

Congress of the United States
Washington, DC 20515

March 12, 2021

VIA ELECTRONIC TRANSMISSION

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Attorney General Garland:

We commend the Department of Justice (DOJ) for launching an investigation last year into four states' practices of pressuring nursing homes to admit residents who may have been infected with the COVID-19 virus. We urge that you continue to pursue this investigation. We also ask that you explore whether state officials who were the subject of DOJ's investigation engaged in obstruction of justice or violated rules for participation in Federal programs.

As the COVID-19 pandemic was beginning to accelerate last March, at least one epidemiologist publicly warned that "even some so-called mild or common-cold-type coronaviruses have been known for decades [to] have case fatality rates as high as 8% when they infect people in nursing homes."¹ This information—well known to many geriatricians—hinted at the challenges facing many of the nation's nursing homes at the outset of the pandemic. Media reports highlighting the rapid spread of COVID-19 in a Washington long-term care facility last March also underscored the risks, for the elderly and often frail residents of nursing homes, of this coronavirus.²

Yet, as the coronavirus spread throughout their jurisdictions, the governors of several especially hard hit states "actually ordered nursing homes to accept patients with active COVID-19 infections who were being discharged from hospitals,"³ according to media reports. The

¹ Avik Roy, "The Most Important Coronavirus Statistic: 42% of U.S. Deaths Are From 0.6% of The Population," FORBES (May 26, 2020), available at <https://www.forbes.com/sites/theapothecary/2020/05/26/nursing-homes-assisted-living-facilities-0-6-of-the-u-s-population-43-of-u-s-covid-19-deaths/#7c36cba274cd>.

² Asia Fields and Paige Cornwell, "Coronavirus killed hundreds at Washington state's long-term care facilities," THE SEATTLE TIMES (Apr. 18, 2020), available at <https://www.seattletimes.com/seattle-news/coronavirus-killed-hundreds-at-washington-states-long-term-care-facilities-six-weeks-later-widespread-testing-may-finally-near/>. See also "COVID-19 Poses Particular Challenges for Nursing Homes" HUB (Apr. 1, 2020), available at <https://hub.jhu.edu/2020/04/01/alice-bonner-coronavirus-nursing-homes/>.

³ Avrik Roy, *supra* note 1 ("an astounding 42% of all COVID-19 deaths have taken place in nursing homes and assisted living facilities," which house 0.62% of the U.S. population).

governors issuing such directives include those in New York⁴ as well as Pennsylvania⁵ (where 69 percent of the state’s COVID-19 fatalities were attributable to nursing and personal care homes, as of last June),⁶ New Jersey (where the case rate reportedly was roughly 52 percent as of last May),⁷ and Michigan.⁸

In New York, which made national headlines for its case and fatality rates in the earliest phase of the pandemic, the governor reportedly reinforced this requirement on nursing homes in late April—well after the period in which COVID-19 cases at hospitals already had peaked.⁹ As noted by Forbes, the timing of one such statement suggests that the issuance of the governor’s directive was not entirely due to hospital overcrowding.¹⁰

Meanwhile, state authorities in New York also did not rely, in any truly meaningful way, on the temporary hospitals that the Federal government set up in their jurisdiction. For example, the U.S. Navy sent an entire hospital ship staffed with a crew of 1,200 to treat COVID-19 patients, but the 1,000 bed hospital ship departed New York on April 30, 2020, having treated fewer than 200 during its month-long stay.¹¹ In addition, the U.S. Army Corps of Engineers set

⁴ Kim Barker and Amy Julia Harris, “Playing Russian Roulette’: Nursing Homes Told to Take the Infected,” N.Y. TIMES (Apr. 24, 2020) (citing “state guideline [that] says [nursing homes](#) cannot refuse to take patients from hospitals solely because they have the [coronavirus](#)”), available at <https://www.nytimes.com/2020/04/24/us/nursing-homes-coronavirus.html>.

⁵ Kaiser Family Foundation, “State Reports of Long-Term Care Facility Cases and Deaths Related to COVID-19,” (Apr. 23, 2020), available at <https://www.kff.org/coronavirus-covid-19/issue-brief/state-reporting-of-cases-and-deaths-due-to-covid-19-in-long-term-care-facilities/>.

⁶ Don Shaw, “69% of COVID-19 Deaths in PA are Nursing or Personal Care Homes, House Speaker Unveils Bill to Protect Residents Living in Care,” PENNSYLVANIA CHRONICLE (June 19, 2020), available at <https://www.pennsylvaniachronicle.com/news-pennsylvania/pennsylvania/69-of-covid-19-deaths-in-pa-are-in-nursing-or-personal-care-homes-house-speaker-unveils-bill-to-protect-residents-living-in-care/>.

⁷ Karen Yourish, K.K. Rebecca. Lai, et al., “One-Third of All U.S. Coronavirus Deaths are Nursing Home Residents or Workers,” N.Y. TIMES (May 11, 2020), available at <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html>.

⁸ Craig Mauger, “New Michigan numbers: 34% of COVID-19 deaths linked to nursing homes,” THE DETROIT NEWS (June 15, 2020), available at <https://www.detroitnews.com/story/news/local/michigan/2020/06/15/new-michigan-numbers-34-covid-19-deaths-linked-nursing-homes/3193407001/>.

⁹ Avik Roy, *supra note 1*.

¹⁰ *Id.*

¹¹ J.D. Simkins, “Hospital ship Comfort departs NYC, having treated fewer than 200 patients, U.S. NAVY TIMES (Apr. 30, 2020) (“By the time of Comfort’s departure, the approximately 1,200-person crew and 1,000-bed hospital had treated just 182 patients, of which approximately 70 percent had COVID-19”), available at

up a temporary hospital inside the nation's biggest convention center, the Jacob K. Javits Center, at the end of March, which by early April had the capacity to treat up to 2,500 patients but was largely underused.¹² These temporary hospitals could have served as an alternative to housing the infected in nursing homes in New York and California.

Further, the head of the Centers for Medicare and Medicaid Services (CMS) warned on May 27, 2020, that “[u]nder no circumstances should a hospital discharge a patient to a nursing home that is not prepared to take care of those patients’ needs.”¹³ As reported by Politifact, the policy of the Centers for Disease Control and Prevention (CDC) is that hospitals should discharge patients with a COVID-19 diagnosis only to nursing homes and other long-term care facilities that are capable of implementing all recommended infection control procedures:

CDC “cited two ‘key factors’ to consider when deciding whether to discharge a patient with COVID-19 to a long-term care facility....First, is the patient medically ready for discharge to a long-term care facility? And second, *is the selected long-term care facility able to safely care for a patient recovering from the virus by implementing all recommended infection control procedures?* These [CDC] directives were in place on or before March 23, two days before the state [of New York] issued its advisory.”¹⁴

State officials in other parts of the country followed this CDC guidance, often with better results. In Florida, for example, the governor last year signed an order banning hospitals from discharging infected patients into long-term care facilities.¹⁵ Other states, instead of barring nursing homes from denying admission (or readmission) to a patient solely based on a confirmed

<https://www.navytimes.com/news/your-navy/2020/04/30/hospital-ship-comfort-departs-nyc-having-treated-fewer-than-200-patients/>.

¹² *Id.* (noting that “[u]nderutilization of added medical resources in New York City is not unique to the Comfort. Thousands of hospital beds made available in a converted convention center have gone largely unused after quick assembly by the U.S Army Corps of Engineers.”)

¹³ Danielle Brown, “Verma Calls out Cuomo for forcing NY nursing homes to take COVID-19 patients,” MCKNIGHTS LONG TERM CARE NEWS (May 29, 2020) (citing Fox News interview with CMS Administrator Seema Verma), available at <https://www.mcknights.com/news/verma-calls-out-cuomo-for-forcing-ny-nursing-homes-to-take-covid-19-patients/>. A March 13th CMS document “says that nursing homes should only accept those patients for which they can care. The CMS memo also states: ‘Per CDC, prompt detection, triage and isolation of potentially infectious residents are essential to prevent unnecessary exposures among residents, healthcare personnel, and visitors at the facility. Therefore, facilities should continue to be vigilant in identifying any possible infected individuals.’” Jill Terreri Ramos, “New York’s nursing home policy was not fully in line with CDC,” POLITIFACT (Jun. 13, 2020), available at <https://www.politifact.com/factchecks/2020/jun/13/andrew-cuomo/new-yorks-nursing-home-policy-was-not-line-cdc/>

¹⁴ Jill Terreri Ramos, *supra* note 13 (characterizing as “mostly false” a statement by New York Gov. Cuomo regarding CDC’s policy) [emphasis added].

¹⁵ Don Shaw, *supra* note 6.

or suspected coronavirus diagnosis, designated some facilities for COVID-19 treatment only—an approach that some have characterized as a safer way to free up hospital beds for the most severely ill.¹⁶

State officials who pressured nursing home administrators to admit untested and contagious COVID-19 patients from hospitals likely increased the case rate or fatality risks for residents of nursing homes in these jurisdictions.¹⁷ Questions about these officials' practices have become increasingly compelling, in the weeks following the issuance of a report by New York's attorney general. That report, issued in late January, shows that COVID-19-related nursing home deaths in New York were undercounted by as much as 50%—resulting in thousands of COVID-19-related nursing home deaths not being reported properly last year.¹⁸

Only after the issuance of this attorney general's findings did New York's governor publicly acknowledge the coronavirus-related deaths of 15,000 nursing home residents in his state (not the 8,500 that his administration previously had reported).¹⁹ Reportedly, a top aide to the governor, Melissa DeRosa, acknowledged that the state had withheld nursing home data "because it feared an investigation" by DOJ.²⁰ As noted in a media account:

¹⁶ Danielle Brown, *supra* note 13.

¹⁷ As noted by Politifact, "the AMDA Society for Post-Acute and Long-Term Care Medicine issued a statement on March 26 opposing the New York Governor's] order: "We find the New York State Advisory to be over-reaching, not consistent with science, unenforceable, and beyond all, not in the least consistent with patient safety principles." A joint statement by that organization and others in long-term care three days later reinforced their objections: 'a blanket order for every nursing home in the state to accept all admissions from hospitals is not sound policy.'" Jill Terreri Ramos, *supra* note 13. *See also* Report of New York Attorney General Letitia James, "Nursing Home Response to COVID-19 Pandemic" at 37 (updated Jan. 30, 2021), *available at* <https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf> ("over 4,000 nursing home deaths occurred after the issuance of the [New York governor's] March 25 guidance. While additional data and analysis would be required to ascertain the effect of such admissions in individual facilities, these admissions may have contributed to increased risk of nursing home resident infection, and subsequent fatalities").

¹⁸ Report of New York Attorney General Letitia James, *supra* note 17 at 11 ("preliminary data for the 62 facilities and time periods noted above suggests that COVID-19 resident deaths associated with nursing homes in New York state appear to be undercounted by DOH by approximately 50 percent").

¹⁹ Anthony Zurcher, "Governor Cuomo admits to withholding nursing home deaths," BBC NEWS (Feb. 18, 2021), *available at* <https://www.bbc.com/news/world-us-canada-56091682>. *See also* Michael Balsamo and Marina Villeneuve, Pressure mounts on Cuomo over COVID deaths at nursing homes, ASSOCIATED PRESS (Feb. 18, 2021), *available at* <https://apnews.com/article/new-york-andrew-cuomo-coronavirus-pandemic-nursing-homes-queens-605e299d687f947b93ceccc33d9ef38c>.

²⁰ Jesse McKinley and Luis Ferré-Sadurní, "New Allegations of Cover-Up by Cuomo Over Nursing Home Virus Toll," N.Y. TIMES (updated Feb. 17, 2021), *available at* <https://www.nytimes.com/2021/02/12/nyregion/new-york-nursing-homes-cuomo.html>.

“Ms. DeRosa’s jarring admission came when she was asked about ongoing delays in giving lawmakers nursing home death data. She said that after the Department of Justice requested information last summer, ‘basically, we froze...We were in a position where we weren’t sure if what we were going to give to the Department of Justice, or what we give to you guys, and what we start saying, was going to be used against us and we weren’t sure if there was going to be an investigation,’ Ms. DeRosa said during the call, according to a partial transcript later released by the governor’s office after her remarks appeared in the *New York Post*.”²¹

In the wake of this admission by Ms. DeRosa, a New York assemblyman stated that New York’s governor allegedly threatened political retaliation if the assemblyman did not publicly back the governor. As reported by CNN, this assemblyman, Ron Kim, disclosed: “Gov. Cuomo called me directly on Thursday to threaten my career if I did not cover up for Melissa [DeRosa] and what she said.²² He tried to pressure me to issue a statement, and it was a very traumatizing experience.” Governor Cuomo reportedly told the assemblyman: “we’re in this business together and we don’t cross certain lines and he said I hadn’t seen his wrath and that he can destroy me,” according to Kim.”²³

More recently, the news media reported that some of the New York governor’s senior aides had a hand in rewriting a state nursing home official’s report, resulting in the undercounting of nursing home deaths attributable to COVID-19.²⁴ As noted by the *Wall Street Journal*, for example:

“The changes Mr. Cuomo’s aides and health officials made to the nursing-home report, which haven’t been previously disclosed, reveal that the state possessed a fuller accounting of out-of-facility nursing-home deaths as early as the summer. The Health Department resisted calls by state and federal lawmakers, media outlets and others to release the data for another eight months.”²⁵

²¹ *Id.*; see also Morgan Gstalter, “Top Cuomo aide apologized to Democrats, says ‘we froze’ in withholding COVID-19 data,” *THE HILL* (Feb. 12, 2021), <https://www.google.com/amp/s/thehill.com/homenews/state-watch/538575-top-cuomo-aide-apologized-to-democrats-saying-we-froze-in-withholding%3famp>.

²² M.J. Lee and Mark Morales, “Cuomo said ‘he can destroy me’: NY assemblyman alleges governor threatened him over nursing homes scandal,” *CNN* (Feb. 17, 2021), available at <https://www.cnn.com/2021/02/17/politics/cuomo-ron-kim-nursing-home/index.html>.

²³ *Id.*

²⁴ Veronica Straqualursi, *New York Times and Wall Street Journal: Top Cuomo aides rewrote report from state nursing home official to hide higher death toll*, *CNN POLITICS* (March 6, 2021), available at <https://www.cnn.com/2021/03/05/politics/andrew-cuomo-nursing-homes-report/index.html>.

²⁵ *Cuomo Advisors Altered Report on Nursing Home Deaths*, *WALL STREET JOURNAL* (March 5, 2021), available at <https://www.wsj.com/articles/cuomo-advisers-altered-report-on-covid-19-nursing-home-deaths-11614910855>.

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These accounts raise additional questions about whether the Cuomo administration intentionally concealed the extent of the problem facing New York's nursing homes during the national emergency period.

Nursing homes remain hotspots for the coronavirus, which is why we ask that DOJ continue to diligently investigate the extent to which four states' governors violated the civil rights of nursing home residents and failed in their duty of care. We also ask that you investigate whether any such state directives were inconsistent with guidelines or requirements for participation in Federal programs and determine whether there was a coverup or obstruction of justice by public officials who were the subject of DOJ's investigations.

Thank you for your consideration, and if you have any questions, please contact Evelyn Fortier of Senator Grassley's staff at 202-224-4324.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate



Steve Scalise
Ranking Member
Subcommittee on the Coronavirus Crisis
U.S. House of Representatives



Tim Scott
Ranking Member
Select Committee on Aging
U.S. Senate



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Thom Tillis
U.S. Senator



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