around the time of the release of this report,
3692 no.

3693 Q Turning to the next page, the third full paragraph
3694 down. It reads, "The aides who were involved in

3695 changing the report included Melissa DeRosa, the
3696 governor's top aide; Linda Lacewell, the head of the
3697 state's Department of Financial Services; and Jim
3698 Malatras, a former advisor to Mr. Cuomo brought back
3699 to work on the pandemic. None had public health
3700 expertise."

3701 As an initial matter, is it true that none of the
3702 three of you were public health experts?

3703 A I can't speak for Jim. I don't know about
3704 Jim's -- Jim could have some public health official
3705 type background. He is a Ph.D., he's been head of the
3706 University -- you know, SUNY in New York. I can't
3707 speak for Jim. I don't have expertise in public
3708 health, beyond what I learned in my master's. And
3709 Linda is a lawyer.

3710 Q And none were public health employees?

3711 A Correct.

3712 Q Dr. Malatras, in his interview with us, did confirm
3713 being involved with drafting the report, but as I said
3714 earlier, he said the decision about what numbers to
3715 include came from you. Ms. Lacewell also confirmed
3716 working on the report, but as she characterized it, it
3717 was what would become the report working on the
3718 numbers and the graphs. But she did say the DOH
3719 report wouldn't exist without her. And again, while

3720 she would not speak about the details of the phone
3721 call on June 27th, she did say that decisions on the
3722 numbers were made on this call, and that you were the
3723 only one with that authority.

3724 Is it accurate that you would have had the authority
3725 to direct what numbers to include in the report?

3726 A No.

3727 Q Were you the one who initially directed
3728 Dr. Malatras to become involved with the DOH process
3729 on this report?

3730 A I'm not sure I would use the word directed. I
3731 think I asked him to get involved.

3732 Q And the same for Ms. Lacewell?

3733 A I don't know that I asked Linda or if the governor
3734 asked Linda, or if just purely by the role she was
3735 playing as that sort of an intermediary with DOH that
3736 she got involved. But if she said that, I
3737 wouldn't -- if that's her recollection, I wouldn't
3738 question it.

3739 Q Would they have meetings about the report with DOH
3740 without you present?

3741 A Yes.

3742 Mr. Morvillo. Wait, who is "they"?

3743 BY [REDACTED]

3744 Q Dr. Malatras and Ms. Lacewell.

3745 A Yes. Sorry, that's who I interpreted that to be.

3746 Yes, they would.

3747 Q Was the report within Executive Chamber thought of
3748 as a DOH report or an administration report?

3749 Mr. Morvillo. Well, she can speak to how she thought
3750 it was, but not how everybody in the Chamber thought
3751 it was.

3752 BY [REDACTED]

3753 Q We'll start with that. How did you think of the
3754 report?

3755 A As a DOH report.

3756 Q Was there discussion within the Chamber of it being
3757 owned more by Executive Chamber than the Department of
3758 Health?

3759 A Not that I recall.

3760 Q After the release of the DOH report, there were a
3761 lot of media inquiries, right?

3762 A Yes.

3763 [REDACTED] I am going to introduce Minority Exhibit D.

3764 (Minority Exhibit D was identified
3765 for the record.)

3766 BY [REDACTED]

3767 Q Minority Exhibit D is an email chain from around
3768 July 9th and 10th, 2020. And you are not on these
3769 emails, so you are free to take a moment to review,

3770 but I'm going to ask some specific questions again.

3771 A Okay.

3772 Q So these emails, just for the record, are
3773 discussing how to respond to a ProPublica request
3774 regarding the DOH report. And if we look at it, I
3775 just want to point out a couple of specific lines
3776 referencing Dr. Malatras.

3777 A Okay.

3778 Q First, at the very top of the first page, so the
3779 last chronological email, it says, "Jim said he is
3780 reviewing the written answers."

3781 A Okay.

3782 Q And if we turn to the third page in the middle,
3783 there is an email from Peter Ajemian, which says,
3784 "hold on. I want Jim to review before you send."

3785 A Okay.

3786 Q And then on the fourth page, towards the bottom,
3787 there's an email from Jonah Bruno and he says,
3788 "Malatras recommendations are highlighted."

3789 A Okay.

3790 Q So in reference -- my understanding is that all of
3791 those are referring to Jim Malatras. Would that be
3792 accurate?

3793 A It appears that way.

3794 Q And again, just to confirm, Dr. Malatras was not a

3795 DOH employee in 2020?

3796 A Correct.

3797 Q He was on the COVID Task Force, though, correct?

3798 A Correct.

3799 Q So working closely with the Executive Chamber?

3800 A And DOH.

3801 Q My reading of the way people are referring to him

3802 in these emails is that he was the final authority on

3803 answering questions for the media about -- or at least

3804 for this ProPublica response about the DOH report.

3805 People are deferring to him in these emails.

3806 A Is there a question?

3807 Q Would you say that is an accurate understanding of

3808 what these emails are saying?

3809 A No.

3810 Q Would you -- how would you characterize

3811 Dr. Malatras's involvement in the response to media

3812 requests about the DOH report?

3813 A I think that given that he was involved in the DOH

3814 report and had worked on it with DOH, that they're

3815 asking him for his advice on how best to respond,

3816 because he was intimately familiar with the ins and

3817 outs of it.

3818 Q So even Jonah Bruno, who was at the Department of

3819 Health --

3820 A Mm-hmm.

3821 Q -- would be referring to somebody outside of the
3822 Department of Health for the best way to respond about
3823 the report?

3824 A Well, given that he was intimately involved in
3825 drafting the report, I don't think it's crazy that
3826 they would ask his opinion on how best to respond.
3827 But anything coming out of DOH had to be approved by
3828 DOH. Depending on how high up the issue was, it had
3829 to be approved by Zucker. If Zucker was putting his
3830 name on anything, he would line edit it.
3831 When he issued the report, he held a press conference
3832 to explain what was in the report, he line edited the
3833 PowerPoint that went with the report. He made the two
3834 major calls on the decision points about the
3835 admissions versus readmissions and the numbers, and he
3836 said flat out the numbers are irrelevant, it doesn't
3837 matter to what we're doing here. The conclusions are
3838 the same. Use the one we've been using and we'll
3839 audit it later. He testified to all of that to the
3840 Assembly.
3841 So I mean, at the end of the day, DOH -- we were all a
3842 team. So DOH could seek input and guidance from
3843 people, but DOH should not put its name on things DOH
3844 did not want to put its name on.

3845 Q Back on the first page of the exhibit, in the
3846 middle of the page, there is another email from Jonah
3847 Bruno, where he is trying to -- he's explaining that
3848 he is trying to set up an interview with ProPublica
3849 for Jim. That doesn't seem it was just the Department
3850 of Health trying to get information to answer
3851 questions. It seems like they were trying to have
3852 Dr. Malatras actually answer the questions.

3853 Mr. Morvillo. Well, wait. There's no question.

3854 BY ██████████

3855 Q So how does that square with your understanding of
3856 the relationship?

3857 Mr. Morvillo. Are you asking her to comment on an
3858 email that she didn't see that someone else is sending
3859 about something?

3860 ██████████ No, she just described a relationship and
3861 I'm asking how this squares with that. Or if it
3862 doesn't, that's fine.

3863 BY ██████████

3864 Q But how does this square with your characterization
3865 of him merely providing input for them to answer
3866 questions?

3867 A Because he was so heavily involved in the drafting
3868 of the report and Jim was very articulate. As I said
3869 earlier, Dr. Zucker was gifted in a lot of things.

3870 Articulating information to the public was not one of
3871 them, which is why oftentimes at the press
3872 conferences, others at the table had to help interpret
3873 and answer questions that were directed at him; that
3874 if they were trying to get Jim to do a background or
3875 to be able to explain to the reporter more fully to
3876 give them information about the report, that's what
3877 was going on.

3878 Q Okay. I'm going to change topics a little bit. We
3879 have spoken a little bit today about the interactions
3880 between the federal government and state governments
3881 in pandemic response. Is it true that the federal
3882 government played an important role as a partner for
3883 state governments, particularly during the early days
3884 of the pandemic?

3885 A I need you to be more specific.

3886 Q How would you describe the relationship between the
3887 federal government and the New York state government
3888 during the early days of the pandemic, so March?

3889 A March, almost nonexistent. We didn't know what to
3890 do. None of us had ever lived through anything -- and
3891 by the way, I give the federal government a lot of
3892 leeway. None of them had ever lived through anything
3893 like that, either.

3894 But the extent to which they had information they were

3895 withholding, they publicly downplayed, lied about the
3896 extent of the crisis as which we now know that they
3897 knew about it per Mark Meadow's memo and Bob
3898 Woodward's book.

3899 They didn't provide us with materials that their
3900 stockpiles were very thin. They sort of set up this
3901 Hunger Game type situation where states were competing
3902 against one another, which was just driving the price
3903 up on equipment, PPE, ventilators. It was -- it was a
3904 mess. And we would learn about things sometimes on
3905 Twitter, sometimes in the press about decisions that
3906 the President and the team were making.

3907 There was one point where Trump tried to close down
3908 New York, he was going to close off the bridges and
3909 any way to get into New York. He only backed off once
3910 it came out that it would impact the stock market
3911 negatively.

3912 To Jared's credit, you know, he was my point person,
3913 and when I would call him because I really needed
3914 something, I really felt at least in the early days,
3915 to the extent that he could help, he was trying.

3916 But a lot of our interactions with the federal
3917 government was either an absence of information,
3918 confusing information, or politics where it was
3919 literally if you don't praise my response, we are

3920 going to withhold things from you. And it was scary.
3921 I will say that as someone who was on the front lines
3922 of this thing, who literally closed the door to my
3923 office and laid on the floor and cried at the end of
3924 the day after I called the families of the health care
3925 workers who died, like it was unlike anything I ever
3926 experienced. It was unlike anything I had ever
3927 believed I would live through in my life. And as
3928 someone who spent a lifetime believing in public
3929 health and science and medicine and government, it was
3930 a real low point for this country.
3931 And I only hope that whatever this exercise turns out
3932 to be, that you guys actually spend some time talking
3933 to emergency room doctors and other people in other
3934 states who were on the front lines, because we were
3935 not prepared for that pandemic, and I am afraid that
3936 this has all become so politicized that it's going to
3937 happen again in our lifetime and we only have each
3938 other to look at and blame because we will have
3939 learned nothing.

3940 Q Had you been working in New York government during
3941 any prior public health crisis, knowing that none of
3942 them compared at all to the COVID-19 pandemic, but
3943 Zika, Ebola, anything like that?

3944 A Yes.

3945 Q During those prior public health crises, was there
3946 a better working relationship with the federal
3947 government?

3948 A Ebola certainly, although we did disagree with the
3949 Obama administration on some things during Ebola, and
3950 we worked closely with Governor Christie in New Jersey
3951 on response, because it impacted our airports in the
3952 tri-state area. But it certainly didn't smack of
3953 the -- like, while there were disagreements on public
3954 health response, it didn't have the same vitriol and
3955 politics that it did during COVID.

3956 Q Early in the pandemic response, the federal
3957 government opted to create its own COVID-19 tests
3958 instead of using testing models that had been
3959 developed in other parts of the world that were also
3960 responding to early cases of COVID-19. Ultimately,
3961 the testing assays that the CDC developed and rolled
3962 out were contaminated and contained design flaws that
3963 rendered them ineffective.

3964 How did the federal government's failure to deploy
3965 effective testing hamper state level responses to the
3966 pandemic?

3967 A When I look back and think about COVID and
3968 how -- what went wrong, like from -- like the first
3969 thing that I can think of, it was the testing. The

3970 testing was blown.
3971 Originally, the federal government controlled the
3972 tests, the states were not allowed to do our own
3973 testing. The federal government dictated who was
3974 allowed to get a test, which early on was just people
3975 that came from quote/unquote hot spots around the
3976 world that were known to have been COVID positive and
3977 test symptoms.
3978 And their inability -- A, we were the first state in
3979 the country that was allowed to get testing done.
3980 Pence was the head -- Vice President Pence was the
3981 head of the COVID Task Force for President Trump, and
3982 Governor Cuomo successfully lobbied him to grant
3983 access to New York to begin doing testing.
3984 We got the approval to start doing testing through one
3985 lab, Wadsworth, up in Albany. I think it was
3986 something like 200 tests a day when we first started.
3987 We got that approval granted on March 29th, it was a
3988 leap year -- I'm sorry, February 29th, it was a leap
3989 year. On March 1st, we had our first positive.
3990 And when I look back and think about how stupid we all
3991 were -- and when I say we all, I include Dr. Fauci, I
3992 include President Trump, I include every health
3993 official in this country. The fact that we thought,
3994 oh, we have this one positive who happens to be this

3995 woman who is a doctor coming from Iran who happens to
3996 have a fever. So we know she was in a hot spot, and
3997 we know she has a fever and that's the one positive,
3998 and we didn't think to ourselves it's everywhere?
3999 Like, we closed the airports coming from China, but we
4000 left the ones coming from Europe, the door wide open
4001 for two months, we just delayed COVID landing on the
4002 West Coast and fed it to the tri-state area.
4003 Like, that's what happened here. Fundamentally, it
4004 was a failure from the top on down. And by the way,
4005 from what I understand, Trump didn't not close the
4006 airports because he didn't want to for political
4007 purposes. His advisers didn't advise him to. At some
4008 point, these people in these executive functions have
4009 to have medical professionals to rely on and make
4010 decisions. And from what I understand, Fauci wasn't
4011 telling them, close the airports, and he said no.
4012 So there's a lot -- and I don't want to use the word
4013 blame because it shouldn't be a blame exercise. But
4014 if, like, any real retrospective has to look at all of
4015 this. The states should have been testing starting in
4016 January. The minute we knew that this was in China,
4017 we should have started testing. All the states, every
4018 lab should have been granted permission.
4019 Whatever the antigens were, whatever -- they should

4020 have been distributed as widely as possible. It's
4021 like nobody talked about it, as if because nobody was
4022 talking about it, it wasn't happening. And I think
4023 there was a lot of politics involved, I think there
4024 was a lot of arrogance involved in that, and I think
4025 that the testing, first and foremost, is what caused a
4026 million Americans to die from COVID.

4027 Maybe some of that could have been cut off if there
4028 weren't so much disinformation and distrust built into
4029 the vaccine rollout later on, because you saw the
4030 deaths in red states spike as a result of the all the
4031 misinformation that was going on there in the second
4032 and third wave.

4033 But that first wave was preventable, and that's
4034 something that everyone should think long and hard
4035 about. If we had been doing the testing in January
4036 and February, we would have known where it was, we
4037 would have understood who was susceptible, and we
4038 could have had a proper response. Instead, we were
4039 caught completely flat-footed, blind-sided, and
4040 everywhere you looked, it was politics.

4041 Q When New York did get the authority to do its own
4042 testing February 29th, starting March 1st, you just
4043 said it was about 200 tests a day?

4044 A I'm estimating, but call it that.

4045 Q That's a low number.

4046 A 19-and-a-half million people, yeah.

4047 Q How was it determined who would be tested with that
4048 limited supply?

4049 A So originally, we tried to model some of it based
4050 on what the feds were doing. So it had to be somebody
4051 who was believed to have come into contact with
4052 someone who was COVID positive, had traveled to a
4053 location that we knew had COVID present, and was
4054 demonstrating symptoms. There were so few that it had
4055 to be done in that way.

4056 So my memory may be slightly off. Don't hold me to
4057 it, but that's my memory of how we originally set the
4058 structure for who was to be tested.

4059 Q And what was your role in developing that testing
4060 program?

4061 A So at the very beginning, it was a scramble. And
4062 once we got -- once the governor got Pence to sign off
4063 on Wadsworth -- excuse me, Vice President Pence to
4064 sign off on Wadsworth, he immediately said to us, a
4065 small group of us, we need to find out how many other
4066 labs in the state, if they were granted permission,
4067 could have the capacity to do testing, because testing
4068 is going to be ground zero for this thing.

4069 So when I tell you it was me and ten senior staff on

4070 my office, everyone on the cell phones with lists of
4071 labs printed out and phone numbers, and I'll take
4072 this, I'll take this, I'll take this. If you can
4073 picture that, that's what was going on on March 2nd
4074 sitting in my office, was us individually calling
4075 labs, and saying, if we got you the materials, how
4076 many could you do? What do you have the capability to
4077 do?

4078 We talked through initially people's fears around
4079 going to hospitals and being afraid to get tested
4080 because you didn't know if you'd expose yourself to
4081 someone with COVID. So the governor had this idea of
4082 doing these drive-through COVID sites.

4083 So I worked with our state operations director and the
4084 National Guard and our OEM people and our DSHES people
4085 to set up drivethrough testing facilities around the
4086 state, so people wouldn't have to get out of their
4087 car.

4088 I don't know if you guys remember those days, but it
4089 was like the images of doctors in the HAZMAT outfits
4090 like literally through the glass taking the swab
4091 samples and putting it to the state police and the
4092 state police driving it off to be tested.

4093 So it was like an operational role at the beginning
4094 that I played in helping to get testing going.

4095 Q There have been allegations that early in the days
4096 of the pandemic, those close to Governor Cuomo
4097 received preferential access to the limited supply of
4098 COVID-19 tests that were available at that point. And
4099 while we appreciate the importance of ensuring that
4100 individuals close to the governor and other key
4101 officials have access to tests in order to minimize
4102 disruption to the continuity of government, there is a
4103 distinction between prioritizing tests for those
4104 reasons and prioritizing people for tests for personal
4105 reasons, particularly when there's a limited supply.
4106 Did you direct government employees at any point to
4107 administer COVID-19 tests to people with whom the
4108 governor had a purely personal relationship?

4109 A No.

4110 Q Are you aware of such priority testing being given
4111 to those who had a personal relationship with Governor
4112 Cuomo?

4113 A Not the way you've just explained it.

4114 Q How would you explain it?

4115 A After the fact, I learned that Chris Cuomo received
4116 testing at the end of March. He fell squarely into
4117 the same categories of the people who would have
4118 received testing. He had been exposed to COVID, he
4119 had symptoms, and he ended up being COVID positive.

4120 Also, vis-à-vis Chris, at the time we made -- we
4121 classified journalists as essential employees, and so
4122 journalists were given above and beyond access.
4123 Without using names due to HIPAA requirements,
4124 reporters at the New York Times received similar
4125 treatment, other reports at CNN received similar
4126 treatment, reporters at ABC and CBS received similar
4127 treatment.

4128 So his last name happens to be Cuomo, but he got
4129 similar treatment to other reporters in his field, and
4130 based on the same criteria that people who were
4131 receiving tests at that point were receiving them.

4132 Mr. Morvillo. You learned that when?

4133 The Witness. April of 2021. March, April of 2021,
4134 when press inquiries were coming in.

4135 BY [REDACTED]

4136 Q Speaking of press, I am going to introduce Minority
4137 Exhibit E.

4138 (Minority Exhibit E was identified
4139 for the record.)

4140 BY [REDACTED]

4141 Q This is a Washington Post article from March 29th,
4142 2021 regarding allegations of a priority testing
4143 program. I'll give you a moment to review it, but,
4144 again, I will direct your attention to specific

4145 sections.

4146 A Okay.

4147 Q So this article makes allegations that a top state
4148 physician, it doesn't name them, was sent to the
4149 Hamptons home of Governor Cuomo's brother, Chris
4150 Cuomo. And that is at the top of the second page,
4151 very top.

4152 You just described Chris Cuomo being tested. Were you
4153 aware that a state physician had gone to his home to
4154 test him?

4155 A Only as a result of the news inquiry.

4156 Q And was that following normal protocol at the time?

4157 A So again, other reporters did receive testing at
4158 their homes.

4159 I would also note for the record Democratic members of
4160 Congress requested this sort of testing, Republican
4161 members of the legislature requested this sort of
4162 testing. They also requested it for their staffs and
4163 their family members.

4164 Part of the reason -- and I want this in the
4165 record -- that the Assembly was ultimately first
4166 looking at this as part of their impeachment inquiry,
4167 but it never came to pass is because stories started
4168 to leak out about their own individual members and
4169 family members and staff members associated -- that

4170 received testing at the height of March 2020 and that
4171 includes members of Congress.

4172 So I just want to make sure everyone is aware that the
4173 administration viewed members of the media and elected
4174 officials as crucial to the response to COVID-19. And
4175 if they themselves requested testing or their family
4176 members or their staff, or their staff's family
4177 members, and it was granted, it was granted under the
4178 same circumstance the public was getting it, which is,
4179 they were either directly exposed to somebody known to
4180 have COVID or had COVID symptoms or both. But I
4181 didn't know about any of this until afterwards when
4182 the press inquiry came in.

4183 Q Sure. As I mentioned earlier, we understand the
4184 need for testing for continuity of government
4185 operations. That makes sense in a time of crisis,
4186 that you need your elected officials to be doing their
4187 jobs.

4188 A I would actually say that probably members of the
4189 legislature and Congress should have fallen lower on
4190 the list because what were they really doing as a
4191 result of the pandemic response? But, yes.

4192 Q However, this article also makes reference to
4193 Kenneth Cole, who was the governor's brother-in-law,
4194 it's on the bottom of the first page. And Kenneth

4195 Cole would not seemingly fall into any of the
4196 categories you just have said. Is there any reason
4197 that he would be part of a priority testing program?
4198 A Well, I dispute the premise of what you just said,
4199 because he could have been -- I don't know the
4200 specific circumstances surrounding Kenneth. It's
4201 inappropriate that his name was ever leaked due to
4202 HIPAA purposes. But I assume if he was being tested,
4203 it's because he was in the presence of someone known
4204 to be COVID positive.

4205 I also know that during that period of time, the
4206 governor was very concerned about his mother and would
4207 make unannounced visits to try to see her in February
4208 leading up to the COVID pandemic, and she was moving
4209 around from house to house. And after Chris was known
4210 to have been COVID positive, there was concern that
4211 others could be and if the governor was going to
4212 interface with them.

4213 But again, the standard was, if you had been exposed
4214 to somebody who was known to be COVID positive or
4215 showing symptoms yourself. And that was available to
4216 the public, writ large.

4217 Mr. Morvillo. Was there a priority testing program in
4218 place, that you're aware of?

4219 The Witness. Not one that was called a priority

4220 testing program that I was ever aware of, no.

4221 BY ██████████

4222 Q You mentioned there being -- and this is not an
4223 exact number, but around 200 tests a day at the very
4224 beginning. Were there more than 200 people a day who
4225 would fit the criteria to be tested?

4226 A Well, that's -- I'm talking the first week of
4227 March. I'm sure any report you guys do would do this
4228 homework. But I think by the end of March, we were
4229 churning out tens of thousands of tests a day. We
4230 were by the beginning of April, or late April, I know
4231 New York was doing more tests than any individual
4232 country on the globe. I mean, we ramped up in a way
4233 that was unimaginable how many tests we are doing.
4234 But by the end of March, it was not 200 tests a day.
4235 We were well into the tens of thousands I want to say.

4236 Q So at that point when the testing program was
4237 ramped up and there were thousands of tests a day,
4238 were testing sites being utilized to test people for
4239 COVID?

4240 A Yeah.

4241 Q And would anyone who needed a test be directed to
4242 those sites?

4243 A Generally speaking. Some would be directed to
4244 hospitals. In some instances, they did go to people's

4245 homes. It just depended on a case-by-case basis, and
4246 it was done in the judgment of the Department of
4247 Health.

4248 Q You mentioned not learning about the allegations of
4249 a priority testing program until after the fact. Can
4250 you please reiterate when you became aware of the
4251 allegations?

4252 A When Josh Tosi reached out. Although that's what I
4253 wrote in my book and I got a nasty phone call from a
4254 reporter from the Times Union who said, I reported it
4255 first. So it may have been when the Times Union
4256 reached out, but it was sometime in there.

4257 I remember when the requests came in, people being
4258 confused because people hadn't -- the people I was
4259 interacting with hadn't thought of anything as a
4260 quote/unquote priority anything.

4261 Q When you learned about these allegations, did you
4262 do anything to investigate whether there had, in fact,
4263 been a priority testing program?

4264 A I'm sure that I did, because I know I was part of
4265 the response to the press inquiry. But this is the
4266 particular period of time where my mind is not -- is a
4267 little bit fuzzy because there was a lot going on.
4268 There was like many press inquiries coming in every
4269 day, there were three investigations going on. I was

4270 not my usual sharp self during that point, so I can't
4271 tell you anything specific I gleaned from those
4272 conversations.

4273 Q Sure. It seems that by its nature, if a priority
4274 testing program were to exist, it would necessitate
4275 inappropriately diverting state resources and using
4276 Department of Health employees inappropriately.

4277 Did that concept concern you when you learned about
4278 it?

4279 A That's not how it was explained to me. And I don't
4280 deal with words like inappropriate. Was this against
4281 the law, was it unethical? And the answers to those
4282 questions was no. Individual judgments, I leave for
4283 other people.

4284 Q As we have talked about pretty extensively, but
4285 feel free to weigh in more, there were many failures
4286 of the federal government at the beginning of the
4287 COVID-19 pandemic. We just went over testing, but now
4288 I want to focus a little bit on PPE, the disbursement
4289 of PPE.

4290 In the early days of the pandemic, you mentioned the
4291 federal government was not coordinating PPE in a way
4292 that was helpful for the states; is that correct?

4293 A Correct.

4294 Q And this led to the states competing with each

4295 other for PPE?

4296 A Correct.

4297 Q How did this hamper the public health response in
4298 New York, including in nursing homes and other
4299 congregate care facilities?

4300 A Massively is the word. I mean, I remember the
4301 front page of the New York Post, nurses in garbage
4302 bags because there was no PPE and there was nowhere to
4303 find it.

4304 I remember being on the phone to wealthy, you know,
4305 individuals around the country who had private planes
4306 and begging them to send their planes to China to try
4307 to get some of the PPE to come because we
4308 couldn't -- we were afraid of creating a staffing
4309 shortage if all the people you were sending in to
4310 service these patients were not themselves properly
4311 protected and thereby infecting or getting infected.
4312 It was a disaster.

4313 Q There has been a great focus in the medical
4314 research community about how COVID spread throughout
4315 the country in various different communities. And one
4316 that has been focused on is nursing homes.

4317 The American Geriatric Society published an article
4318 that found the most significant and consistent
4319 predictors of skilled nursing facility outbreaks was

4320 case count and case fatality rate and larger bed size
4321 and higher SARS-Co-V-2 prevalence in the county where
4322 the nursing home is located.

4323 One of the authors of that article, Vincent Moore, who
4324 is at Brown University, has said presumably staff were
4325 vectors early in the pandemic, too, but there was more
4326 trouble getting tested then. Bigger facilities and
4327 facilities in areas with high community prevalence are
4328 at a greater risk for COVID-19. It's about the staff
4329 coming and going every day.

4330 Is that consistent with your understanding of what you
4331 just described?

4332 A That is consistent with my understanding and what I
4333 described. That is consistent with the findings of
4334 the DOH report. That is consistent with what I've
4335 heard experts give testimony to Congress in the last
4336 four years, what international medical journals have
4337 put out. It was the staff.

4338 Q And I know we can't go back in time, but does it
4339 seem -- and from what we've learned about how COVID-19
4340 spread, that PPE and having more of it would have
4341 aided in protecting patients and those in nursing
4342 homes from community spread.

4343 A If used appropriately, yes.

4344 Q You may or may not be aware, but in 2019, the Trump

4345 administration proposed to relax a federal requirement
4346 that nursing homes employ onsite infection prevention
4347 specialists. According to public reporting, Trump's
4348 proposal led some facilities to cut corners in
4349 infection control.

4350 Based on your understanding, is the maintenance of
4351 infection control standards and compliance with those
4352 standards important to prevent viral infection and
4353 spread within nursing homes?

4354 A Critical.

4355 Q And would relaxing infection control standards in
4356 nursing homes better prepare staff and residents for a
4357 future pandemic?

4358 A Would relaxing them better prepare? No.

4359 Q What impact would it have?

4360 A The opposite impact, and it would have gotten much
4361 worse and many more people would have died.

4362 Q Thank you.

4363 ██████████ We can go off the record.

4364 (Whereupon, at 12:45 p.m., the testimony in the
4365 above-entitled matter was recessed, to reconvene at
4366 1:21 p.m. this same day.)

4367

AFTERNOON SESSION

4368

(1:21 p.m.)

4369 Mr. Emmer. We can go back on the record.

4370 BY MR. EMMER.

4371 Q I want to redirect your attention to the March 25th

4372 guidance. And I guess my questions will be more

4373 general.

4374 Was this intended to be interpreted as mandatory?

4375 Mr. Morvillo. Intended by whom?

4376 BY MR. EMMER.

4377 Q By the drafters, interpreted by the nursing homes

4378 as mandatory?

4379 A I would say you would have to ask the Department of

4380 Health that question.

4381 Q Do you know whether nursing homes were consulted

4382 prior to this order being issued?

4383 A I know that the Department of Health had an ongoing

4384 dialogue with nursing homes. I don't know if they

4385 were consulted on this particular piece of guidance

4386 before it went out.

4387 Q So you wouldn't know if nursing homes were provided

4388 any sort of advanced notice?

4389 A I don't.

4390 Q I believe in a previous hour, you mentioned the

4391 obligation that nursing homes had to deny patients

4392 that they weren't capable of caring for; is that
4393 right?

4394 A Yes.

4395 Q And are those assertions related to Section 415.26
4396 of the New York Code?

4397 A It's related. Sure, yes, that sounds right.

4398 Q Are you familiar with Section 415.26?

4399 A Only because after everything, after the press
4400 started asking questions, DOH pointed us to that
4401 section of law in explaining the other obligations
4402 that they had, and subsequently was in the clarifying
4403 order, et cetera.

4404 Q As best as you recall, can you describe what
4405 obligations the nursing homes had under that section?

4406 A Just broadly, that you could not accept a patient
4407 you could not care for, provide adequate care for. I
4408 don't remember the exact language.

4409 Q Are you aware of whether section 415.26 was in full
4410 effect when the March 25th order was issued?

4411 A It was.

4412 Mr. Emmer. At this time, I'm going to introduce what
4413 will be marked as Majority Exhibit 4.

4414 (Majority Exhibit No. 4 was identified
4415 for the record.)

4416 BY MR. EMMER.

4417 Q This is Executive Order Number 202.5 issued by the
4418 Cuomo administration on March 18, 2020. I will give
4419 you a minute to review.

4420 A You can go ahead.

4421 Q Are you familiar with Executive Order 202.5?

4422 A Yes, to the extent I just looked over it.

4423 Q And it appears that the printing may have cut it
4424 off, but would you have signed this executive order?

4425 A Yes.

4426 Q I want to direct your attention to the first bullet
4427 point on the second page. It relates to subdivision
4428 (i) of Section 415.26 of Title 10.

4429 A Okay.

4430 Q This appears to suspend or at the very least limit
4431 Section 415.26. Were you aware of this?

4432 A It doesn't -- I know that Mr. Arbeeny has tried to
4433 make an issue of this and incorrectly stated it in an
4434 op-ed to the Daily News.

4435 The subdivision, that is the one that I just
4436 referenced that the Department of Health continues to
4437 point to was always in effect. It was a different
4438 subdivision, I think it was (ii), not (i).

4439 So this does not alter the legal obligation of the
4440 nursing home to adhere to the law, which is only
4441 accept patients you can care for is what has been

4442 explained to me by the lawyers and by the Department
4443 of Health.

4444 Q This wasn't a determination that you made. That's
4445 what you're testifying to?

4446 A I mean, my signature is on this document. But what
4447 I'm saying is, is that this, the -- the suspension of
4448 that subdivision is a different subdivision of that
4449 law that mandates that you can only accept a patient
4450 you can care for. It's been misrepresented previously
4451 in an op-ed in the Daily News, I know.

4452 BY MR. BENZINE.

4453 Q Do you recall what subdivision (i) was, is?

4454 A Beyond what's here?

4455 Q Yes.

4456 A Just what's here. But it was subdivision (ii) is
4457 the one that I have been told by lawyers and by the
4458 Department of Health that governed your legal
4459 obligation to only accept patients you can care for.

4460 BY MR. EMMER.

4461 Q Are you aware of whether subdivision (i) had the
4462 operative language that nursing homes must deny
4463 residents that they cannot provide adequate care for?

4464 A I am not. But I am told that it's subdivision (ii)
4465 is where the pertinent language is, but this is a
4466 different subdivision.

4467 Q Do you recall what lawyers would have told you that
4468 it had to deal with another subdivision?

4469 A Generally, counsel's office. But I can't tell you
4470 who specifically.

4471 Q Thank you.

4472 Ms. DeRosa, do you recall arguing that the March 25th
4473 order was consistent with CMS and CDC guidance?

4474 A When?

4475 Q After you learned the March 25th guidance and
4476 throughout the pandemic thereafter.

4477 A Yes.

4478 Q Did you consult with anyone from CMS or CDC prior
4479 to the issuance of the order?

4480 A I didn't know about the order until afterwards, so,
4481 no.

4482 Q Do you know if anyone from the Executive Chamber,
4483 Task Force, or Health Department consulted with CMS
4484 prior to issuing the order?

4485 A I don't, but I assume the Department of Health.

4486 Q Do you know if anyone from the Executive Chamber
4487 Task Force or Health Department consulted with the CDC
4488 prior to issuing the order?

4489 A I don't.

4490 Q Do you recall whether anyone ever told -- scratch
4491 that.

4492 Do you recall whether anyone from the federal
4493 government ever told the administration that the March
4494 25th order was consistent with federal guidance?

4495 A I don't.

4496 Q And I may make you repeat yourself, but do you know
4497 who would have made the determination within the
4498 administration that the order was consistent with CMS
4499 and CDC guidance?

4500 A Department of Health people.

4501 I do want to say for the record that the Attorney
4502 General in her report said it was -- their people
4503 concluded it was consistent with CDC and CMS, and the
4504 Friday report from the Olson Group said that the March
4505 25th and other guidance put out by the Department of
4506 Health were consistent with best practices and federal
4507 policy.

4508 Q Are you today able to explain how the March 25th
4509 order was consistent with CMS's guidance?

4510 A I am not a health professional. I would leave that
4511 to them.

4512 Q So I believe you testified that you didn't learn
4513 about the CMS guidance until after you learned about
4514 the March 25th order; is that correct?

4515 A I don't know when I learned about the CMS guidance.
4516 It's possible I saw it on Twitter or it was in my

4517 inbox at some point. I'm saying I learned about the
4518 CMS guidance being what informed the -- or the CDC, I
4519 don't know which one it was -- being what informed the
4520 25th health advisory from DOH in the context of the
4521 conversation after the press conference.

4522 Q And that would be the same -- the answer would be
4523 the same with CDC, you would have learned about it
4524 after you learned about the March 25th order in the
4525 press conference?

4526 A I don't know. You know, again, like you see things
4527 on Twitter. There was a lot going on. I could have
4528 seen that earlier, understanding that that's what
4529 informed the March 25th DOH health advisory within the
4530 context of that conversation with the DOH folks.

4531 BY MR. BENZINE.

4532 Q On April 20th.

4533 A -ish, yeah, I believe, is my memory of that.

4534 Mr. Emmer. At this time, I would like to introduce
4535 Majority Exhibit 5.

4536 (Majority Exhibit No. 5 was identified
4537 for the record.)

4538 BY MR. EMMER.

4539 Q This is an email thread between the Executive
4540 Chamber and Health Department officials, including
4541 yourself, Dr. Malatras, Ms. Lacewell, and Dr. Zucker

4542 on June 22nd, 2020, attaching an article entitled
4543 "Verma: Cuomo Contradicted Federal Nursing Home
4544 Guidance." There's obviously significant redactions,
4545 but I'll give you a minute to review.

4546 Mr. Morvillo. Is there anything not redacted other
4547 than the article?

4548 Mr. Benzine. The article, and then there's one email
4549 with resending with MDR correct email, adding --

4550 Mr. Morvillo. Plus Melissa. Okay, got it.

4551 BY MR. EMMER.

4552 Q For the record, MDR is referring to you, right?

4553 A Yes.

4554 Q Do you recall CMS Administrator Verma saying that
4555 the March 25th guidance contradicted federal guidance?

4556 A Not specifically.

4557 BY MR. BENZINE.

4558 Q Do you recall any conversations about it within the
4559 Chamber?

4560 A I recall -- is it a she? I recall she had said
4561 that exclusively to Breitbart, which is obviously
4562 known to be a far right leaning publication. And the
4563 suspicion was that Trump or -- what was his
4564 name -- Michael Caputo put her up to it to try to go
4565 after the governor politically, because Dr. Fauci had
4566 just given testimony before the House Subcommittee on

4567 COVID, saying that what New York did was right, and
4568 that New York did an admirable job of flattening the
4569 curve and listening to all the guidance. And he had
4570 said something positive, and then it was like days
4571 later, this happened.

4572 And I believe -- I don't remember what Redfield said.
4573 Like, there was a splinter amongst those health
4574 professionals. Birx had said one thing, and Seema
4575 said one thing, and Fauci said another thing, and
4576 someone else said another thing.

4577 And the belief internally was this is Michael Caputo
4578 at DOH trying to get somebody who will parrot the
4579 President's talking points to try to attack the
4580 governor on our COVID response, and so we viewed it as
4581 political.

4582 Q Why did you think it was Mr. Caputo?

4583 A So Michael Caputo had been campaign
4584 manager to -- this is really getting into the New York
4585 political weeds, but let's go. He had been campaign
4586 manager to Carl Paladino who ran in 2010 against Cuomo
4587 when Governor Cuomo crushed him, and he had been a
4588 constant adversary, political adversary of the
4589 governor and our administration ever since.

4590 And when you talk about putting political people in
4591 health positions, when they made him the DOH

4592 communications director and I believe it was later
4593 reported that he downplayed numbers and he told them
4594 to hide information, and then he had a nervous
4595 breakdown and was forced to resign. When things like
4596 this happened, we tended to believe that Michael
4597 Caputo's fingerprints were all over this.

4598 Q You're giving me flashbacks of terrible hearings
4599 that I had to deal with in 2020. I've been doing this
4600 too long.

4601 A The same.

4602 Q And I think if my memory serves me, we released
4603 Dr. Birx's testimony, and her position was that the
4604 March 25th order violated federal guidance. She
4605 obviously has had harsh words for the former President
4606 as well.

4607 Do you recall any reaction within the Chamber on
4608 Dr. Birx saying that?

4609 A Well, Dr. Birx has sort of been a little bit of a
4610 chameleon, right? Dr. Birx, when she was there, was
4611 sort of happy to toe the line, and then when she left
4612 and the weather shifted, she was happy to attack Trump
4613 when it financially and politically benefited her and
4614 doing some reputation repair.

4615 So when she did that, at the time, I don't think that
4616 we were very surprised. The larger point from where

4617 we were sitting was if this was the case, at that
4618 point the March 25th health guidance had been widely
4619 publicized beginning April 20th. That was when that
4620 really first reached the press in a meaningful way.
4621 Why wouldn't any of them have said anything sooner?
4622 If that was the case, why didn't they immediately call
4623 and say this goes against our guidance. You'd better
4624 scrap that guidance. Or what you're out there saying
4625 contradicts -- this is in line with what we said.
4626 You're wrong. You know what I mean? Why did it take
4627 three months? And what responsibility and rules did
4628 they sort of have?
4629 And so, again, it's really hard to separate during
4630 that period of time what was political versus what was
4631 not political. And that didn't -- that didn't just
4632 mean the politicians and the political actors. It
4633 also included, unfortunately, some of the health
4634 people.

4635 BY MR. EMMER.

4636 Q In the previous hour, you testified to other
4637 states, including Republican states, issuing similar
4638 orders; is that right?

4639 A I did testify to that, yes.

4640 Q And so after you learned of the March 25th order on
4641 April 20th, do you recall whether you were briefed on

4642 other states that issued similar orders?

4643 A Not at that time.

4644 Q When do you recall being briefed?

4645 A At some point later. I believe -- I may get this
4646 timeline screwed up, so just stipulate that for the
4647 record.

4648 I have the clearest memory of that when the Department
4649 of Justice started doing their -- when they made their
4650 overture, their request for information from the four
4651 Democratic states. Counsel's office, along with
4652 outside counsel, did a review of what other states
4653 did, and they came back to us and said --

4654 Mr. Morvillo. Not what they said.

4655 The Witness. I'm sorry.

4656 Mr. Morvillo. Your conclusion or your understanding.

4657 The Witness. My understanding after which was that
4658 there were 11 to 12 states that had similar admissions
4659 and readmissions guidance, and that there were a
4660 handful that were Republican, there were a handful
4661 that were Democrat, but it was -- and some, by the
4662 way, that were Democrat that were left out and they
4663 weren't looking into.

4664 As I said, Newsom -- you actually look at the
4665 California guidance, it's almost verbatim the New York
4666 guidance. So that, like, stoked this idea that

4667 politics were playing a role.

4668 BY MR. BENZINE.

4669 Q Do you remember the states?

4670 A I don't offhand. However -- and I don't know if
4671 you would be allowed to get this. I think it's a
4672 public document. But there was a white paper that had
4673 been prepared for DOH from our outside law firm who
4674 responded, like, on all of these different matters,
4675 and they had in that paper listed out and I believe
4676 they had like footnoted and hyperlinked to where
4677 those -- what those guidance were.

4678 And I just remember people kept saying Kentucky, and I
4679 was like Kentucky has a Democratic governor.
4680 Everybody, I know you think of it as Republican, it's
4681 a Democratic governor.

4682 BY MR. BENZINE.

4683 Q Was the outside firm at the time Fried Frank?

4684 A I don't think so. I think it was Abramowitz.
4685 Mr. Morvillo. We just refer to it as the Abramowitz
4686 firm.

4687 The Witness. But there is a white paper that -- I
4688 believe that at some point, it was made public. At
4689 one time, it was a privileged document, but I'm sure
4690 we can get it to you guys if you want to see it.

4691 BY MR. EMMER.

4692 Q Were you briefed on whether those states restricted
4693 testing requirements for discharged patients?

4694 Mr. Morvillo. Other than by lawyers.

4695 The Witness. Other than by lawyers. I don't recall.

4696 BY MR. EMMER.

4697 Q Do you recall whether you were ever briefed on when
4698 the other states with similar orders rescinded their
4699 orders?

4700 A I don't recall.

4701 Q Did you ever talk to Governor Murphy or anyone from
4702 his staff regarding their order?

4703 A Their admissions guidance? Yes. Not Governor
4704 Murphy. It's his chief of staff, George Helmy.

4705 Q And what were the nature of your conversations with
4706 Mr. Helmy?

4707 A Honestly, I can't recall specifically. We
4708 just -- they were dealing with a lot of press
4709 incoming, like similar. And so I'm sure -- not I'm
4710 sure. I know at some point we discussed dealing with
4711 press incoming and the health people saying this was
4712 all consistent with CMS/CDC kind of conversations. I
4713 think they scrapped theirs or they overrode theirs at
4714 some point a few weeks later as well.

4715 Q I believe it was April 13th. Would you have known
4716 that around the time that you learned of the March

4717 25th guidance?

4718 A That's when they scrapped theirs?

4719 Q I believe it was April 13th.

4720 A It's like all a mush. But they got like grouped in
4721 with us and with Michigan and with Pennsylvania later,
4722 and I know nursing home deaths in general were a very
4723 big topic in the Northeast, and we had a coalition of
4724 states that were talking all the time.

4725 BY MR. BENZINE.

4726 Q Do you recall any -- New Jersey issued theirs
4727 within a day or two of New York issuing theirs. Do
4728 you recall any conversations of whether or not they
4729 just copied New York's order?

4730 A I don't remember.

4731 Mr. Emmer. At this time, I would like to introduce
4732 what will be marked as Majority Exhibit 7.

4733 (Majority Exhibit No. 7 was identified
4734 for the record.)

4735 BY MR. EMMER.

4736 Q This is guidance issued by the New York State
4737 Health Department on April 7th entitled "Advisory:
4738 Possible Discharges and Admissions to ACFs."

4739 A Okay.

4740 Q Do you recognize this guidance?

4741 A I'm not sure that I ever looked at this guidance.

4742 I'm aware of it. I think it just mirrors, right -- it
4743 just does it for adult care facilities.

4744 Q For the record, did you have any role in the
4745 development of this guidance?

4746 A No.

4747 Q Would you know who drafted this guidance?

4748 A No. I would assume similar to the other guidance.

4749 I mean, is it a copy-paste?

4750 BY MR. BENZINE.

4751 Q No, it's a little more specific. It actually puts
4752 the code in there that they have to be able to care
4753 for them.

4754 A Okay.

4755 BY MR. EMMER.

4756 Q Thank you. Do you recall how long the March 25th
4757 guidance was still in effect, or was in effect?

4758 A Until May 10th.

4759 Q And again, we talked about in a previous hour, what
4760 would you characterize May 10th's effect on the March
4761 25th guidance?

4762 A It superseded it.

4763 Q And what prompted the administration to issue the
4764 executive order that superseded it?

4765 A At the beginning of May, we were in a position
4766 where we had a much greater testing capacity, and

4767 there were two conversations on the nursing homes
4768 happening at that point.

4769 One was all the medical professionals that we talked
4770 to kept saying it's the staff, it's the staff, it's
4771 the staff. So if it were, in fact, the staff that
4772 were bringing the COVID into the nursing homes, we
4773 thought it would be best to implement once a week
4774 testing.

4775 In conversations about it, they're like, if you do one
4776 day and six days go by, you should really do, if we
4777 can make it work, twice a week. So it's like one day,
4778 and then three days go by, and then four days go by,
4779 and then three days go by, so that you would catch it
4780 in realtime.

4781 And that was right around the same time that they
4782 started to develop these rapid tests that you could do
4783 at home and so we had the capability. We believed we
4784 had the capability to be able to operationalize that.
4785 So we decided we were going to do that by executive
4786 order.

4787 And then also there had become -- since that April
4788 20th press conference, it had become so politicized,
4789 and people got this idea of the admissions and people
4790 going in, were those people the ones that were
4791 bringing in.

4792 So sort of to answer the hysteria, to answer the
4793 concern, the public concern, we said hospitals are no
4794 longer a concern. We hadn't just flattened the curve
4795 at that point, we had crushed the curve. Like the
4796 hospital bed capacity was no longer a concern. We
4797 were starting to reopen the state, in fact.
4798 So the governor did an executive order saying a
4799 negative test would be required. And it was more to
4800 answer people's individual concerns about their own
4801 loved ones and family members in nursing homes and try
4802 to tamp down the political hysteria and the hysteria
4803 around that. So we did both of those at once. We did
4804 it through executive order so it had the force of law,
4805 and -- yeah.

4806 So I would say it was beginning around May 1st, May
4807 2nd. And once we knew that we had both hospital
4808 capacity and that we could pull off the testing
4809 capacity, which was not a small feat, we set on May
4810 10th.

4811 Q Was there anyone in the administration that didn't
4812 want the March 25th order to be superseded by the
4813 executive order?

4814 A Not that I recall.

4815 Q You mentioned -- the first part of your answer had
4816 to do with the theory that it was nursing home

4817 or -- well, nurses bringing it in and you brought
4818 medical professionals that were telling you that. Can
4819 you be more specific as far as which medical
4820 professionals would have been saying that it was being
4821 brought in by the workers?

4822 A So primarily, I would say it was Dr. Zucker. But
4823 beyond Dr. Zucker, as I mentioned earlier, and I would
4824 want to check his name, it's been out there before.

4825 But the gentleman, I think his name is Bruce Allred
4826 who was from WHO is who came in and embedded with us.
4827 And then, again, I would have in my office during the
4828 day, CNN, MSNBC, Fox, congressional hearings. And any
4829 time the conversation of nursing homes came up, this
4830 was the resounding -- the nursing home rates mirrored
4831 almost identically what they were in any given
4832 community. And that regardless of the admissions
4833 policy, you know, a state like Massachusetts which had
4834 far more nursing home deaths than New York didn't have
4835 that admissions policy, that it was very clearly the
4836 staff.

4837 And there was actually this person who I couldn't tell
4838 you who he was, but somehow got ahold of my phone
4839 number and was texting me relentlessly saying, how do
4840 you not see this? It's the staff, it's the staff.
4841 You need to be testing the staff.

4842 It was everywhere that we turned, the answer was
4843 always it's the staff. So that was why it was a
4844 good-faith effort to answer what we believed was what
4845 was introducing into it the nursing home, which was
4846 the staff. So that is why the testing of the staff.
4847 Mr. Emmer. At this time, I would like to introduce
4848 what will be marked as Majority Exhibit 8.

4849 (Majority Exhibit No. 8 was identified
4850 for the record.)

4851 BY MR. EMMER.

4852 Q This is an email thread that you're not a part of
4853 that's between Department of Health staffers started
4854 by Jill Montag on May 12th, 2020. I'll give you a
4855 moment to read through it.

4856 Mr. Benzine. It's really only the first page, the
4857 first full page.

4858 The Witness. Okay.

4859 BY MR. EMMER.

4860 Q Do you know why the March 25th order was removed
4861 from the Department of Health website on April 29th?

4862 A Well, according to this email chain, it says it's
4863 because it was inconsistent.

4864 Q Do you know what the authors of this email chain
4865 would mean by it was inconsistent?

4866 A Wait, hang on a second.

4867 Oh, so I remember what happened. So April 29th -- and
4868 I'm sure this is publicly available or was turned over
4869 to you guys. April 29th, I believe, is when the
4870 Department of Health issued its clarifying guidance,
4871 which was the initial March 25th admissions guidance,
4872 but expressly included the language around your
4873 responsibility to only accept patients who you could
4874 care for.

4875 And so I believe what happened -- because there were
4876 press inquiries on this. I believe what happened was
4877 they removed the original and then they replaced it
4878 with the updated guidance because, to the extent that
4879 the concern was people were confused or it was not
4880 clear what their obligations, standing obligation was
4881 under the law, that made it crystal clear. So it was
4882 replaced, I believe, with the exact same guidance, but
4883 with the guidance that included that additional
4884 statutory language saying as a reminder.

4885 Q Really quick. It says that they were instructed to
4886 remove it by the Executive Chamber. Do you know who
4887 would have instructed them to do it?

4888 A I don't.

4889 Q It wasn't you?

4890 A Not that I recall.

4891 Q Thank you.

4892 Mr. Emmer. At this time, I would like to introduce
4893 what will be marked as Majority Exhibit 9.

4894 (Majority Exhibit No. 9 was identified
4895 for the record.)

4896 BY MR. EMMER.

4897 Q This is an email thread started by Ms. Benton to
4898 you, Jim Malatras, Gareth Rhodes, and Dr. Zucker on
4899 June 7th, 2020. I will give you a minute to review.

4900 A Okay.

4901 Q So Ms. Benton attaches an article seemingly
4902 critical of the March 25th order and writes, "This is
4903 going to be the great debacle in the history books.
4904 The longer it lasts, the harder to correct. We have a
4905 better argument than we made. Get a report on the
4906 facts because this legacy will overwhelm any positive
4907 accomplishment. Also how many COVID people were
4908 returned to nursing homes in that period? How many
4909 nursing homes? Don't you see how bad this is? Or do
4910 we admit error and give up?"

4911 Do you remember receiving this email?

4912 A No.

4913 Q For the record, who is Ms. Benton?

4914 A The governor's right hand. She was the director of
4915 the governor's offices.

4916 Q Does "great debacle" sound like an expression that

4917 Ms. Benton would have used?

4918 A No.

4919 Q Numerous witnesses have testified that they
4920 believed, or at the very least it appeared to them
4921 that this email was actually from the former governor.

4922 What do you think?

4923 A I think that's correct.

4924 BY MR. BENZINE.

4925 Q Was that common?

4926 A He didn't have email, and so he would often dictate
4927 emails to Stephanie to send from us. And we were
4928 aware based on tone who it was coming to.

4929 Q In addition to pins and in-person meetings, if you
4930 needed to get something to the governor, would it go
4931 through Ms. Benton?

4932 A Potentially, yeah.

4933 BY MR. EMMER.

4934 Q During the pandemic, where was the governor
4935 primarily working? Did he have an office at the
4936 mansion, or was he at the Capitol?

4937 A I would say 90 percent of the time, he was working
4938 out of the Capitol, 10 percent of the time he did have
4939 an office at the mansion. But we were mostly, I mean,
4940 90 percent of our communications during COVID were
4941 in-person communications, I would say.

4942 Q So again, to reiterate what Mitch just discussed,
4943 if there was a document that the governor needed to
4944 review, you would send it to Ms. Benton who would
4945 print it out and present it to him? How did that
4946 work?

4947 A Either that, or you would just print it out
4948 yourself and bring it to Stephanie and say this is for
4949 the governor, and she would bring it to him.

4950 Q And if he had edits to any document, would he
4951 provide it to Benton who would scan it and send it
4952 back to everyone?

4953 A Correct.

4954 Q So the email writes, "Get a report on the facts."
4955 Do you think this email is referring to the July 6th
4956 report?

4957 A Yes.

4958 Q Did the governor direct the report to be drafted?

4959 A So the governor and Dr. Zucker had a conversation
4960 in front of me, I believe we were in a helicopter,
4961 actually, in May of 2020, where Dr. Zucker was
4962 lamenting after a press conference because more
4963 questions on nursing homes -- the March 25th
4964 admissions policy kept coming up. And Dr. Zucker kept
4965 saying, if they only looked at the facts they would
4966 see it's the staff, it's the staff, it's the staff.

4967 And the governor said to him, well, if that's the
4968 case, then look at it. Do a report on it. Put the
4969 numbers out. You know, like do an actual report and
4970 explain this, because otherwise it's going to be
4971 tainted by the politics and the press and we're not
4972 explaining this properly. The entire time he's like
4973 we're not clearly explaining this.

4974 And so this email, I read as he's needling us because
4975 it's like, guys, how many times have we said we're not
4976 properly explaining this? It continues to get
4977 misconstrued, misrepresented in the press. You know?
4978 Go explain this properly.

4979 And I believe at this point, the report was already
4980 underway. I think the Health Department and McKinsey,
4981 Linda, started pulling together the data in May at
4982 some point, middle to end of May. And where he says
4983 here, how many people returned from nursing homes in
4984 that period? That's him saying, because Dr. Zucker
4985 kept assuring him over and over it's staff.

4986 Okay, so what's the answer? How many people? When
4987 were they? Which nursing homes? Which were the
4988 deaths in those nursing homes? How do you analyze if
4989 it was the staff. So this was him needling us a
4990 little.

4991 BY MR. EMMER.

4992 Q For the record, do you have an approximate time
4993 that that helicopter ride would have taken place?

4994 A I want to say it was sometime around the early to
4995 middle of May, because it was around the time that we
4996 did the superseding May 10th executive order.

4997 Q So you responded to the email. You said, "Tracy,
4998 please set a call with this group for today after the
4999 press conference to go through."

5000 Do you recall having a phone call in response to this
5001 email?

5002 A Not specifically, but I'm sure it happened.

5003 Q The last line of the email says, "Don't you see how
5004 bad this is? Or do we admit error and give up?"
5005 Were there ever discussions related to admitting that
5006 the March 25th order was a mistake?

5007 A No. This is him saying you people are screwing up
5008 explaining this. This has been going on for months.
5009 You keep saying the facts tell the real story, get the
5010 facts out, is how I interpret that.

5011 Q And to conclude just this line of questioning, do
5012 you stand by the March 25th order?

5013 A You know, I've been asked that question in a lot of
5014 interviews that I've done off of my book, and this is
5015 what I will say. It is hard for me as a government
5016 professional who is not a health professional, when

5017 the health professionals continue to tell you that
5018 they did this on the best possible science and that it
5019 was the right thing. And that if you leave nursing
5020 home patients for hospitals for too long, they could
5021 die of sepsis and that they need a certain skill level
5022 of care that they only receive in nursing homes.
5023 And, you know, solely on the basis, it doesn't
5024 supersede this, that there was a -- you know,
5025 medically stable is a term of art which, by
5026 definition, means you're no longer contagious.
5027 It's hard for me, as a lay person, to say I know
5028 better than the doctors. I regret that we allowed it
5029 to become so -- that it got away from us in terms of
5030 communications-wise, and that it was allowed to become
5031 so politicized. And I think that there are very real
5032 people who endured a tremendous amount of pain in
5033 losing loved ones, and I regret that we didn't do a
5034 better job of explaining this, clarifying it if that's
5035 what needed to be done sooner, earlier than we did.

5036 Q Thank you. Let's move on to discussing the data
5037 surrounding nursing homes. Just a question right off
5038 the top, yes or no. Is accurate data important for
5039 informing public health decisions?

5040 A Yes.

5041 Q Do you think the administration presented accurate

5042 data throughout the pandemic?

5043 A Yes.

5044 Q Do you think --

5045 A To the best of our ability and in realtime, yes.

5046 Q Do you think the administration was fully
5047 transparent regarding the data throughout the
5048 pandemic?

5049 A Yes, to the best of our ability in realtime.

5050 Q Do you think that the administration was fully
5051 transparent regarding the amount of nursing home
5052 residents who died from COVID-19 during the pandemic?

5053 A I think that we were fully transparent in how we
5054 were presenting the data in saying that we were
5055 presenting the people who died in nursing homes and
5056 the people who died in hospitals based on their place
5057 of death. There was never any confusion as to how we
5058 were releasing the death data.

5059 Q I am going to make you repeat yourself a little bit
5060 here, but can you describe how the daily briefings
5061 were organized on a day-to-day basis?

5062 A Sure.

5063 Mr. Morvillo. You mean the press conferences?

5064 Mr. Emmer. Press conference, daily briefings.

5065 Mr. Morvillo. I'm actually asking for myself so I
5066 understand.

5067 BY MR. EMMER.

5068 Q Okay.

5069 A Linda would text me or email me the numbers
5070 overnight, usually between 3:00 and 4:00 a.m. I
5071 believe Jim and Gareth were on those emails or texts,
5072 whatever. I would copy and paste them and send them
5073 to the governor.

5074 We would go to the office. Generally speaking, we
5075 would arrive before the governor. And by we, I mean
5076 me, Linda, Jim, Gareth, Stephanie, Dr. Zucker, and a
5077 number of other people who I'm not giving their due,
5078 who killed themselves.

5079 People would roll in anywhere between 5:30 and 6:30
5080 every day and we would discuss what needed to be
5081 announced. For example, if the night before we got a
5082 phone call that said this is really becoming a
5083 problem, people can't go to notaries, things are
5084 getting backed up. We've got to do an executive order
5085 allowing people to do notaries on Zoom, whatever. The
5086 unforeseen pops up.

5087 We talk about whether or not it's something that we
5088 should do, the merits of it. If you say yes, okay,
5089 we'll recommend it to the governor, is it worthy of
5090 doing in the presentation or should we just put it on
5091 paper? How do we communicate the information?

5092 So we would come to a group consensus on what
5093 information needed to be conveyed that day from a
5094 policy perspective, and the numbers would be put into
5095 the PowerPoint by, I think, Gareth. And Linda would
5096 provide the numbers to Gareth and/or Jim and they
5097 would put the numbers in the PowerPoint. We would
5098 show visually where we were on the curve, the whole
5099 thing, flatten the curve. So they would do graphics
5100 around that.

5101 Some days the governor had his own opinions about what
5102 needed to be in the PowerPoint front and center.

5103 Sometimes he would take what we gave him and make
5104 minor edits, other times he would take it apart and do
5105 a whole new one. And they always sort of followed the
5106 same themes, which were facts and numbers first,
5107 policy announcements, and then something emotional,
5108 inspirational, empathetic, something to connect with
5109 the public who was stuck at home going through this
5110 traumatic period of time. And then we would do Q and
5111 A.

5112 So we would put the presentation together, give it to
5113 him, he would make edits or throw it in the garbage
5114 and write it himself. And he would bring the team
5115 that was going to be on the dais that day in, which
5116 always 99 percent of the time consisted of me and

5117 Zucker, plus whomever was going to be up there,
5118 whether it be Robert Mujica or Jim or Gareth, Beth,
5119 Linda, whoever.

5120 We would talk about what we were going to talk about
5121 for the day. If anyone had any issues, that was their
5122 opportunity. He had a big screen at the end of the
5123 conference table, click through the PowerPoint. As a
5124 team we would watch it all together, Gareth, change
5125 this, change this, change this, and make edits in
5126 realtime, load it up, go do the press conference, come
5127 back, do the recap, and then everyone would sort of
5128 scatter to go do their work for the rest of the day.

5129 Q Let's focus on the numbers that were presented.
5130 You mentioned that Linda would email you the numbers
5131 every morning. Where was she receiving those numbers
5132 from?

5133 A From the Department of Health. I'm not sure who
5134 within the Department of Health.

5135 Q And when you received these numbers, you talked
5136 about -- I believe you said you talked to
5137 Dr. Malatras, Gareth Rhodes, others. Actually, let's
5138 back up.

5139 Did those numbers include nursing home fatalities?

5140 A Not at first.

5141 Q When would they have included nursing home

5142 fatalities?

5143 A At the very beginning -- and again, I only remember
5144 this because I recently read an article refreshing my
5145 memory. In the very beginning, we were reporting
5146 hospital deaths which started around March 13th-14th.
5147 And then I want to say by the end of the month or
5148 early the following month, we started reporting two
5149 categories, hospital deaths, people who died in
5150 hospitals and then people who died in nursing homes.

5151 Q And when the administration started to include the
5152 numbers of nursing home fatalities, at any point
5153 within your deliberations regarding the daily press
5154 briefings, did you decide not to include nursing home
5155 fatalities or certain numbers related to nursing home
5156 fatalities?

5157 A I'm sorry, that question confused me.

5158 Q I guess I'm asking, how did you, Mr. Rhodes,
5159 Dr. Malatras determine which numbers would be
5160 presented to the public on a day-to-day basis?

5161 A Okay. So at the very beginning, it was just the
5162 hospitals. A lot of what we were doing was reactive
5163 to the press. The press played a hugely critical role
5164 during this time because they sort of served as our
5165 eyes and ears in the world for things we weren't
5166 seeing.

5167 So we started seeing press reports about certain
5168 nursing homes, particularly in New York City, where
5169 all of a sudden, there were high death rates. And so
5170 we were like, what is going on in these nursing homes?
5171 And at first, the Department of Health was issuing
5172 surveys, asking about infection rates and PPE and how
5173 many ventilators you have and things like that, but
5174 not asking about deaths.

5175 So in conversations with DOH, the decision was made,
5176 we have to be collecting the death data in these
5177 nursing homes. So they revised the survey to start
5178 asking, you know, how many people died in the last 24
5179 hours? And then we started presenting those two
5180 categories to the public daily. But at first, it was
5181 just hospitals, and then we added in nursing homes and
5182 I think that was the beginning of April.

5183 Q During the daily calls that you had, did you ever
5184 decide not to include certain numbers, namely those
5185 related to nursing homes?

5186 A In daily calls?

5187 Q When you were putting together the daily
5188 presentations with other staff, did you ever decide
5189 not to include certain numbers related to nursing home
5190 fatalities?

5191 A No.

5192 Q And unfortunately I'm going to make you repeat
5193 yourself again but you briefly touched on it. Can you
5194 explain how the administration collected data
5195 specifically as it related to nursing homes during the
5196 pandemic?

5197 A It was an evolving process. At first, they were
5198 just -- DOH was just asking questions about basic
5199 preparedness essentially and infection control. So
5200 they were asking about people who were suspected COVID
5201 positive, were COVID positive, what their staffing
5202 levels were, how much PPE they had, how many empty
5203 beds they had, how many ventilators they had. And
5204 then it became, we need to know the death numbers.
5205 So then they asked a new question which was, how many
5206 people died in your nursing home in the last 24 hours?
5207 And then at some point, we expanded that to say, how
5208 many people died -- and this is another -- o this was
5209 what I'm saying, like, it was evolving and some of it
5210 was reflective of the press, because we would go out
5211 at the daily presser and say seven people died at this
5212 nursing home. And then we would get a call from the
5213 AP or the Post or whomever saying, well, they're
5214 telling us 14 people died.
5215 And we were, like, DOH, square this. How can it be
5216 that this number is different than this number? So

5217 then they would call Cobble Hill or whichever nursing
5218 home and say, why are you reporting to us seven, but
5219 you're telling them 14?

5220 And then they said, oh, we believe even though we
5221 can't prove it, that seven additional people died.
5222 And then started saying, okay, well, then now we need
5223 to ask about probables. So then we started asking
5224 about probables, and then that became a subset within
5225 the death total in nursing homes.

5226 Then we start getting questions about, what about
5227 people who left nursing homes and died in a hospital?
5228 So then they started asking that question.

5229 Some of the nursing homes said that because of the
5230 wording of the surveys, that the survey wording was so
5231 terrible that they were giving incomplete information,
5232 because there was one point where there was
5233 accusations that they were misrepresenting to the
5234 state the number of deaths and we essentially -- I
5235 don't remember if it was by executive order or DOH by
5236 reg, said you've got to certify these deaths. And if
5237 you're lying, you can face penalties. Because there
5238 was reports from family members that they believed the
5239 nursing homes were underreporting deaths.

5240 So this was an ever-evolving situation. And at one
5241 point when we were trying to get to the bottom of the

5242 question of, was it patients that brought it back in?
5243 Was it staff? Well, you can't have that informed
5244 conversation until you find out how many patients were
5245 discharged from nursing homes. And then there's this
5246 conversation, as I said, about admission versus
5247 readmission.

5248 So the surveys were redone north of a dozen times
5249 over, like, a month-and-a-half. And as has been
5250 reported, and I recently read in an article from back
5251 in the heat of things, the nursing homes were furious.
5252 They felt like they were being pulled away from
5253 important tasks that they were doing to have to do
5254 these surveys, that it was a waste of time, that their
5255 time could have been better spent and that the numbers
5256 obviously incomplete and they were given wrong answers
5257 because they were poorly worded questions.

5258 So to say it was imperfect is the understatement of
5259 the century, but it was an evolving process meant to
5260 try to get as much information as we could.

5261 Q Did you, yourself, have any role in crafting the
5262 surveys that the Department of Health was sending to
5263 nursing homes?

5264 A No.

5265 Q So is it your testimony that you would have learned
5266 after that these surveys weren't including questions

5267 related to fatalities or were confusing to nursing
5268 homes; that would have been something you would have
5269 learned after the fact?

5270 A Correct.

5271 Mr. Emmer. At this time, I would like to introduce
5272 what will be marked as Majority Exhibit 10.

5273 (Majority Exhibit No. 10 was
5274 identified for the record.)

5275 BY MR. EMMER.

5276 Q This is the report issued by the Office of New York
5277 State Comptroller entitled "Department of Health, Use,
5278 Collection, and Reporting of Infection Control Data,
5279 issued in March of 2022.

5280 A Okay.

5281 Q Do you recognize this report?

5282 A Yes. But I will stipulate that I've never read it.

5283 Q And you weren't interviewed by the comptroller; is
5284 that right?

5285 A That's correct.

5286 Q I want to direct your attention to page 13, and I
5287 will actually give you a minute to read that page.

5288 A From the top?

5289 Q Yes.

5290 A I don't think this is correct.

5291 BY MR. BENZINE.

5292 Q Which part?

5293 A So, I mean, a lot of it. But I will say I am 99.9
5294 percent positive we always reported nursing home
5295 deaths as in-facility, because at the time, the
5296 Department of Health said that's how they legally did
5297 it. Like, by law -- and apparently, this is a thing
5298 and perhaps it should be revisited. But by law, at
5299 the end of the year or the month or the quarter,
5300 whatever, every hospital in the State of New York has
5301 to report to the state how many people die in their
5302 facilities. The same thing with nursing homes.
5303 So when discussing this at the beginning, how should
5304 we do this? The Department of Health said. This is
5305 how it's always done. And presumed -- we didn't start
5306 collecting until afterwards, and the presumed didn't
5307 show up in the data until May 3rd. And there's news
5308 articles to this effect.
5309 On May 3rd, we literally did a data dump, because we
5310 had gathered this information at some point between
5311 when we first started collecting nursing home deaths
5312 and May 3rd. And the Department of Health said to us,
5313 I think it was something like 2,000 additional, what
5314 they believed were presumed in-facility deaths. And I
5315 said we have to report them.
5316 So on May 3rd, we put them up on the board, and there

5317 was this smattering of press stories -- you can find
5318 them. I remember the New York Times had like all of a
5319 sudden the nursing numbers jumped.

5320 So it's not as if they were in one category and then
5321 pulled out into a different category. It's that it
5322 was always the in-facility deaths. And one day we
5323 started reporting the presumed in-facility, and we did
5324 report them as subcategories, I believe, at least for
5325 a time. We ultimately may have just combined them,
5326 but we were reporting them separately, and that
5327 happened on May 3rd.

5328 And the out-of-facility deaths, we didn't report until
5329 after -- well after the audit into January. I'm 99
5330 percent positive that they were never up on the board
5331 that way.

5332 There was also an issue with, initially they tried
5333 to -- we tried to report them for transparency sake by
5334 facility, and there was this whole argument on, by
5335 facility of under five deaths, over five deaths, and
5336 what was allowed HIPAA and not allowed HIPAA. So that
5337 was happening at the same time, too. So, anyway.

5338 Q And I appreciate that context, and you're more than
5339 welcome. We are not going to stand by the
5340 comptroller's report.

5341 A Yeah.

5342 Q We're just using it for the timeline that they
5343 have.

5344 A Yeah. But you should look, on May 3rd there's this
5345 article that's like, nursing home deaths in New York
5346 explode. And it was because for the first time, we
5347 introduced presumed, and Trump like lost his mind.
5348 And it was a couple weeks after New York City, when de
5349 Blasio unveiled this category of in-home COVID
5350 presumed. And he did it first and Trump went crazy
5351 and was like, New York is trying to make me look bad.
5352 And then we did it two weeks later with the nursing
5353 home presumed, and the number went from -- like it
5354 essentially doubled, call it 2,000 to 4,000 overnight.
5355 So this is incorrect. It wasn't that they were being
5356 reported and then being reported separately. Like,
5357 that's not actually accurate.

5358 Q I'm going to continue to just use this as a
5359 reference.

5360 A Okay.

5361 Q You're more than welcome to testify that it's
5362 wrong.

5363 A Sure.

5364 Q So I just want to focus on the first paragraph that
5365 says, "throughout the pandemic, the department used
5366 alternating methodologies to account for nursing home

5367 deaths." Is that a characterization that you disagree
5368 with?

5369 A That is a characterization I disagree with.

5370 BY MR. BENZINE.

5371 Q Would it be more fairly characterized -- so they're
5372 saying alternating methodologies, which I have never
5373 worked in the comptroller's office, I have no idea
5374 what they actually do other than this kind of stuff.

5375 A Other than cheap shot audits that can't actually
5376 hold up to scrutiny.

5377 Q I'm guessing what they're referring to is going
5378 from counting in-facility confirmed to then counting
5379 in-facility confirmed --

5380 A And presumed.

5381 Q -- and presumed. And then counting in-facility
5382 confirmed and presumed and out-of-facility confirmed,
5383 and then out-of-facility confirmed and presumed.

5384 So instead of alternating methodology, it would be
5385 better characterized as just kind of adding more
5386 facts?

5387 A Yeah. I mean, and it was -- again, I wouldn't say
5388 throughout. It was like a two-week period of time or
5389 three-week period of time in April when it was just
5390 in-facility nursing home deaths.

5391 And then we tacked on at the end of April to try to

5392 make a good-faith effort to reconcile why the press's
5393 numbers were different than the numbers we were
5394 getting from the DOH. We started asking this presumed
5395 number.

5396 And then on May 3rd, like all in one drop, we updated
5397 with the presumed number and the numbers shot up. And
5398 then we consistently reported the presumed and
5399 in-facility confirmed on a daily basis until the end
5400 of August of 2020, we stopped reporting presumed
5401 because Dr. Zucker did a health -- I don't remember if
5402 it was an advisory, through regulation.

5403 But essentially, at that point, it was like tests
5404 runneth over. Like there was no concern at all about
5405 tests anymore. And so we mandated for accuracy that
5406 if someone dies and you think they died of COVID, you
5407 have to test them because we want to know. At this
5408 point, like, we want to know if they died of COVID.
5409 No more guesswork. Because there's no more guesswork
5410 necessary.

5411 So at the end of August, early September of 2020, we
5412 stopped reporting presumed because we mandated that if
5413 you suspected someone died of COVID, you prove it one
5414 way or another, so that all statistics would be
5415 accurate. And then the out-of-facility numbers were
5416 added in January of 2021.

5417 BY MR. EMMER.

5418 Q And I think we're running out of time during this
5419 hour, so we'll come back with more specifics. But I
5420 guess to rephrase my earlier question, it seems to me
5421 that there were changes in how you reported nursing
5422 home fatalities. Would you agree with that?

5423 A Yes.

5424 Q And who would have made the decision to make these
5425 changes?

5426 A Well, Dr. Zucker ultimately would have to make the
5427 decision of how and when to make the changes, but they
5428 were certainly in consultation with the Executive
5429 Chamber in that when we were going out and the
5430 governor, whose credibility was on the line, was
5431 saying there's ten nursing home deaths and the
5432 Associated Press would say, no, there's 17, and we
5433 would say to the Department of Health, reconcile this.
5434 And like if this is what the nursing homes are saying,
5435 and the concept of probable had been introduced at
5436 that point by CDC, then in the spirit of transparency
5437 and totality, then add the presumed. You know, we
5438 supported that decision and then got blasted for it,
5439 but --

5440 Q But you, yourself, were involved in these
5441 discussions related to how this data would be

5442 presented to the public? You said Executive Chamber
5443 earlier.

5444 A We were certainly -- I was certainly involved in
5445 saying you can't have a situation where the press is
5446 reporting one thing and we're reporting something
5447 else. And once the concept of presumed was out there,
5448 I supported using and reporting presumed deaths.

5449 Q Would you have to sign off on these changes?

5450 A No, but I was certainly a voice that was involved.

5451 Mr. Emmer. We can go off the record.

5452 (Recess.)

5453 Mr. Emmer. We can go back on the record.

5454 BY MR. EMMER.

5455 Q Ms. DeRosa, in the previous hour, we discussed the
5456 timeline of changes as far as how nursing home
5457 fatalities were reported to the public, and I just
5458 want to use the comptroller report just to inform the
5459 questions we are going to ask.

5460 So I want to direct your attention to the second full
5461 paragraph and it's the second sentence. I will read
5462 it out loud.

5463 Mr. Morvillo. Still on page 13?

5464 Mr. Emmer. Correct.

5465 BY MR. EMMER.

5466 Q I will read it out loud for the record. It says,

5467 "For the next 18-day period, April 15 to May 2, 2020,
5468 the Department added reporting of presumed deaths by
5469 county as well as both confirmed and presumed deaths
5470 by individual facility - but only if the facility had
5471 five or more deaths."

5472 I believe you touched on it previously, but why would
5473 death totals at facilities with less than five deaths
5474 not be included?

5475 A That's a very good question that never made sense
5476 to me, and that I pushed the Department of Health on.
5477 They claimed it was a HIPAA issue, because if you were
5478 reporting -- let's say there's a facility and there
5479 were fewer than five deaths and they reported two
5480 deaths, and you know of somebody who just died there,
5481 then you could deduce that that person died of COVID,
5482 thereby robbing that family of the ability to tell
5483 people what their loved one died of. That was the
5484 theory. It never made sense to me, and pretty quickly
5485 we did away with that.

5486 But they were -- they were not initially broken down
5487 facility-by-facility data, but they were always
5488 included in the overall total.

5489 BY MR. BENZINE.

5490 Q So like the hypothetical Excel sheet would be
5491 Cobble Hill, less than five, and then if it was three,

5492 there would be three included in the total?

5493 A Exactly. Or it wouldn't show Cobble Hill at all,
5494 it would just put like a dash, but then at the bottom,
5495 the numbers wouldn't add up because the overall number
5496 would be more than the individuals if you added them
5497 up.

5498 Q Did that cause any issues or frustration?

5499 A A tremendous amount, especially during press
5500 conferences. And that was another one where I was
5501 like, as a layperson, explain it to me like I'm stupid
5502 because this doesn't make any sense to me whatsoever.

5503 BY MR. EMMER.

5504 Q To be clear, you would not have been involved in
5505 any decisions to exclude those deaths?

5506 A Correct.

5507 Q And you brought up Dr. Zucker. Would he have made
5508 that decision?

5509 A He -- look, ultimately, any decision that came out
5510 of DOH, he was -- it was his responsibility. But
5511 Dr. Zucker delegated, and there was a lot going on at
5512 that time, so he certainly had deputies who were
5513 making those decisions.

5514 Q So moving on to, I believe, two sentences later.
5515 It says, "Subsequently, from May 3, 2020 to February
5516 3, 2021, the Department excluded deaths that occurred

5517 at other locations and separated confirmed and
5518 presumed deaths."

5519 Were you involved in any discussions related to not
5520 including out-of-facility death totals and what was
5521 presented to the public?

5522 A No. In fact, I don't think we started at -- I
5523 don't think the Department of Health started asking
5524 the out-of-facility number until later. It's my
5525 recollection that that came a couple of weeks after we
5526 collected the presumed when we were attempting to do
5527 the retrospective.

5528 Q And I guess it only says April 12 to April 14. Do
5529 you disagree with how this report characterizes the
5530 reporting of nursing home deaths between April 12th
5531 and April 14th that says reported all confirmed deaths
5532 at nursing homes and other locations?

5533 A Yes. That's not my recollection.

5534 BY MR. BENZINE.

5535 Q We'll talk about kind of the out-of-facility later.
5536 But one of the -- and any number of people have
5537 brought this up, that kind of like people that break
5538 their leg go to the hospital and catch COVID, or catch
5539 COVID and get in a car accident, and then are counted
5540 as a COVID death.

5541 I guess one of the concerns that the chairman has in

5542 not counting the out-of-facility, regardless of where
5543 they died was where they caught COVID. And again,
5544 understanding the difficulties of having to figure
5545 that out. But looking back, do you think where the
5546 individual caught COVID is important in determining
5547 the scale of the crisis in nursing homes or in
5548 hospitals?

5549 A I think, looking back, understanding how the COVID
5550 was getting into facilities was the most important
5551 thing, because that's how we're going to inform if
5552 there's another pandemic, trying to guard against it.
5553 And so I think that trying to get to that answer was
5554 the most important thing.

5555 I do also agree that early on it was stupid that
5556 someone would die of a -- you know, get into a car
5557 accident. And if they also had COVID, in New York out
5558 of an abundance of caution, the hospitals were listing
5559 them as a COVID death. And I think looking back on
5560 that, that doesn't do anything to help inform the
5561 situation, because if it was a healthy 45-year-old,
5562 they were throwing off the statistics.

5563 Q I know the death certificates that were made public
5564 at the time were pretty interesting. It was like
5565 cause of death number one was blunt force trauma from
5566 accident, and cause of death number two was COVID. I

5567 think number one is a little bit different than number
5568 two.

5569 A Yes. It was a desire to be as transparent and
5570 forthcoming as possible and try to let people know the
5571 extent of the crisis. But I think in retrospect,
5572 like -- and this is why this exercise, I hope, is
5573 taken somewhat seriously, because in the future, that
5574 stuff needs to be considered because you can't really
5575 understand the scope of the thing if then later we
5576 find out school kids were 99 percent of the time okay
5577 and we were treating them the same as we were treating
5578 immunocompromised and elderly for a period of time
5579 which ultimately set them back, right?

5580 BY MR. EMMER.

5581 Q Do you recall becoming aware that deaths occurring
5582 after 5:00 p.m. weren't being counted?

5583 A Yes.

5584 Q And when did you become aware of this?

5585 A I don't remember the specific timeline, but
5586 somebody -- and I don't remember if it was Beth or if
5587 it was Megan or Linda, somebody at some point said to
5588 me, the Department of Health had a reporting screw-up
5589 where -- I don't know if it was because of the way the
5590 question was worded or because of a glitch in the
5591 system, there was a two-week period where they weren't

5592 counting people who died between 5:00 p.m. and 5:00
5593 a.m. And my reaction was, what are we doing about
5594 that?

5595 And they said, well, they've retrospectively gone and
5596 collected the data. And the response was, add them
5597 into the reporting numbers.

5598 So that was another instance, I think it was end of
5599 June perhaps, sometime in there, where there was all
5600 of a sudden a bump in the numbers and the press was
5601 like, where did that come from? And it was like,
5602 because there had been this Department of
5603 Health -- and I don't want to say screw-up because
5604 that's not kind to people who were doing their best in
5605 a pandemic.

5606 But was something that -- it was either the way the
5607 question was worded or it was an issue for the
5608 malfunctioning reporting thing, but it was
5609 acknowledged and fixed within a short period of time
5610 after it was identified.

5611 Q Do you recall how many deaths would have been
5612 excluded?

5613 A I don't. But it was during a period of time when
5614 the rate of death was much lower. It was like in May
5615 or something like that. It wasn't like March, April,
5616 when it was at its height.

5617 Q Do you recall whether there was any sort of
5618 reluctance to report that data when you became aware
5619 that it wasn't being included?

5620 A No.

5621 Q Do you recall having meetings regarding this issue?

5622 A To the extent -- I recall being told of the issue.
5623 I don't remember there being multiple meetings. But
5624 certainly it bubbled up that there had been a screw-up
5625 that needed to be addressed.

5626 Q Did you support the immediate release of data that
5627 wasn't being reported because of this mistake?

5628 A I think so. I don't think there was any like -- it
5629 wasn't just releasing the data that hadn't been
5630 released. I think they had to go back and collect it.
5631 I think that they hadn't been collecting it, not that
5632 it wasn't being reported. That's my memory of it.

5633 Q Do you recall having any conversations with
5634 Ms. Lacewell regarding the data that was being
5635 excluded because of this mistake?

5636 A I thought that I had the conversations with Beth,
5637 but it may have been Linda. I don't remember.

5638 BY MR. BENZINE.

5639 Q Do you recall any conversations with Ms. Baldwin
5640 about this?

5641 A I would usually communicate with Megan on email. I

5642 didn't talk to her voice-to-voice all that often, but
5643 she would have certainly been involved because I think
5644 Megan was sort of reporting to Linda or was acting at
5645 her person at DOH she was helping with numbers.

5646 Q What about Dr. Malatras?

5647 A I don't remember if he was involved in this or not.

5648 BY MR. EMMER.

5649 Q During one of the Minority's hours, they talked to
5650 you about Dr. Zucker, the letters that were prepared
5651 in August and October. And I just want to rewind.
5652 On August 3rd, Dr. Zucker declined to provide the New
5653 York state legislature with the number of nursing home
5654 residents who died. Do you recall his testimony?

5655 A Yes.

5656 Q And at that time, again, I'm going to ask you to
5657 sort of repeat yourself. But why couldn't you provide
5658 the number?

5659 A Because they hadn't been audited yet and we knew
5660 that they were wrong. So they needed to be audited.

5661 Q Did he support releasing the number during or prior
5662 to that hearing?

5663 A Not that I recall.

5664 BY MR. BENZINE.

5665 Q While he's looking over the questions, you were
5666 asked a lot of question's about Mr. Rhodes' audit, the

5667 600 or so, about 20 percent that he found potentially
5668 inconsistent.

5669 Do you recall -- and you might have answered this and
5670 my apologies if you did. Do you recall, did
5671 Mr. Rhodes advocate for releasing the remainder, the
5672 2400 or whatever it was?

5673 A Yes.

5674 Q Were they released at that time?

5675 A They were not released at that time.

5676 Q Why not?

5677 A That was -- I'll repeat myself from earlier. But
5678 that was almost exactly at the same moment that we
5679 received the inquiry from DOJ, and that's when we met
5680 with the lawyers and went to the leaders and said, we
5681 need to put your request aside. We can't have numbers
5682 floating around in the world. We have the DOJ
5683 inquiry. We have to get back to them. Our priority
5684 has to be making sure that their request is fulfilled
5685 in a timely, transparent, and truthful manner. And
5686 that's when they said, that's fine, just January.

5687 Q And we talked to Mr. Rhodes, obviously a smart guy.
5688 This isn't a question that's meant to disparage him.
5689 But when you get a DOJ request, you probably want
5690 someone more than Mr. Rhodes doing the audit to make
5691 sure the numbers are right. Was that the situation?

5692 A Yes.

5693 BY MR. EMMER.

5694 Q Do you recall Mr. Rhodes advising the release of
5695 the full numbers of the audit with some sort of
5696 disclaimer that there are 600 inconsistencies that
5697 warrant further follow-up?

5698 A He may have, but I don't remember.

5699 Q Do you recall whether the administration considered
5700 doing any such thing?

5701 A I don't recall entertaining saying, here are these
5702 extra numbers and there might be another 600 more, but
5703 we need to do more work. I remember, at least from my
5704 part and others, there being a desire to have the
5705 audit complete and done so that when we got back to
5706 the legislature, it was like, here it all is.

5707 And it was very troubling to me that on a cursory
5708 three-day long trip to DOH, they identified upwards of
5709 20 percent error rate, potential error rate in the
5710 numbers that three months earlier, McKinsey and DOH
5711 had just blindly dumped into a report despite knowing
5712 that they were wrong.

5713 So I think that there was a balance we were trying to
5714 strike between the desire to put these numbers out,
5715 which the press were asking for, and the desire to
5716 make sure what we were putting out was actually

5717 correct.

5718 BY MR. BENZINE.

5719 Q Did you end up employing an audit firm or
5720 accounting firm to do it?

5721 A Once DOJ got involved, everything went to the
5722 lawyers.

5723 Q Do you know if they hired an accounting firm to do
5724 it?

5725 A I do not.

5726 BY MR. EMMER.

5727 Q And you talked with the Minority about the letter
5728 that Dr. Zucker drafted in August of 2020. Was it
5729 your testimony that you don't recall actually
5730 reviewing it?

5731 A Correct.

5732 Q Do you recall having conversations with Dr. Zucker
5733 about releasing the full data pursuant to the letter
5734 that he drafted?

5735 A I don't recall having conversations with him about
5736 it.

5737 Q And again, asking you repeat yourself. But why
5738 wasn't that letter shared with the legislature at that
5739 time?

5740 A Because we were prioritizing the DOJ request over
5741 the legislative request.

5742 Q And was your testimony the same -- scratch that.
5743 Dr. Zucker seemed to also recall another letter that
5744 was also reporting the full numbers that he drafted in
5745 October, that he was confident. Do you recall
5746 reviewing such a letter?

5747 A No. And I think he -- I don't know if you guys
5748 have a copy of it or not, but my memory of that was it
5749 was around Thanksgiving. But, no, I don't think that
5750 I reviewed it.

5751 Q You may have already answered this, but how long
5752 did it take for the administration to respond to the
5753 Department of Justice's August information inquiry?

5754 A A month, perhaps.

5755 Q And why couldn't the administration respond to the
5756 legislature's request while also responding to the
5757 Department of Justice?

5758 A We wanted to prioritize DOJ. The legislature was
5759 fine with it. We didn't know what kind of follow-up
5760 questions they were going to come back with, if they
5761 were going to expand the scope. But once DOJ was
5762 involved, we were giving deference to DOJ.

5763 Q At that time in August, the Department of Justice's
5764 request only involved around 30 public state-run
5765 nursing homes; is that right?

5766 A If that's the number you've got, I don't doubt it.

5767 Q So I guess if the goal was to continually audit the
5768 numbers, why would that necessitate pausing the audit
5769 of the rest of the nursing homes in the State of New
5770 York?

5771 A I don't think it did. I think that in October,
5772 after that reported on Columbus Day call, they were
5773 doing more work on the numbers. I think they were
5774 doing additional auditing work on the private nursing
5775 home numbers because they had completed the -- they
5776 felt comfortable certifying to DOJ what they had done
5777 on the public nursing homes when they submitted that
5778 response, and then they continued to work on the
5779 private nursing homes separately from that through
5780 whenever Dr. Zucker did his second response to the
5781 legislature.

5782 Q And you mentioned just now and with the Minority
5783 that the legislature approved of this delay of
5784 receiving the numbers in January. Do you recall who
5785 in the legislature would have approved such an
5786 arrangement?

5787 A Yes.

5788 Q And who was?

5789 A Shontell Smith in the Senate and LouAnn Ciccone in
5790 the Assembly.

5791 Q Thank you. I want to direct your attention to the

5792 July 6th report which is marked as Minority Exhibit B.

5793 Prior to this report, had you ever been involved in

5794 editing a Department of Health report?

5795 A Not that I recall. But I also can't remember

5796 another time we did a DOH health report.

5797 Q And to be clear, I think I may have jumped ahead.

5798 And I don't want to mischaracterize your testimony,

5799 but you testified that you did edit this report during

5800 the drafting process?

5801 A I provided suggestions and I asked a lot of

5802 questions.

5803 Q Do you recall what areas you would have provided

5804 suggestions on?

5805 A Not specifically. But it's more what I was saying

5806 before. You know, a lot of times these things get

5807 loaded up with jargon that is not easily

5808 understandable to lay people. And the purpose of this

5809 was to try to be as straightforward as possible and

5810 able to easily explain what happened in another less

5811 complicated situation.

5812 So that was the majority of my feedback. And it was

5813 also asking questions. You're making this assertion,

5814 where did it come from? How are you going to back it

5815 up? Where's the footnote? You know, things like

5816 that.

5817 BY MR. BENZINE.

5818 Q Were your edits in track changes and comments?

5819 A I don't know. I don't know.

5820 BY MR. EMMER.

5821 Q And you testified to who was involved from the
5822 administration in the Minority's hour. But were there
5823 any other individuals or organizations outside the
5824 government that were involved in drafting the report?

5825 A In drafting the report? No, not that I am aware
5826 of.

5827 BY MR. BENZINE.

5828 Q What about reviewing the report?

5829 A I sent it to -- I'm going to screw up his
5830 name -- Dr. Grabowski, who was someone I saw in that
5831 COVID congressional hearing in June of 2020 who
5832 I -- he was from Harvard, he seemed like he had a
5833 tremendous amount of credibility with both parties.
5834 So I just cold called him and said, I heard your
5835 testimony. DOH is preparing to release this report.
5836 I would love a gut check. Would you mind reviewing
5837 this and letting me know what you think?
5838 And then I think also, Howard Zucker shared it, I
5839 think, with a few other hospitals and some other
5840 doctors to ask them for their feedback, you know,
5841 informally. It wasn't what the DOH had initially

5842 wanted, the formal peer review. This is more
5843 informal, hey, would you do me a favor, and I hold you
5844 in high esteem. What do you think?

5845 Q That was going to be my next question is Mr.
5846 Azzopardi put out a statement saying that it was a
5847 peer-reviewed paper. Was it a peer-reviewed paper?

5848 A I think that to the extent that, as I said,
5849 medically stable is a term of art in the medical
5850 community which is something that, like, lay people
5851 like me and Rich Azzopardi wouldn't have known and
5852 didn't fully appreciate.

5853 I think that when he used the word peer reviewed, he
5854 meant we sent this to other doctors, not used as in
5855 the term of art, like it would be traditionally used
5856 like in a medical journal. But in no way was that
5857 meant to mislead. We certainly sought outside input
5858 and reaction from medical professionals.

5859 BY MR. EMMER.

5860 Q Do you recall whether Michael Dowling may have
5861 reviewed the report?

5862 A I believe he did.

5863 Q Do you recall whether anyone from the Greater New
5864 York Hospital Association reviewed the report?

5865 A Not specially whom, but I believe they did.

5866 Q And in regards to Greater New York Hospital

5867 Association, Northwell Health, they would have just
5868 reviewed it, they wouldn't have made edits to it?

5869 A They would have reviewed it and said, did you
5870 consider -- and, again, this is -- I don't want to
5871 speak with 100 percent certainty. So my view on what
5872 they would have done, which is a hypothetical, is this
5873 section is strong, did you consider this? Do you have
5874 the numbers to back that up? Did you consider adding
5875 this graph? You know what I mean? That kind of
5876 feedback. But I don't think that they, like, line
5877 edited it.

5878 BY MR. BENZINE.

5879 Q Do you recall when you first saw a draft?

5880 A Sometime in the end of June, middle of June, end of
5881 June.

5882 Q Was it a pretty established paper by that point?

5883 A Yes, I think so.

5884 BY MR. EMMER.

5885 Q The impeachment report notices that throughout the
5886 drafting process, the former governor reviewed and
5887 edited the draft DOH report on multiple occasions and
5888 made edits to strengthen the defense of the March 25th
5889 directive.

5890 Is it true the governor reviewed and edited the report
5891 on multiple occasions?

5892 A If he did, I don't remember.

5893 Q Do you think it's possible that he may have edited
5894 the July 6th report?

5895 Mr. Morvillo. Anything is possible.

5896 The Witness. I don't know.

5897 BY MR. BENZINE.

5898 Q If he had made edits, would it have been
5899 communicated back to you by Stephanie Benton?

5900 A Possibly or Stephanie could have been communicating
5901 directly with Jim or with, you know --

5902 BY MR. EMMER.

5903 Q During one of the Minority's hours, they discussed
5904 the decision to not include out-of-facility deaths in
5905 the report. Do you recall whether you reviewed drafts
5906 that included the full hospital deaths?

5907 A I don't recall if I reviewed a draft that had the
5908 full number. I recall that there was a time at some
5909 point way late in the process where a draft was
5910 generated, where the unverified numbers were included.
5911 And also included in that initial draft I believe was
5912 the admissions and readmissions.

5913 And so this is what I was referencing before where
5914 there was two decision points and there was a
5915 consensus among the team that had been working on it
5916 that unverified numbers we knew were wrong would not

5917 be defensible.

5918 You can't reach a conclusion and at the same time say,
5919 we know -- not that these numbers aren't verified, we
5920 know these numbers are wrong, we just don't know how
5921 wrong they are. There was general consensus whether
5922 you use admissions or admissions and readmissions in
5923 the analysis, but not total consensus.

5924 So I went to Dr. Zucker, posed the question on both.
5925 He said the death number was irrelevant to the
5926 exercise, but what mattered was how it was walking in
5927 and he agreed that we should use the verified number
5928 and then audit the numbers when we had the opportunity
5929 to audit the numbers.

5930 And he said that we should use admissions because if
5931 we're looking at how COVID got into nursing homes, if
5932 you were an admit, you were, by definition, new to the
5933 nursing home with the COVID. If you were a
5934 readmission, you were already there had COVID left and
5935 came back. So that you left with it and came back
5936 after you were treated and weren't introducing it into
5937 the facility. So those were the two decision points
5938 we sought Dr. Zucker's guidance on, I sought
5939 Dr. Zucker's guidance on.

5940 Q Do you recall when you sought Dr. Zucker's
5941 guidance, was that a phone call or did you organize a

5942 meeting?

5943 A It was either a phone or in person.

5944 Q Do you recall --

5945 A Everything was either on phone or in person.

5946 Q Do you recall who else would have been on or a part
5947 of this discussion?

5948 A There were a couple of discussions. There was one
5949 big group discussion that was on a call. I had one
5950 off conversations with Zucker on my own. And Zucker
5951 and Linda spoke separately. I know I think Dr. Zucker
5952 and Jim spoke separately. So there were all kinds of
5953 iterations of these conversations.

5954 Mr. Emmer. Off the record for one minute.

5955 (Recess.)

5956 Mr. Emmer. We can go back on the record. At this
5957 time, I would like to introduce what we will mark as
5958 Majority Exhibit 11.

5959 (Majority Exhibit No. 11 was identified
5960 for the record.)

5961 BY MR. EMMER.

5962 Q This is a statement entitled statement from Beth
5963 Garvey, special counsel to the governor from March
5964 5th, 2021.

5965 A Okay.

5966 Q First, you recognize the statement?

5967 A Yes.

5968 Q Do you recall why Ms. Garvey had to issue this
5969 statement?

5970 A Yes.

5971 Q Can you explain why she issued it?

5972 A I believe there was a New York Times story or some
5973 story that reported that Jim, Linda, and I altered the
5974 numbers of the deaths in the July DOH report which was
5975 not truthful. Jim had issued a statement on his own,
5976 which then made it look as if since he issued a
5977 statement, but Linda and I hadn't issued a statement,
5978 that that meant that we had changed the numbers, which
5979 wasn't true.

5980 So Linda, on behalf of Chamber, issued, on behalf of
5981 everybody, issued a statement to clarify it. We were
5982 in the middle of a DOJ investigation, so the one thing
5983 we were told by the lawyers was none of us was allowed
5984 to individually speak or defend ourselves. So we were
5985 stuck in a position where we couldn't say anything.
5986 But Jim made a statement. So this was Beth's attempt,
5987 as a lawyer, to put out a statement explaining what
5988 had happened and made clear that none of us changed
5989 the numbers.

5990 Mr. Morvillo. You said Linda.

5991 The Witness. Beth.

5992 BY MR. EMMER.

5993 Q Do you recall a phone call asking Dr. Malatras to
5994 retract his statement?

5995 A I don't know that it was asking him to retract his
5996 statement. I remember he put out the statement and
5997 didn't tell anyone. And so I saw it on Twitter, and
5998 it wasn't just me, there was a group of people on the
5999 phone.

6000 But I think I said to Jim, the way that you did this
6001 without coordinating is going to look like just you
6002 and not Linda and I, when that's not the reality. And
6003 he said, I'm president of SUNY now, so I was getting
6004 asked questions, but you guys should put out whatever
6005 you want. And we were told we weren't allowed because
6006 of the ongoing investigation so Beth Garvey issued a
6007 formal statement.

6008 Q Who else was on that phone call?

6009 A I believe Linda, I believe -- I don't know Beth
6010 would have been on the phone, too.

6011 Q So I want to direct your attention to the second
6012 paragraph. It reads, "COVID Task Force members
6013 including Melissa DeRosa, Linda Lacewell, and Jim
6014 Malatras were involved in reviewing the draft report.
6015 None of them changed any of the fatality numbers or
6016 altered the data. After asking DOH questions as to

6017 the source of the previously unpublished data to which
6018 there were not clear or complete answers probing to
6019 determine whether it was relevant to the outcome of
6020 the report, a decision was made to use the dataset
6021 that was reported by the place of death, with
6022 firsthand knowledge of the circumstances which gave a
6023 higher degree of comfort in its accuracy."

6024 Now, several minutes ago, I believe we touched on the
6025 discussions that led up to that decision. Do you
6026 recall what questions were asked of the Department of
6027 Health that ultimately led to the decision to exclude
6028 the out-of-facility deaths.

6029 A Yes.

6030 Mr. Morvillo. When you say -- are you asking for
6031 conversations that she had with lawyers? Are you
6032 asking a different question? I'm just not sure which
6033 questions you're talking about. Are you talking about
6034 in the conversation that you know I'm going to object
6035 to, that had lawyers in it, or are you something about
6036 something different?

6037 Mr. Benzine. The questions that were asked to DOH
6038 that led to the decision to not publish that data.

6039 Mr. Morvillo. By the Executive Chamber or by the
6040 papers or by who? That's what I'm trying to figure
6041 out, who is asking the questions.

6042 BY MR. BENZINE.

6043 Q I would imagine it was you.

6044 Mr. Morvillo. So you can answer if lawyers aren't
6045 involved in that conversation. If it's not legal
6046 advice.

6047 The Witness. There was multiple conversations. There
6048 was one penultimate conversation that was privileged
6049 and we won't talk about because it's privileged. You
6050 say that it's privileged.

6051 Mr. Morvillo. I don't say it's privileged. But the
6052 Executive Chamber --

6053 BY MR. BENZINE.

6054 Q Is the penultimate conversation the June 27th phone
6055 call?

6056 A I don't know the actual date, but there was that
6057 conversation which was like the big group conversation
6058 which has been reported and discussed previously.
6059 But the questions to DOH not just from me, but from
6060 others including Linda. Including Beth, including
6061 other people, that were looking at this report,
6062 because it, was data that had never been previously
6063 published was, has this been vetted or verified? No.
6064 In looking at the cursory numbers, we've all agreed
6065 previously that this information has to be audited
6066 because it's incorrect. Has anything changed? No.

6067 Have you done anything to figure out which information
6068 is incorrect? No. How certain are you of the numbers
6069 that are reported from outside facilities that they
6070 are correct? Silence.

6071 Are you seriously proposing using numbers in a report
6072 to back a conclusion that the March 25th guidance
6073 didn't influence bringing COVID into nursing homes,
6074 knowing that the numbers are wrong? Not thinking that
6075 they could be wrong but knowing that they're wrong?
6076 Silence. What do we want to do here, guys? What do
6077 you want to do here?

6078 And Zucker said, it doesn't alter the conclusion, the
6079 ultimate conclusion is the same, so let's use the
6080 vetted verified numbers, be clear that's what we're
6081 doing and we will audit them later.

6082 And so it was Zucker's call. Zucker had to defend it,
6083 Zucker had to put his name on it. As Zucker told the
6084 Assembly, if he disagreed with it, he would not say it
6085 out loud. His name was on it. It was his call.

6086 And then along with that, I'm not sure the same but
6087 similar conversation, the question on admissions or
6088 readmissions which was a much shorter discussion
6089 because he was very clear. We're looking at what
6090 brought it in, if it's a readmit they left with it and
6091 they brought it back or they didn't because the viral

6092 load should be so low. So that was sort of,
6093 like -- and that was how the decision was made.

6094 Q And those were the two decision points that you
6095 were talking about earlier that Dr. Zucker made the
6096 call on?

6097 A Yeah, where there were multiple conversations about
6098 what to do and it was Dr. Zucker's call. And then
6099 subsequently, we did make a good faith effort to try
6100 to do an audit. We did confirm the error rate was
6101 north of 20 percent, DOJ, and on and on.

6102 Mr. Morvillo. Just to be clear, when you were given
6103 questions and answers, those are not direct quotes --
6104 The Witness. No, no.

6105 Mr. Morvillo. You're just sort of hypothesizing.
6106 The Witness. Correct. This is I'm giving you, this
6107 is the gist.

6108 Ms. Morvillo. Substance as opposed to specifics.
6109 THE WITNESS: Thank you. And it wasn't just me that
6110 was probing. There were a number of people probing.
6111 Because if you're going to introduce this brand new
6112 number into a report and say this report disproves
6113 that the thing you, DOH, are being accused of doing
6114 that caused people to die, you better damn be sure of
6115 the numbers you are using are right or you're going to
6116 be cooking the books.

6117 And now that we've established in this group
6118 conversation that not only do we not know the numbers
6119 are right, we know the numbers are wrong, to say
6120 nothing of the fact that people are questioning the
6121 use of probables and whether or not the probables are
6122 real and not real and are they inflating it.
6123 So the ultimate goal, which I stated in no uncertain
6124 terms, the governor and Zucker believed in his core
6125 was we had to be right. The numbers had to be right.
6126 So again, it was balancing the desire of the speed
6127 from the press and the legislature to get a certain
6128 set of numbers and making sure they were right. And
6129 the sort of bomb that was thrown into the middle of it
6130 was DOJ.

6131 BY MR. BENZINE.

6132 Q I want to go back to the June 27th penultimate, I
6133 think we're talking about the same one, but I
6134 understand recollection on dates. Was there any
6135 conversation on that phone call that was not
6136 privileged?

6137 Mr. Morvillo. Well, I'm not sure that she's the right
6138 person to ask that question. She's not a lawyer.
6139 She's not going to know exactly. I know you've had
6140 other lawyers in that were on that call, they're
6141 probably better to ask that question to.

6142 Mr. Benzine. Have you debriefed her on the contents
6143 of the conversation? Could you assert privilege on
6144 her behalf?

6145 Mr. Morvillo. It's not our privilege.

6146 Mr. Benzine. Based on that conversation.

6147 Mr. Morvillo. I don't work for the Chamber.

6148 Mr. Benzine. You've been asserting privilege all day.

6149 Mr. Morvillo. Because it's their privilege and we
6150 don't have the right to waive it. So my understanding
6151 is they haven't waived it, so we're protecting the
6152 privilege so if that's what you mean by asserting it,
6153 yes.

6154 Mr. Benzine. I'm trying to understand how you know --

6155 Mr. Morvillo. Because I have been told they're not
6156 waiving the privilege.

6157 Mr. Benzine. Okay.

6158 BY MR. BENZINE.

6159 Q Was there any discussion on that call beyond what
6160 numbers to include?

6161 A I believe also --

6162 Mr. Morvillo. No. Just yes or no on that one.

6163 The Witness. I don't recall specifically.

6164 Mr. Morvillo. Or I don't recall.

6165 The Witness. I don't recall.

6166 BY MR. BENZINE.

6167 Q We can stick with the yes or no. The discussion of
6168 whether to include the north of 9,000 number or the
6169 north of 6,000 number took place on that phone call,
6170 just yes or no?

6171 The Witness. Can I do --

6172 Mr. Morvillo. You can answer that. Just yes or no.

6173 The Witness. Yes. But, like, let me, again, say, A,
6174 because there was many conversations around that time.

6175 BY MR. BENZINE.

6176 Q Yes, and --

6177 Mr. Morvillo. If you want to ask questions about what
6178 happened around that call on that topic without
6179 getting into the that specific call, I have no
6180 objection. If you want to get it in a different way,
6181 more power to you.

6182 Mr. Benzine. I'm trying.

6183 BY MR. BENZINE.

6184 Q So we had an interview with Ms. Lacewell, and
6185 again, without furnishing the transcripts, she
6186 testified that she saw drafts of the report that had
6187 the 9,800 and whatever number prior to June 27th. And
6188 then after June 27, it was all the 6,000 number. She
6189 didn't get into the why on the phone call.

6190 Beyond discussing -- were there discussions prior to
6191 the penultimate phone call on what numbers to include.

6192 A I don't want to -- I'm sorry I used the word
6193 penultimate because there were many phone calls, so
6194 just know there were many conversations. There wasn't
6195 a definitive conversation, but that's the conversation
6196 everyone is claiming privilege over it.

6197 Q And that's why I'm focused, I'm assuming that's the
6198 decision that was made if everyone is claiming
6199 privilege?

6200 A The decision was made by Dr. Zucker over a series
6201 of conversations. Again, I don't remember the first
6202 time I saw the report. I remember that on that date
6203 was sort of like when it called into question, because
6204 it bubbled up to a point where it was like, whoa,
6205 where did these numbers come from and how are we using
6206 the numbers no one has ever seen before. And who's
6207 looking at these numbers?

6208 And Department of Health, you're telling me you know
6209 these numbers are wrong, which is why we haven't used
6210 them previously, but you're just going to put them in
6211 the report? How did McKinsey get them? Tapped the
6212 database without asking any questions about whether or
6213 not they've been vetted or verified?

6214 It was -- there were many of these conversations that
6215 were being had around that discussion. And Dr. Zucker
6216 was the ultimate decisionmaker on this and the

6217 question about admissions versus readmissions and what
6218 to use. And his conclusion was it doesn't change the
6219 outcome so use the verified numbers and then we have
6220 to audit these other numbers, and which we then, a
6221 month later, attempted to begin a good faith effort to
6222 do.

6223 Q Was the governor ever consulted on the decision of
6224 which numbers to include?

6225 A I don't think he was involved in those
6226 conversations.

6227 Q And then my understanding of the series of phone
6228 calls is that it's some combination of you,
6229 Ms. Garvey, and Ms. Lacewell, and Dr. Zucker on them.
6230 Do you remember any other people involved?

6231 A I think Malatras.

6232 Q That's right?

6233 A Eleanor Adams may have been in and out of those.
6234 Gary Holmes may have been in and out of those. A
6235 press person. Like some iteration of that general
6236 group.

6237 Q Okay. Thank you.

6238 BY MR. EMMER.

6239 Q And you had touched on it, but you said the other
6240 decision that was made was whether or not to include
6241 readmission or readmitted residents versus admitted

6242 residents?

6243 A Correct.

6244 Q And what was the ultimate decision?

6245 A To use what Dr. Zucker said because what the report
6246 is trying to examine is how COVID was introduced into
6247 nursing homes, it didn't make sense to use the
6248 readmission number because the readmission number, by
6249 definition, means I had COVID, I'm in a nursing home,
6250 I went to a hospital, I was treated in a hospital. I
6251 was medically stable, I'm then going back to my home.
6252 So you weren't introducing COVID into the nursing home
6253 because you left with it and by the time you came back
6254 under the best medical advice at the time, this
6255 person -- the viral load was such that they were no
6256 longer contagious. So they certainly weren't
6257 introducing it because they got it there.

6258 BY MR. BENZINE.

6259 Q Do you know if hospitals were testing everybody
6260 that they admitted at that time?

6261 Mr. Morvillo. At which time?

6262 The Witness. Which time?

6263 BY MR. BENZINE.

6264 Q While the admissions policy was in place?

6265 A From March 25th to May 10th?

6266 Q Yes.

6267 A Do I know if they were testing everyone who was
6268 admitted, any person, regardless of whether they were
6269 suspected with COVID, I don't believe so.

6270 Q Then the readmission definition you just used
6271 wouldn't work because it's possible a nursing home
6272 resident left without COVID, right? So you just said,
6273 by definition, readmissions would be someone going to
6274 the hospital with COVID, waiting for the viral load to
6275 go away, and then being readmitted?

6276 A So this is not me speaking, this is me speaking in
6277 Dr. Zucker's conclusion. But I think Dr. Zucker would
6278 say -- or at least the reasoning at the time was if
6279 they went in and they were suspected COVID, they were
6280 treated as a COVID patient whether they were tested or
6281 not.

6282 So they were still given all those protocols and they
6283 weren't allowed to be discharged until they met the
6284 medically stable definition and they had been there
6285 over a period of time. So if they were considered a
6286 readmission, it was assumed that when they left, they
6287 had COVID because they left with COVID symptoms and
6288 they were believed to be COVID positive.

6289 Q And I will not belabor the point too much. All I'm
6290 saying is that a nursing home resident could have
6291 fallen, broken their leg, and gone to the hospital?

6292 A Under that circumstance, they were counted as an
6293 admission.

6294 Q Okay.

6295 A If they went in for a reason other than suspected
6296 or known COVID, then they were considered an
6297 admission.

6298 Q Okay.

6299 BY MR. EMMER.

6300 Q Quickly on this point, I want to direct your
6301 attention to page 20 of the July 6 report. And we're
6302 looking to the first sentence under COVID admissions.
6303 And I will just read it out loud. Admissions into
6304 nursing homes for patients who went to the hospital
6305 and were treated and returned back to their nursing
6306 home. If the numbers of readmitted residents weren't
6307 included, why did they define an admission as
6308 effectively a readmission here?

6309 A So they're basically -- this sentence, as I am
6310 reading it, is wrong. It's missing the word "re," it
6311 should say readmission, so I think that's an editing
6312 issue.

6313 Q So you had no role in, I guess, the drafting of
6314 that paragraph?

6315 A I don't recall. I may have certainly weighed in or
6316 like murder boarded it, asked questions about it, but

6317 I think that should have said readmissions. And I
6318 actually kind of remember that being caught later and
6319 being fixed.

6320 Q So you testified that -- well, effectively
6321 testified what Dr. Zucker told you that the ultimate
6322 conclusion wouldn't change regardless of if it
6323 included out-of-facility deaths; is that right?

6324 A Correct.

6325 Q Why was there a rush to publish it on July 6th?

6326 A It wasn't about July 6th as you saw from the
6327 earlier note from the governor. And also, Im sure,
6328 from the exhaustive press clips. Once April 20th
6329 happened, the questions about whether or not this
6330 introduced it to nursing homes, in general, were
6331 relentless, and we were eager to get the public an
6332 answer.

6333 Q Did the reason -- or did it have -- the decision to
6334 publish it rather than delay until you could audit the
6335 data further, did it have anything to do with the
6336 governor's book? The governor met with the publisher
6337 on July 6th regarding the book; is that right?

6338 A I don't remember the specific day, but I don't
6339 challenge your --

6340 Q Would you have been in those meetings?

6341 A I was in a couple of meeting. I like sat next to

6342 him while he was doing Zoom.

6343 Q Are you aware that there was a bidding war for the
6344 book on July 8th?

6345 A I'm aware that there was an auction for the book
6346 sometime that week.

6347 Q When did you become aware that the governor was
6348 intending to write a book?

6349 A Writing or publish?

6350 Q Well, that he --

6351 BY MR. BENZINE.

6352 Q Both.

6353 A He started taking notes, voice notes at some point
6354 in June when things slowed down. He wanted to make
6355 sure that he was remembering everything that was going
6356 on around us because at some point, he wanted to tell
6357 the story. After the daily briefings ended, which was
6358 June 19th, he raised with me what do you think about
6359 now being the time to do the book.

6360 BY MR. EMMER.

6361 Q What role did you play in the governor's book?

6362 A I read a first draft. I edited it. I sat next to
6363 him while he spoke to publishers, took time off on my
6364 time sheets to do it, done on my own personal time.

6365 And then there were a couple of weekends, two
6366 weekends, I think one in July and one in August, where

6367 he really worked on it at the mansion with a couple of
6368 us. I was there for that. And then I weighed in on
6369 drafts of the book with factual edits and places where
6370 I thought things were either incorrect or should have
6371 been stated or could have been stated more clearly
6372 that I had personally been part of.

6373 Q And you said you did it on personal time. Were you
6374 paid for your work on the book?

6375 A I was not.

6376 Q Who else from the administration was involved in
6377 the drafting of the book?

6378 A I wouldn't say drafting, but like editing,
6379 reviewing, Jim Malatras, Gareth Rhodes, and then
6380 Stephanie Benton did -- like, he would dictate and
6381 then send her the dictation. And she would, like, you
6382 know -- you know when you do a voice note, it's
6383 clunky, it doesn't come out exactly right. She would
6384 take it, and clean it up.

6385 Q Did you ever assign administration staff to
6386 complete book-related projects?

6387 A I don't view it that way, no.

6388 Q How do you view it?

6389 A I don't think I did, no.

6390 BY MR. BENZINE.

6391 Q Did you ever ask Executive Chamber staff to work on

6392 the book?

6393 A I think I asked Gareth Rhodes if he wanted to be a
6394 part of the group coming over that weekend. I think I
6395 asked Jim Hodges if he want to. They were aware it
6396 was voluntary. They could say no. There was
6397 certainly no directing.

6398 BY MR. EMMER.

6399 Q Do you know when the governor was first approached
6400 about writing a book?

6401 A The governor was first approached by his -- I want
6402 to say -- so there was his last book that he wrote in
6403 2014. At the end of March, early April, the publisher
6404 from that book reached out through his old agent to
6405 say they want permission to publish it as a paperback,
6406 because the governor was like at the height of his
6407 popularity, and they thought they would be able to
6408 make money.

6409 So they came to us through Bob Barnett through Steve
6410 Cohen, can the governor give permission to do a
6411 reprint of the 2014 book. And the governor said no.
6412 If they do what they do, I'm not going to go after
6413 them or say they can't, but I'm not giving affirmative
6414 consent.

6415 So I don't know if that counts as an answer to your
6416 question, but when he decided that he wanted -- or

6417 that he thought he was going to pursue actually taking
6418 the stuff that he had dictated and turn it into
6419 something, it was after the briefings were over at the
6420 end of June.

6421 BY MR. EMMER.

6422 Q So the JCOPE report, it says that March 19th, that
6423 an editor from Penguin Random House reached out to
6424 Robert Barnett around that -- what you just testified
6425 was -- you might have to correct me on this, but that
6426 it was around the end of March and April that he was
6427 approached. Are you saying that Barnett was reached
6428 out to on this, I'm writing a book, and didn't talk to
6429 the governor about it until later in the month?

6430 A No, no, no. My memory is Barnett reached out
6431 because his 2014 publisher wanted to print paperback
6432 version of the original. He, Bob Barnett, at the time
6433 wasn't talking to me. He was talking to Steve Cohen
6434 who was former secretary to the governor before me.
6435 He had my job in the first year of the administration.
6436 And Steve spoke to the governor about it. If
6437 somewhere in that conversation Barnett said and people
6438 are already saying they're going to want -- are you
6439 going to write a book at some point? That information
6440 didn't reach me.

6441 Q And you may have already touched on this, but when

6442 did the governor start writing the book? Did you say
6443 it was after the press or the daily briefings were
6444 done?

6445 A My memory is in June of 2020, he started because he
6446 didn't want to forget anything and it was all fresh in
6447 his brain dictating into his iPhone in down time. And
6448 then this happened and then this happened and then
6449 this happened, so there would be a record of it. And
6450 it wasn't until after the end of the briefings that he
6451 actually said, I think I want to move forward and
6452 publish. Why don't we see -- I want to see from
6453 Barnett and see what the interest is.

6454 Q So the governor's book, he drafted it completely
6455 based on the notes that he dictated?

6456 A Correct.

6457 Q So no one from the administration retrieved
6458 information for him to use for the drafting of the
6459 book is what you're testifying to?

6460 A No one from the administration retrieved -- in
6461 July, August, when he was writing the book and we were
6462 fact-checking things, certainly like if I needed to
6463 check something online or look at a press release or
6464 look at something, you know, in that part of the
6465 fact-check process. But he also paid somebody through
6466 Random House to -- I think it was Random House, the

6467 publisher, to do fact-checking.

6468 Mr. Emmer. At this time, I would like to introduce
6469 what we'll mark as Majority Exhibit 12.

6470 (Majority Exhibit No. 12 was identified
6471 for the record.)

6472 BY MR. EMMER.

6473 Q I will give you a minute to review the document.

6474 A I am familiar with this.

6475 Q This is an email thread produced via FOIA started
6476 by you on March 30th, in which you write, who can do a
6477 timeline for me? Call me to discuss.

6478 Do you recall sending this email?

6479 A No.

6480 Q Do you have any idea why you would be requesting a
6481 timeline?

6482 A Only in the context of responding to a press
6483 inquiry, when I spoke to Tom and Jamie and asked them
6484 what was this, because I didn't remember and they
6485 refreshed my memory.

6486 Q Did Tom or Jamie have any role in the development
6487 of the governor's book?

6488 A None.

6489 (Majority Exhibit No. 13 was identified
6490 for the record.)

6491 BY MR. EMMER.

6492 Q At this time, I would like to introduce what we
6493 have marked as Majority Exhibit 13. This is another
6494 email thread that was produced by FOIA that was
6495 started by Stephanie Benton on April 18th entitled
6496 call with Melissa. Stephanie writes Pouse and Jamie,
6497 can you please send to me and Melissa what you have
6498 for a tic-toc.

6499 A Pouse.

6500 Q Pouse. First, a tic-toc is referring to a
6501 timeline, right?

6502 A I assume so, yes.

6503 Q On the first page, Mr. Malanowski writes, here's
6504 the preface I've been working on. Was Mr. Malanowski
6505 writing this preface for the book?

6506 A No.

6507 Q Do you know what he was writing it for?

6508 A So again, I didn't until Bill Hammond did his piece
6509 and then the press inquiries. And I didn't remember
6510 any of this. So I had to go back and talk to them and
6511 I asked what was this from.

6512 And they reminded me or told me, I guess, because I
6513 still don't really remember this, that at the
6514 beginning of COVID, or sometime at the end of March,
6515 Jamie Malanowski who was one of our speech writers who
6516 also worked free-lance for a number of magazines had

6517 written books on his own before, reached out to me and
6518 said, I would like to write a book at some point about
6519 all of this. What do you think about that? Like, as
6520 a side project.

6521 And I said to him, I think there's a bazillion things
6522 going on. I don't think now is the time to talk about
6523 doing a book. What I would love for you to do,
6524 because this is history, and we're living through this
6525 time in history, is if you guys aren't doing anything
6526 because you're speech writers and you're sitting
6527 around during this pandemic, record stuff. Like, keep
6528 everything in one place. We're going to want this at
6529 one point.

6530 At some point, we're going to want to be able to tell
6531 the story however that is. So I supported him trying
6532 to keep track of what was going on around us. It was
6533 a complete failure, nothing ever came of it.

6534 At one point, he said to me, could I interview you,
6535 could I interview the governor, could I interview
6536 Dr. Zucker. He expressed I could be a ghost writer
6537 for the governor. I could do it on his behalf when
6538 things slow down.

6539 And I said to him, I fully am supportive of you
6540 recording everything that's going on. Give it your
6541 best shot. I would love to make sure things are being

6542 recorded so we have it for posterity and it crashed
6543 and burned. I think he told me that he had one
6544 conversation with Zucker, they never even generated
6545 notes from it, nothing was ever turned over to the
6546 governor. This certainly never met the hands of
6547 Andrew Cuomo, and it just sort of faded away. And he
6548 was disappointed that the governor was doing a book
6549 and that he hadn't been asked to take the lead and be
6550 a part of it.

6551 BY MR. BENZINE.

6552 Q Did he tell you what the preface that he was
6553 writing was for?

6554 A He wanted to do a book.

6555 Q Okay. This was for his own book?

6556 A Well, at first, he wanted to do his own book in his
6557 name. And then he was trying to pitch this idea that
6558 he could potentially ghost write it for the governor.

6559 Q So this was part of the pitch?

6560 A This was part of an idea of what he could do. And
6561 this was like literally what Hammond had reported was
6562 the extent of it. He never interviewed anyone other
6563 than -- I think he did one conversation with Zucker
6564 that they never gave to anybody. And then I think his
6565 feelings were hurt when the governor announced he had
6566 a book deal.

6567 Mr. Emmer. Thank you. The last one I would like to
6568 introduce at least in this line of questioning,
6569 introduce what will be marked as Majority Exhibit 14.

6570 (Majority Exhibit No. 14 was identified
6571 for the record.)

6572 BY MR. EMMER.

6573 Q This is an email thread from June 13th started by
6574 Stephanie Benton that also includes the day-to-day
6575 timeline of the COVID response including total cases
6576 by day. Please let me know when you have reviewed the
6577 document.

6578 A Okay.

6579 Q Was this document produced and used to write the
6580 book?

6581 A No. Not to my knowledge, no.

6582 Q And I believe that you touched on this earlier, but
6583 what months or when did the governor start drafting
6584 the book?

6585 A At some point in June. But you should also know,
6586 which I think is public, because I think the Times got
6587 an early draft of it. The book wasn't initially laid
6588 out chronologically. He did it by chapters, testing,
6589 contact tracing, the White House, like it was done not
6590 chronologically at all, didn't follow anything that
6591 looked like that.

6592 There was, at the same period of time as we were
6593 winding down, discussion of doing some sort of a -- I
6594 hate to put it this way, but the only way I can
6595 explain it and make it easily understandable, an Al
6596 Gore sort of style. Remember the climate movie he did
6597 doing that kind of a presentation on what happened
6598 during COVID as the first wave was winding down, where
6599 he was actively talking to different people who were
6600 involved in the film industry about what something
6601 like that would look like.

6602 He wanted to write an opus about what COVID was that
6603 could be published for the story of COVID, which we
6604 ultimately did do, I think around this time, that
6605 could be a blueprint for the rest of the country to
6606 follow. Which should still be available on the
6607 website.

6608 Like, this stuff was constantly being pulled and
6609 formed briefings, various projects of all kinds. But
6610 this stuff was not -- the book was something he was
6611 literally dictating like into his phone and originally
6612 was done by subject matter and the publishers, it was
6613 the publisher's idea in the middle of July to
6614 reorganize it into more of a chronological timeline.

6615 Q I believe I asked when he started drafting, but did
6616 he start dictating earlier than June 2020?

6617 A That I don't know.

6618 BY MR. BENZINE.

6619 Q Do you think Ms. Benton wrote this email on 4862?

6620 It's Exhibit 14, but the last page is 4862.

6621 A I'm sorry. I can't find it.

6622 Yes, that's Stephanie.

6623 Q Okay. It's hard to keep track.

6624 Mr. Emmer. We'll go off the record.

6625 (Discussion held.)

6626 Mr. Emmer. Back on the record, please.

6627 BY MR. EMMER.

6628 Q Do you recall whether anyone expressed ethical

6629 concerns or concerns with the appearance of

6630 impropriety related to the governor writing a book

6631 about the administration's response to the pandemic

6632 while simultaneously still responding to the pandemic?

6633 A Not ethical concerns, no.

6634 Q What concerns?

6635 A Political.

6636 Q Can you briefly elaborate on that?

6637 A That optically, it could politically be bad because

6638 people could say your ego is so big and you're trying

6639 to capitalize on this moment politically. But it

6640 wasn't an ethics question, it was a political one.

6641 Q Did the governor have a government ethics attorney

6642 advising him on the book?

6643 A Yes.

6644 Q Who?

6645 A Judy Mogul.

6646 Q Did Linda Lacewell advise him on the book?

6647 A She was consulted as well. But it was Judy
6648 primarily.

6649 Q When did discussions related to the book occur as
6650 far as during the day-to-day drafting of the book when
6651 you were having discussions related to the book?

6652 A Do you mean working, like helping to volunteer on
6653 the book?

6654 Q Yes.

6655 A It was a very condensed period of time. To the
6656 extent that it happened during business hours which
6657 are defined which certainly I'll say that I'm sure you
6658 can appreciate it, too, absurdly defined between 9:00
6659 and 5:30 with an hour lunch break that floats in
6660 between.

6661 So if you were doing any volunteering on the book
6662 during 9:00 to 5:30, absent an hour of floating time
6663 you had to record that off on your time sheets. So
6664 that's how it was all recorded. But most volunteer
6665 work that was done editing or assisting on the book
6666 other than Stephanie Benton who I understand took a

6667 tremendous amount of time during the day to assist the
6668 governor was done at night and on the weekends.

6669 Q Did discussions related to the book ever occur
6670 while the governor, his team, or Task Force were
6671 simultaneously discussing or making policy decisions?

6672 A No, not that I recall.

6673 Q Do you feel that the governor's book influenced the
6674 governor and his staff's decisions during the
6675 pandemic?

6676 A No, the book was written after the first wave was
6677 over and it was his reflections on what had happened
6678 during a lull in the pandemic when we were under 1
6679 percent for a few months.

6680 Q Did discussions related to the substance of the
6681 July 6 report ever occur while simultaneously
6682 discussing the book?

6683 A No.

6684 Q Did you feel that the release of the book
6685 influenced the administration to not release all the
6686 data on fatalities in nursing homes?

6687 A No.

6688 Q Were you aware that the Executive Chamber made
6689 representations to the Joint Commission on Public
6690 Ethics that could be perceived as misleading?

6691 A I am aware that some people think that. I don't

6692 believe that to be true.

6693 Q Can you briefly describe why you don't believe that
6694 to be true?

6695 A Sure. We sought guidance from our ethics counsel
6696 which is in writing in a memo that I believe has also
6697 been made public that specifically addressed whether
6698 or not people who worked for the state could volunteer
6699 their time for the book.

6700 She advised that we could so long as it was on our own
6701 personal time which meant not between 9:00 and 5:30,
6702 sans that hour, or if so, that it was reflected on our
6703 time sheets. And to the best of my ability, that was
6704 done -- to the best of my knowledge, excuse me, that
6705 was done appropriately.

6706 Q Our last line of questioning has to do with the
6707 threat of overcrowding hospitals at the beginning of
6708 the pandemic. Can you briefly describe the
6709 administration's concerns and what measures it took to
6710 accommodate?

6711 A Sure. So a number of academic institutions and
6712 federal government agencies put out predictions that
6713 given the rate of the rapid infection in New York City
6714 that we were on track to need upwards of 150,000
6715 hospital beds. The State of New York, in total, had
6716 something like 42,000 hospital beds. That

6717 necessitated two things.

6718 One was a number of measures to close things down to
6719 try to stop the spread and get people to isolate, stop
6720 moving so we could get the spread under control.

6721 The second thing was a lot of changes needed to be
6722 made in hospitals. So surge and flex happened which
6723 included not just all hospital systems had to speak to
6724 one another, to resource share and make sure they were
6725 balance loading properly, but also they had to add 50
6726 percent capacity to their hospitals which meant doing
6727 things like putting beds in cafeterias. They had to
6728 suspend elective surgeries. They had to limit -- you
6729 couldn't have visitors because that would, by
6730 definition, necessitate use of PPE unnecessarily.

6731 So there was a whole litany of things that the
6732 hospitals had to do to be able to meet the mandate of
6733 being able to do -- add 50 percent additional capacity
6734 to be able to be ready for the anticipated surge.

6735 Q The administration's actions included the Javits
6736 Center and the USNS Comfort; is that right?

6737 A Yes, as overflow.

6738 Q You answered my next question. Were these
6739 facilities able to accept COVID-19 patients when they
6740 first were announced?

6741 A Javits, yes. Although I don't believe that that

6742 was the intent. I think that's where they were
6743 supposed to be routing people who were in need of
6744 medical care but were not COVID positive. The
6745 Comfort, no.

6746 Q Did you ever discuss transporting COVID positive
6747 nursing home patients from nursing homes to the
6748 Comfort?

6749 A No.

6750 Q Why not?

6751 A I'm not sure that I would have been the person
6752 having that conversation, but I will say that at first
6753 the Comfort wasn't taking COVID positive patients.
6754 Then because of the negative press the President was
6755 incurring, he did an about face and said we will
6756 accept COVID positive patients.

6757 Subsequently, the staff of the Comfort got COVID and
6758 couldn't take anybody because the entire staff was
6759 infected. And then at one point when they finally
6760 could, the curve was not just flattened, it was
6761 crushed, it was no longer necessary. So it was
6762 basically a floating press release.

6763 Q Do you recall requests or do you recall receiving
6764 requests from nursing homes to transfer COVID-19
6765 positive patients from the Javits or Comfort?

6766 A I never received those calls if they happened.

6767 Q Do you know why nursing homes would have been told
6768 that the Javits and the Comfort were only receiving
6769 patients directly from hospitals?

6770 A I don't.

6771 Q At this time, I would like to introduce what will
6772 be marked as Majority Exhibit 15.

6773 (Majority Exhibit No. 15 was identified
6774 for the record.)

6775 BY MR. EMMER.

6776 Q This is an email chain collected by FOIA between
6777 Vice Admiral Mike DuMont and yourself, as well as
6778 Dr. Malatras, Stephanie Benton, and Jill DesRosiers.
6779 And I will give you a minute to look it over.

6780 A Okay.

6781 Q So the vice admiral writes, "we could use some help
6782 from your office. The governor asked us to permit use
6783 of the USNS Comfort to treat patients without regard
6784 to their COVID status and we have done so. Right now,
6785 we only have 37 patients on board the ship. Further,
6786 we are treating all 83 patients at the Javits Center.
6787 Our greatest concern is twofold, helping take the
6788 strain off local hospitals and not wasting high end
6789 capabilities the U.S. military has brought to NYC."
6790 Do you remember the vice admiral's request?

6791 A No, but I've since gotten press inquiries on it, so

6792 I'm aware of it.

6793 Q And I believe you may have already answered, but
6794 why wasn't the Comfort -- or why wasn't the Comfort
6795 fully utilized at this time?

6796 A At first it was because they weren't allowed to
6797 accept COVID. Then when they were, the crew got sick.
6798 Then when they could, apparently it looks like based
6799 on this email, they have -- they had 37 patients on
6800 the ship. And then according to Mike Kopi, who is the
6801 point person and head of the Office of Emergency
6802 Management, the things that the admiral wrote in his
6803 email were all incorrect for all the reasons he states
6804 in his own words.

6805 Q And you write they are setting this up to say that
6806 we are the reason the ship and the Javits are empty.
6807 Did you interpret the vice admiral's email as a
6808 political ploy?

6809 A There were two options. One was that he was
6810 stupid. The other was that he was being political and
6811 I could not fathom that a vice admiral of the U.S.
6812 Navy was stupid so I assumed he was being political.
6813 BY MR. OSTERHUES.

6814 Q Final question. So this is the deputy commander of
6815 U.S. Northern Command. So he is, as the deputy
6816 commander, responsible for effectively a homeland

6817 security mission in all of North America. And based
6818 on one email, you think he's being political?

6819 A So here's the thing. And you have to remember the
6820 circumstance. Everything with the Trump
6821 administration was political. They sent this ship, it
6822 was essentially a floating press release. All of a
6823 sudden it came under a tremendous amount of press
6824 scrutiny so it became the hot potato in the press,
6825 whose fault is it that they're not using this ship?
6826 And Trump was getting a lot of the blame. The
6827 governor asked for them. Under that pressure, they
6828 reversed themselves but they were still not getting
6829 patients. At this point in the timeline, they were no
6830 longer needed.

6831 So when he sent this right, usually if something like
6832 this would come up, in my experience with other people
6833 that I had worked with, Jared Kushner or others
6834 working under him in the White House, they would pick
6835 up the phone and just say, hey, Melissa, there's this
6836 situation going on, can we work this out.

6837 The way this email was constructed, and I mean the
6838 governor asked us to do this, to date this. We've
6839 been saying this. And then I, in good faith, forward
6840 it on to Mike Kopi, who is the head of Emergency
6841 Management, saying what's going on here?

6842 What's -- how can this possibly be?
6843 And when the head of emergency management immediately
6844 responds, saying, every single thing this person is
6845 saying is incorrect and wrong, it's really hard to
6846 believe that someone of his stature who's as
6847 experienced as he is could be that wrong.
6848 And so whether it was correct or not, I assumed he was
6849 being political and that's part of the problem with
6850 the entire interaction we had with the federal
6851 government, that everything felt inherently political.
6852 So give them the benefit of the doubt that he wasn't,
6853 but I'm telling you that was my realtime reaction and
6854 what it was based on.

6855 Q So I've been on that ship and deployed to places
6856 like Haiti as part of disaster relief. And other
6857 missions. And I served for 25 years in the Navy under
6858 three Democrat administrations and two Republican
6859 administrations.

6860 And I can tell you that the men and women that were
6861 out there and the ship being out there, I'm just
6862 shocked at your characterization. I mean, you kept
6863 referring to it as a floating political stunt. Coming
6864 from New York which hosts the fleet week, I'm a little
6865 surprised at your characterization and I don't think
6866 that's going to look very good on the record.

6867 A Well, I'm sorry if I offended you. And I thank you
6868 for your service. I'm telling you what it felt like
6869 while we were living through it. It was there. It
6870 was made a big deal of. And ultimately, we couldn't
6871 use it for anything. And then by the time we could,
6872 we had flattened the curve and it became a blame game
6873 in the press and that's not a testament to the men and
6874 women who were serving, but had more to do with the
6875 people above them.

6876 BY MR. EMMER.

6877 Q One final question. You said that the Comfort was
6878 no longer needed as of the day. This is April 7th.
6879 The March 25th order was still in effect for another
6880 month after this. Is that right?

6881 A Guidance.

6882 Q Is that a yes?

6883 A Yes.

6884 Q Thank you.

6885 BY MR. BENZINE.

6886 Q My final question, and then we'll get out of here
6887 before 4:00. What was former Lieutenant Governor
6888 Hochul's involvement in the pandemic response?

6889 A Kathy was in charge of the western New York control
6890 room. There were control rooms around the state that
6891 basically worked with the local governments to help

6892 facilitate questions and answers and get them
6893 resources as needed on a needed basis and she was
6894 heading up the western New York control room out of
6895 Buffalo.

6896 Q Is that because she was not in Albany?

6897 A She was not in Albany.

6898 Q All right. Thank you.

6899 BY MR. EMMER.

6900 Q Did she play an important role in the state's
6901 response to the pandemic?

6902 A You can't serve me up that softball at this time of
6903 day. She did not play an important role in the
6904 state's response to the pandemic.

6905 Mr. Emmer. We can go off the record.

6906 (Whereupon, at 3:49 p.m., the proceedings concluded.)