

**MEMORANDUM OF LAW TO DISSUADE FURTHER
INVESTIGATION AND PROSECUTION**

In re Grand Jury Investigation, F. #2021R00167

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INTRODUCTION

As counsel to the New York State Executive Chamber, we submit this Memorandum in regard to *In re Grand Jury Investigation*, F. #2021R00167. Although your Office has not identified any statutes you believe might have been violated or by whom, or what actions and statements could give rise to criminal liability, we understand your investigation to be focused mainly on New York State's collection, tabulation, and publication of data relating to deaths of nursing home residents in New York State from the COVID-19 virus. Simply put, we believe that New York State's executive branch and its employees acted within their authority in the face of an unprecedented crisis and there is no possible criminal liability for any member of the Executive Chamber relating to these issues.

As explained further below, we are also deeply concerned that the genesis of this investigation was politically motivated, much like other examples of the Department of Justice's misuse under the previous Presidential administration as a tool to investigate and tarnish the former President's enemies.¹ The federal government first began its probe into nursing homes in

¹ Recent revelations detail several instances when the Department of Justice under President Trump was weaponized to conduct politically motivated investigations of President Trump's enemies rather than bona fide investigations in pursuit of appropriate law enforcement purposes. Particularly, the DOJ under President Trump abused its investigative powers by secretly subpoenaing the phone records of both Democratic lawmakers and journalists. These reports have led to the resignation of the Justice Department's top national security official and an investigation by the DOJ's Inspector General. See Katie Benner et al., *Hunting Leaks, Trump Officials Focused on Democrats in Congress*, N.Y. Times (June 10, 2021), <https://www.nytimes.com/2021/06/10/us/politics/justice-department-leaks-trump-administration.html?referringSource=articleShare>; Charlie Savage & Katie Benner, *Trump Administration Secretly Seized Phone Records of Times Reporters*, N.Y. Times (June 2, 2021; updated June 14, 2021), <https://www.nytimes.com/2021/06/02/us/trump-administration-phone-records-times-reporters.html>; Michael Balsamo, *DOJ Official Resigning Amid Uproar Over Democrats' Subpoenas: Report*, Huffington Post (June 14, 2021), https://www.huffpost.com/entry/doj-officials-resigns-subpoenas_n_60c76e4be4b09cc99b880d00.

New York (and three other states led also by Democrats) in August of 2020 via a request for information about public nursing homes purportedly related to a potential investigation under the Civil Rights of Institutionalized Persons Act (CRIPA). This inquiry began under highly suspect circumstances—immediately after Governor Cuomo was publicly critical of President Trump and President Trump, in response, tweeted attacks on Cuomo related to New York State’s handling of COVID-19 in nursing homes. That initial inquiry was quickly followed by a request from Jeffrey Bossert Clark, then the Acting Assistant Attorney general for the Civil Division, for information related to all New York State nursing homes, issued in the final weeks of the Trump administration. Mr. Clark’s willing participation in President Trump’s “long-running effort to batter the Justice Department into advancing his personal agenda” has been widely reported, including Clark’s efforts to unseat the acting attorney general, take the job for himself, and then advance then-President Donald Trump’s baseless attempt to overturn the election results.² Notably, New York state requested in June 2021 that the Inspector General of the DOJ investigate the federal government’s initiation of inquiries into nursing homes.³ Soon after, on July 22, 2021, the DOJ informed New York that it had “decided not to open a CRIPA investigation of any public nursing facility within New York at this time.”⁴

In light of the above, we ask that your Office and the Department of Justice reassess whether it is a proper exercise of the federal government’s investigative authority to continue this

² Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted To Oust Acting Attorney General*, N.Y. Times (Jan. 22, 2021; updated June 15, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

³ Letter from New York Special Counsel for Public Integrity Victor Olds to Inspector General Horowitz dated June 30, 2021 (Exhibit 1).

⁴ Letter from Special Litigation Section Chief Steven H. Rosenbaum to Deputy General Counsel Michael G. Bass dated July 22, 2021 (Exhibit 2).

investigation. We do not believe that it is in keeping with the traditions of your Office and the Department of Justice to allow an investigation tainted by politically motivated origins to continue. Additionally, we request that you share this Memorandum with the supervisors in your Office and with the appropriate supervisors at the Department of Justice, and we believe that upon internal review, your Office and the Department of Justice will determine that it is in the public interest to suspend this investigation.⁵

Below, we first lay out the relevant factual background. Then we explain why no member of the Executive Chamber has committed a federal crime.

- ***First***, the State's decisions on what information related to nursing home deaths to publish, when to publish it, and which information is sufficiently reliable to publish, are core public policy decisions protected by the Tenth and Eleventh Amendments.
- ***Second***, any prosecution based on the State's publications would be barred by the First Amendment.
- ***Third***, there has been no violation of any federal statute. Any prosecution premised on a theory of false statement or fraud cannot succeed for many reasons, including that no member of the Executive Chamber made a materially false statement about nursing home deaths—much less knowingly made such a false statement with intent to mislead the federal government—and there is no evidence that any member received any improper benefit.

Next, we discuss the discretionary reasons why you should end this investigation and decline to bring any action. Principles of federalism dictate that the federal government should not use criminal statutes as a vehicle to second-guess state policymaking. Long-standing DOJ practices and guidelines likewise establish that federal prosecutors should generally defer to state authorities where the state has a sufficient interest and ability to address the allegations at hand.

⁵ We note that Acting United States Attorney Jacquelyn Kasulis has recused herself from all matters involving Morvillo Abramowitz Grand Iason & Anello P.C.

Here, the political process is the proper arena for resolution of these issues—in fact, the state is already conducting an impeachment investigation. And New York has multiple investigative bodies that can readily investigate these matters. As a result, the federal government should allow the issues discussed in this Memorandum to proceed in New York.

Finally, we address the concerning rise of the criminalization of politics in the United States. Courts and commentators have expressed alarm over the increase in criminal actions filed by federal prosecutors for political decisions by state officials. At bottom, the proper place to address State officials' public policy choices—including controversial decisions such as those at issue here—is in the ballot box, not the jury box.

We look forward to engaging in a dialogue with you and your colleagues at the Department of Justice about the issues raised in this Memorandum.

BACKGROUND AND ORIGIN OF THE CURRENT INVESTIGATION

A. The COVID-19 Virus Begins a Public-Health Crisis in New York

The COVID-19 virus arrived in the beginning of 2020; in New York, possibly as early as January.⁶ The speed and devastation of the virus wreaked havoc across the country. As of July 29, 2021, there have been over 30 million cases of COVID-19 infection in the United States and over 600,000 deaths.⁷ At the outset, there was an immediate shortage of PPE,⁸ the supply of ventilators was woefully short of the anticipated demand,⁹ and the anticipated need for hospital and ICU beds was forecasted to—and in some places, did—outnumber the available capacity.¹⁰

Nowhere were the consequences of this chaos and uncertainty felt more acutely than in the State of New York. As the early epicenter of the pandemic, New York experienced staggering rates of COVID-19 cases, largely from community spread invisibly seeded through

⁶ *Mount Sinai Study Finds First Cases of COVID-19 in New York City Are Primarily from European and US Sources*, Mount Sinai (June 2, 2020), <https://www.mountsinai.org/about/newsroom/2020/mount-sinai-study-finds-first-cases-of-covid-19-in-new-york-city-are-primarily-from-european-and-us-sources-pr>.

⁷ *COVID Data Tracker*, U.S. Ctrs. for Disease Control (June 15, 2021), <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

⁸ See, e.g., Mariel Padilla, *'It Feels Like a War Zone': Doctors and Nurses Plead for Masks on Social Media*, N.Y. Times (Mar. 19, 2020; updated Mar. 22, 2020), <https://www.nytimes.com/2020/03/19/us/hospitals-coronavirus-ppe-shortage.html>; Andrew Jacobs et al., *'At War With No Ammo': Doctors Say Shortage of Protective Gear Is Dire*, N.Y. Times (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html>.

⁹ Sarah Kliff et al., *There Aren't Enough Ventilators To Cope with the Coronavirus*, N.Y. Times (Mar. 18, 2020; updated Mar. 26, 2020), <https://www.nytimes.com/2020/03/18/business/coronavirus-ventilator-shortage.html>.

¹⁰ Lydia Ramsey Pflanzner & Jeremy Berke, *The Scary Things that this Virus Can Do: Doctors Across NYC Share the Harrowing Reality of Caring for Oxygen-Starved Coronavirus Patients as Equipment Runs Short*, BusinessInsider.com (Apr. 4, 2020), <https://www.businessinsider.com/nyc-hospitals-are-filled-with-coronavirus-patients-shortages-loom-2020-4>.

early travel from Europe.¹¹ Confirmed cases hit a peak of nearly 20,000 a day; deaths reached nearly 1,000 per day. Forecasts predicted that New York's downstate hospitals would be inundated and, in fact, the system was overwhelmed. New York City's 911 system could not keep up with the pace of daily calls;¹² the State was forced to deploy dozens of refrigerated trucks as mobile morgues because of the strain placed on funeral homes;¹³ public spaces became makeshift infirmaries;¹⁴ and the federal government dispatched a Navy hospital ship and helped New York State operationalize a temporary field hospital at the Javits Center to handle anticipated patient overflow.¹⁵

B. New York Responds Comprehensively and Methodically To Protect Its Nursing Home Populations

Amid this escalating and unprecedented crisis, notwithstanding significant uncertainty about the timing, epidemiology, and ultimate effects of the virus, New York State, in

¹¹ Carl Zimmer, *Most New York Coronavirus Cases Came from Europe, Genomes Show*, N.Y. Times (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/science/new-york-coronavirus-cases-europe-genomes.html>; Greg Miller et al., *One Final Viral Infusion: Trump's Move to Block Travel from Europe Triggered Chaos and a Surge of Passengers from the Outbreak's Center*, Wash. Post (May 23, 2020), https://www.washingtonpost.com/world/national-security/one-final-viral-infusion-trumps-move-to-block-travel-from-europe-triggered-chaos-and-a-surge-of-passengers-from-the-outbreaks-center/2020/05/23/64836a00-962b-11ea-82b4-c8db161ff6e5_story.html.

¹² See Ali Watkins, *NYC's 911 System Is Overwhelmed, 'I'm Terrified,' a Paramedic Says*, N.Y. Times (Mar. 28, 2020; updated Mar. 31, 2020), <https://www.nytimes.com/2020/03/28/nyregion/nyc-coronavirus-ems.html>.

¹³ Alan Feuer and Andrea Salcedo, *New York City Deploys 45 Mobile Morgues as Virus Strains Funeral Homes*, N.Y. Times (Apr. 2, 2020; updated April 10, 2020), <https://www.nytimes.com/2020/04/02/nyregion/coronavirus-new-york-bodies.html>.

¹⁴ John Del Signore, *An Emergency Field Hospital Is Going up in Central Park as Coronavirus Cases Surge in NYC*, Gothamist (Mar. 29, 2020), <https://gothamist.com/news/emergency-field-hospital-going-central-park-coronavirus-cases-surge-nyc>.

¹⁵ Eric Levenson & Melanie Schuman, *A Navy Hospital Ship Will Head to New York To Help Handle Coronavirus Outbreak*, CNN (Mar. 18, 2020), <https://www.cnn.com/2020/03/18/us/nyc-coronavirus-updates/index.html>.

consultation with State, federal, and international health experts, acted urgently to curb the spread of the coronavirus and to alleviate pressure on the State’s hospitals.

This terrible virus was particularly harmful to the elderly. The CDC reports that the “greatest risk for severe illness from COVID-19 is among those aged 85 or older.”¹⁶ As the crisis unfolded in the spring, to balance the competing public-health needs of freeing hospital space and caring for older New Yorkers, DOH, on March 12, gave clear, detailed guidance to nursing homes to help minimize the spread of COVID-19. This guidance recommended, among other things, cohorting of residents exhibiting symptoms and that staff wear PPE, in line with evolving and sometimes shifting federal guidance and scientific knowledge. The State also embarked on an ambitious plan to expand hospital capacity in New York State to meet an expected massive surge in demand for patients with COVID-19 requiring acute care.¹⁷

A key component of this balancing act was developing a plan for recovering COVID-19 patients to be discharged to care facilities once they were medically stable and no longer in need of hospital-level care, thereby freeing urgently needed hospital beds to care for acutely ill patients. On March 25, 2020, DOH issued an advisory which provided that no “resident shall be

¹⁶ Audrey McNamara, *CDC Expands List of People at High Risk of Severe Illness from COVID-19* (updated June 26, 2020), <https://www.cbsnews.com/news/coronavirus-infection-risk-cdc-list/>.

¹⁷ See *During Novel Coronavirus Briefing, Governor Cuomo Announces New Mass Gatherings Regulations*, N.Y. State COVID-19 Updates (Mar. 12, 2020), <https://www.governor.ny.gov/news/during-novel-coronavirus-briefing-governor-cuomo-announces-new-mass-gatherings-regulations>; see also *Advisory: Hospital Discharges and Admissions to Nursing Homes*, N.Y. Dep’t of Health (Mar. 25, 2020) (Exhibit 3); Executive Order No. 202.10, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency (Mar. 23, 2020) (Exhibit 4); Executive Order 202.1, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency (Mar. 12, 2020) (Exhibit 5); *COVID-19 Directive To Increase Availability of Beds by a Minimum of 50% and Provide Necessary Staffing and Equipment*, N.Y. Dep’t of Health (Mar. 23, 2020) (directing all hospitals to increase beds available to COVID-19 patients, given a projected “100% increase in hospital bed capacity”), http://dmna.ny.gov/covid19/docs/all/DOH_COVID19_FacilityDirective_032320.pdf.

denied re-admission or admission” to a New York nursing home “solely based on a confirmed or suspected diagnosis of COVID-19.”¹⁸ It reminded facilities that, “[a]s always, standard precautions must be maintained, and environmental cleaning made a priority, during this public health emergency,” referring facility providers to information on DOH’s website.¹⁹ The Advisory banned discrimination against individuals based solely on their having had or being suspected of having COVID-19, especially at a time of great need for hospital beds.

New York’s initiative aligned with federal policy. Almost two weeks before the Department’s March 25 Advisory, the federal Centers for Medicare & Medicaid Services issued guidance that “Nursing homes *should*”—not “may,” or “could,” but “should”—“admit any individuals that they would normally admit to their facility, including individuals from hospitals where a case of COVID-19 was/is present.”²⁰ CMS guidance provided that “[a] nursing home can accept a resident diagnosed with COVID-19 and still under Transmission-Based Precautions for COVID-19 as long as the facility can follow CDC guidance for Transmission-Based Precautions.”²¹ Soon after, the CDC issued recommendations on March 23, 2020, which

¹⁸ *Advisory: Hospital Discharges and Admissions to Nursing Homes*, N.Y. Dep’t of Health (Mar. 25, 2020) (Exhibit 3). Once the strain on New York’s hospitals had abated, the Governor issued an order on May 10, 2020, that a “general hospital shall not discharge a patient to nursing home” without performing a diagnostic COVID-19 test and obtaining a negative result. Executive Order No. 202.30, *Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency* (May 10, 2020) (Exhibit 6).

¹⁹ *Advisory: Hospital Discharges and Admissions to Nursing Homes*, N.Y. Dep’t of Health (Mar. 25, 2020) (Exhibit 3).

²⁰ *Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes*, Ctrs. for Medicare & Medicaid Servs., at 5 (Mar. 13, 2020), <https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf>.

²¹ *Id.* at 4. The CDC defined “Transmission-Based Precautions” as including, for example, maintaining hand hygiene, and wearing a mask, eye protection, gloves, and gowns when interacting with a patient. *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed*

anticipated the discharge of patients to nursing homes from hospitals by stating that “[p]atients can be discharged from the healthcare facility whenever clinically indicated,” and provided recommendations for how a “public nursing home” should receive a returning resident.²²

New York’s approach also was consistent with that of multiple other states. Indeed, at least a dozen states issued similar guidance to nursing homes, including Kentucky, Utah, Arizona, Florida, Indiana, Nevada, New Jersey, Pennsylvania, and Michigan. New York’s March 25 Advisory also did not supplant federal or state requirements. All State nursing-home facilities remained subject to federal regulations, including federal requirements that facilities establish an infection prevention and control program for identifying and controlling communicable diseases among residents and staff, isolate residents when appropriate, and employ other transmission-based precautions.²³ Further, a facility’s acceptance of a COVID positive admission was predicated—as is any nursing home admission—on the facility’s ability to protect its vulnerable residents. Under preexisting New York law, a nursing home in New

Coronavirus Disease 2019 (COVID-19) in Healthcare Settings, Ctrs. for Disease Control & Prevention (Mar. 13, 2020), <https://web.archive.org/web/20200313224827/https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html>.

²² *Discontinuation of Transmission-Based Precautions and Disposition of Patients with COVID-19 in Healthcare Settings (Interim Guidance)*, Ctrs. for Disease Control & Prevention (March 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-hospitalized-patients.html#:~:text=Patients%20can%20be%20discharged%20from,or%20state%20public%20health%20departments>.

²³ See 42 C.F.R. § 483.15(c) (prohibiting discharge and transfer of residents except in enumerated circumstances); *id.* § 483.70(e) (requiring facility to “conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies”); *id.* § 483.80(a) (establishing infection control requirements for facilities, including procedures for isolation of infected residents); see also *State Operations Manual Appendix PP, Guidance to Surveyors for Long Term Care Facilities*, Ctrs. for Medicare & Medicaid Servs. (rev. Nov. 22, 2017), https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_pp_guidelines_ltcf.pdf.

York State may “accept and retain only those nursing home residents for whom it can provide adequate care.” 10 N.Y.C.R.R. 415.26(i)(1)(ii). In the context of the COVID-19 pandemic, adequate care requires, at a minimum, adherence to detailed guidance issued to nursing homes throughout the unfolding crisis, including rigorous infection control procedures and providing adequate PPE. Even before the first confirmed case of COVID-19 in the State, DOH issued a letter to all nursing homes on January 29, 2020, which reminded facilities of their infection prevention and control obligations under State and federal regulations.²⁴ That letter also provided general infection control best practices as recommended by the CDC to mitigate the onset and spread of infection within the facility.

Starting in mid-March, New York issued frequent, detailed additional directives covering infection control, restrictions on visitors and group activities within nursing homes, health screenings, furlough requirements for staff who were symptomatic or exposed to COVID-19, and isolation and quarantine procedures for staff and residents exposed to the virus. In addition, to augment the precautions and infection control procedures nursing homes had to follow, the State went beyond federal guidance, providing 14 million pieces of PPE, connecting nursing homes to a staffing portal of more than 96,000 volunteer health care professionals, and helping facilitate transfers of residents to other homes as needed. Furthermore, in May, New York launched the nation’s most aggressive nursing home testing program: testing residents in all 613 nursing homes in the State and mandating twice-weekly testing of all nursing home staff, leading to more than 1 million tests to date and the discovery of several thousand previously unidentified positive

²⁴ *Dear Administrator Letter NH 19-19: Infection Prevention and Control*, N.Y. Dep’t of Health (Jan. 29, 2020), https://www.health.ny.gov/professionals/nursing_home_administrator/docs/dal_nh_19-19_infection_control.pdf.

cases. The State also conducted 1,700 onsite inspections—every single nursing home and adult care facility in the State at least once—to ensure infection control practices were in place.

Unfortunately, this guidance, and the heroic efforts of New York’s nursing home employees to control the spread of the virus, got a late start, due to federal shortcomings, scarcity of testing, and the unrecognized risk of asymptomatic spread. COVID-19 was already present in New York, including in its nursing home and long-term-care facilities, for more than a month before the State’s first confirmed COVID-19 case, silently infiltrating our communities after arriving from Europe in January or early February.

C. New York Undertakes a Massive Data-Collection Effort

To monitor the effect of the virus on New York’s population, the State implemented an unprecedented data collection effort to track the number of people who were infected and those who had died from the virus. This included collecting data daily for not only COVID-19 infections statewide, but also for specific groups of people, including prisoners, medical personnel, hospital patients and staff, nursing home patients and staff, and other at-risk individuals, as well as other information (*e.g.*, PPE supplies and burn rate) to help guide the State’s public health response.

The collection of reliable data about COVID infections was, and remains, incredibly challenging. The incubation rate for COVID-19 makes it difficult to pinpoint when and where any particular person contracted the virus. The incubation period of the virus is typically four to five days before the onset of symptoms, although it can be up to 14 days or longer, and the

median time from the infection to ICU admission is about 9.5-12 days.²⁵ This slow timeline means that people could be infected in one place, show symptoms in another, and die in another.

Determining who has died from COVID-19 has been just as complex. Because testing “was scarce at the start of the pandemic,” “many people died with coronavirus symptoms but without any confirmation of infection.”²⁶ Some who were thought to have died of COVID because they had COVID-like symptoms did not have the disease, while others who had contracted COVID—especially nursing home patients, all of whom already required skilled nursing care before contracting COVID and many of whom already have underlying health conditions—died from various other causes. Put simply, at the beginning of the pandemic the State (and country) did not have infrastructure in place to test for COVID-19 quickly enough to keep up with the toll of the virus.

On top of the difficulty in determining when and where someone contracted COVID-19, and whether the virus caused or led to their death, there is added complexity: the State relies on self-reporting to collect the relevant data. For nursing home data, the State needed to collect data from 613 nursing homes (including 26 publicly run nursing homes, 20 of which are operated by a county or city) on many topics, including nursing home staff and residents who contracted the virus, residents who died from the virus, and where those residents died. Because testing was scarce early on in the pandemic, nursing homes had to make judgment calls about what qualified

²⁵ *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, Ctrs. for Disease Control & Prevention (updated Feb. 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>.

²⁶ Mitch Smith and Lisa Waananen Jones, *As the U.S. Toll Passes 600,000, Questions Remain About How To Count the Deaths*, N.Y. Times (June 16, 2021), <https://www.nytimes.com/live/2021/06/15/world/covid-vaccine-coronavirus-mask>.

as a suspected (or presumed) COVID-19 infection or death. As would be expected, the 613 distinct reporting entities took different approaches to determining a suspected infection or death, and the reliability of the data suffered as a result. Nursing homes repeatedly provided data that was incomplete, contained clear error (*e.g.*, a date of death in the future), or failed to timely report required information.

Faced with these difficulties, the State sought rapidly to implement a data collection system able to capture reliable data. This process was an iterative one, with the data collection improving significantly over time. On March 9, 2020, DOH began issuing surveys for all nursing homes via its Health Electronic Response Data System (“HERDS”), a system that never before had been used for a data-collection project of this scale. New York State also collected COVID-related data from hospitals via HERDS.

The initial survey asked nursing homes for, among other things, (i) their total capacity, (ii) number of “suspected” cases of COVID-19; (iii) number of laboratory-confirmed COVID-19 cases, (iv) number of people hospitalized because of COVID-19, and (v) number of residents who were in isolation or quarantine.²⁷ Because the initial survey focused on COVID *infections*, and did not ask about COVID *deaths*, DOH officials initially sought to gather fatality information through telephone calls to each facility. Subsequently, the HERDS survey questions were revised dozens of times.

On March 17, 2020, DOH first added to the HERDS questionnaire a question relating to deaths. The survey asked, “As of today, how many residents of your nursing home facility have

²⁷ March 9, 2020 HERDS Survey (Exhibit 7).

been removed from your census due to death from COVID-19 *in a hospital?*”²⁸ That survey did not seek any information about COVID-19 deaths that occurred *at nursing homes*, although DOH personnel continued their efforts to gather such information through hundreds of phone calls to nursing home facilities.

These surveys proved to be confusing in certain respects that led to over and underreporting, double counting, and mis-matched data sets. To remedy these issues, DOH reconstructed the HERDS survey questions and, on April 16, 2020, began releasing those new questions.²⁹ The new survey questions were better tailored than the previous iterations, and captured additional information. The survey asked, among other things: confirmed positive COVID-19 deaths in the facility; presumed positive COVID-19 deaths in the facility (as determined by a physician); and total number of COVID-19 positive residents who had died outside the facility (including all presumed and confirmed COVID-19 deaths).

The next day, April 17, 2020, DOH issued a retrospective survey. This survey requested data about all previously reported deaths, the location of each death, and COVID-19 status. DOH sent out unique spreadsheets to each of the hundreds of nursing homes in the State, which contained all the data that had been reported and requested that the nursing homes make any changes based on their current records.³⁰

²⁸ March 17, 2020 HERDS Survey (Exhibit 8) (emphasis added).

²⁹ April 16, 2020 HERDS Survey (Exhibit 9).

³⁰ Significantly, when the federal government began its own effort through the Center for Medicare and Medicaid Services (CMS) to collect data directly from nursing homes—an effort which was not put into place until May 6, 2020, almost two months after New York’s data-collections began, CMS made decisions, which could be questioned in hindsight, about what data should and should not be collected. CMS did not require nursing homes in New York to report retrospective data from the beginning of the pandemic—the time when the greatest number of nursing home residents died. *See Interim Final Rule*

Subsequently, the HERDS survey questions were repeatedly revised to gather additional information, clarify existing questions, or eliminate redundant requests. In late August 2020, for example, DOH issued new guidance requiring post-mortem testing for any presumed COVID-19 death.³¹ As a result, the question about “presumed” COVID-19 deaths, which was no longer relevant, was dropped from the HERDS survey, and questions thereafter sought only data on confirmed deaths.

D. New York Releases Information Pertaining to COVID-19 Infections and Deaths in Nursing Homes

To keep the public informed of the ongoing public-health crisis, on April 15, 2020 DOH began publishing data on a daily basis on its website about COVID-19 infections and deaths statewide, as well as a breakdown of the number of COVID-19 deaths that occurred in nursing homes. Its reporting system was equivalent or superior to that of most other states: as of August 18, 2020, 14 states did not report any nursing home data, and New York State was one of just nine states to report confirmed *and presumed* COVID fatalities in nursing homes.

As has been widely reported, throughout much of the pandemic, the State published in-facility deaths but did not publish out-of-facility deaths. The State noted plainly on its website that the published *nursing home* COVID-19 death figures did not include deaths of residents that occurred after being transferred to a hospital: indeed, “the state website had always been clear

Updating Requirements for Notification of Confirmed and Suspected COVID-19 Cases Among Residents and Staff in Nursing Homes, Ctrs. for Medicare & Medicaid Servs. (May 6, 2020), <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurvey/certificationgeninfo/policy-and-memos-states-and/interim-final-rule-updating-requirements-notification-confirmed-and-suspected-covid-19-cases-among>.

³¹ *Department of Health Announces New Regulations Requiring Increased and Postmortem COVID-19 and Influenza Testing To Ensure Data Integrity*, N.Y. Dep’t of Health (Aug. 31, 2020), https://www.health.ny.gov/press/releases/2020/2020-08-31_postmortem_covid19_influenza_testing.htm.

that deaths it listed did ‘*not include deaths outside of a facility.*’³² Rather, such deaths were included in the tally of hospital deaths, which were separately published by the State. The significance of the disclaimer was not lost on the public, with press reports repeatedly noting that the tallies of nursing home deaths reported by the State did not include those who died in hospitals.³³

New York State’s decision to classify deaths based upon the location where such deaths occurred was a pragmatic approach that balanced the need to provide clear, consistent, and easily-digestible real-time data to the public regarding the pandemic, the State’s limited ability to verify self-reported data, the difficulty of obtaining complete and accurate information from already-overburdened nursing homes, and a (well-founded) concern that irrespective of the approach taken, the State would inevitably face criticism for purportedly under- or over-counting deaths. Indeed, throughout the pandemic, President Trump repeatedly and publicly alleged that New York and other states purportedly *inflated* their COVID-19 death toll in order to harm his reelection prospects.³⁴

³² Jesse McKinley & Luis Ferré-Sadurní, *N.Y. Severely Undercounted Virus Deaths in Nursing Homes, Report Says*, N.Y. Times (Jan. 28, 2021) (emphasis added), <https://www.nytimes.com/2021/01/28/nyregion/nursing-home-deaths-cuomo.html>.

³³ See, e.g., Post Editorial Board, *New York’s Coronavirus Nursing Home Death Toll Didn’t Have to be so High*, N.Y. Post, (May 5, 2020) (“The new Health Department info released late Monday adds 1,700 presumed coronavirus deaths to the grim total, suggesting that COVID-19 complications have killed 4,813 residents of nursing homes and adult-care facilities — and that *doesn’t include those who died in hospitals.*” (emphasis added)), <https://nypost.com/2020/05/05/new-yorks-coronavirus-nursing-home-deaths-didnt-have-to-be-so-high/>; Associated Press, *Another 1,700 Coronavirus Deaths in Nursing Homes*, A.P. (May 5, 2020) (“Exactly how many nursing home residents have died remains uncertain despite the disclosure. The list released by Gov. Andrew Cuomo’s administration did not include nursing home residents who were transferred to hospitals before dying.”), <https://apnews.com/article/andrew-cuomo-virus-outbreak-us-news-ap-top-news-new-york-city-f8fe00218e5bc6e14e45dde8f2154227>.

³⁴ See, e.g., Matthew Rosenberg & Jim Rutenberg, *Fight Over Virus’s Death Toll Opens Grim New Front in Election Battle*, N.Y. Times (May 9, 2020; updated May 11, 2020) (President Trump retweeted a post

Some press and commentators have criticized the decision to classify COVID-19 deaths based upon the location of death, even going so far as to suggest that New York deliberately adopted that approach in order to provide an overly rosy depiction of the State’s handling of the COVID-19 crisis in nursing homes.³⁵ Such criticism ignores that the approach taken by the State was symmetrical: if a nursing home resident died after being transferred to a hospital, that death was counted in the public tally as a hospital death; conversely, if a hospital patient was transferred to a nursing home and then died, that death was classified as nursing home death. If the State’s tally of nursing home deaths was supposedly understated by omitting residents who died in a hospital, then the nursing home death figure logically was *overstated* by including hospital patients who died after being transferred to a nursing home. Moreover, these armchair criticisms ignore the circumstances and concerns that animated the State’s approach.

that claimed New York’s COVID-19 death tally was being inflated “by the same people behind the . . . Mueller investigation.”), <https://www.nytimes.com/2020/05/09/us/politics/coronavirus-death-toll-presidential-campaign.html>; Noah Weiland, Maggie Haberman and Abby Goodnough, *Trump Suggests Virus Death Count Is Inflated. Most Experts Doubt It*, N.Y. Times (May 22, 2020) (President Trump “has begun questioning the official coronavirus death toll, suggesting the numbers, which have hobbled his approval ratings and harmed his re-election prospects, are inflated”), <https://www.nytimes.com/2020/05/22/us/politics/coronavirus-trump-death-toll.html>; Laura King, *COVID Fatalities in U.S. top 350,000. Refuting Trump, Fauci Says Deaths Are ‘Not Fake’*, L.A. Times (Jan. 3, 2021) (President Trump claimed that “the country’s fatality count toll was ‘far exaggerated,’” and “complained . . . about his government’s ‘ridiculous method of determination’ for counting fatalities”).

³⁵ Some in the press have argued that out-of-facility deaths were purposefully omitted to make it appear as though there had been fewer deaths of New York nursing home residents overall. We disagree with this assertion for reasons set out below. But even if done for political reasons, the withholding of out-of-facility death data in published reports would not give rise to any criminal violation. Among other reasons, as addressed *infra*, the data published on the State’s website was not a statement to the federal government. As importantly, the published data was accurate. More specifically, DOH had always been clear that the tally of “nursing home” deaths on its website included only deaths that *occurred in* a nursing home, and never suggested that figure included all fatalities that could be *attributed* to nursing homes.

As noted above, the State did collect out-of-facility death information from nursing homes. Unlike in-facility deaths, however, quantification of out-of-facility deaths was uniquely challenging. As an initial matter, such data relied on information provided by an entity (the nursing home) that lacked any firsthand information. Nursing homes would only be able to report such fatalities to DOH if the hospital (or other place) where the person had died reported the death to the nursing home, and only if the hospital provided the nursing home with sufficient information to determine reliably whether the death was attributable to COVID-19. Obtaining timely and complete information about out-of-facility deaths from nursing homes therefore was dependent on nursing home and hospital staff—who already were overburdened—devoting adequate resources each day to keeping nursing homes informed in real-time of the subsequent medical history of residents who had been hospitalized. As explained above, the incubation period of the virus and scarcity of testing also made it difficult for the hospitals and nursing homes to collect information about where a given person contracted the virus that led to their death. And DOH could conduct only limited verification of the data by nursing homes and hospitals. In light of the above, treating all out-of-facility deaths as a “nursing home” death would have led to illogical results. For example, if a resident with a broken hip and no known COVID infection was transferred to a hospital, and later infected by COVID in the hospital, and then died due to COVID complications, this would have been reported as a confirmed COVID nursing home fatality that occurred in a hospital. Artificially counting such a death as a “nursing home” death where the individual neither contracted the virus nor died in a nursing home would defy logic.

Categorizing COVID fatalities by location of death also eliminated the risk of double counting. If the State’s tally of hospital COVID-19 deaths included all COVID deaths that occurred at a hospital, and the tally of nursing home deaths included deaths of nursing residents both in *and outside* the facility, then any nursing home resident who died in a hospital would be counted as both a “hospital death” and a “nursing home death.” Publishing data in that manner would present a significant risk of double-counting New York’s COVID-19 death toll if people simply added the total number of nursing home deaths and hospital deaths, which would (because of double-counting) yield a figure substantially higher than the State’s total COVID-19 death toll. Contemporaneous emails show that double counting was a bona fide concern for the State in deciding which data to collect and report.

The approach taken by the state—classifying data on its website based on the location of death—allowed the State to minimize the double-counting risk, and avoided the need to rely upon second-hand information that was considered to be inherently less reliable.

The State’s approach to nursing home COVID-19 deaths also was consistent with longstanding State practices that predate the COVID-19 pandemic. Notably, New York State’s historical practice has been to report publicly vital statistics reflecting New Yorkers’ death information based on the place and nature of the institution where the death actually occurred, rather than the type of institution in which the decedent had previously resided. In those official statistics, which designated the place of death as documented in the death certificate, deaths in

nursing home facilities are reflected as nursing home deaths and deaths in hospitals are recorded as hospital deaths.³⁶

In addition to DOH's postings on its website, on July 6, 2020, the State published a white paper analyzing the effect of COVID-19 on New York nursing homes.³⁷ In that report, the State stated that it had found 6,432 people had died from COVID-19 "*in* Nursing Homes" between March 1, 2020 and June 10, 2020.³⁸ It also reported the following findings based on an in-depth review of the data:

- The timing of staff infections correlates with the timing of peak nursing home resident mortality across the State;
- Nursing home employee infections were related to the most impacted regions in the State;
- Peak nursing home admissions occurred a week after peak nursing home mortality, therefore illustrating that *nursing home admissions from hospitals were not a driver of nursing home infections or fatalities*;
- Most patients admitted to nursing homes from hospitals were no longer contagious when admitted and were thus not a source of infection; and,
- Nursing home quality was not a factor in nursing home fatalities.³⁹

No government entity or credible news publication has claimed that the data that the State chose to publish in the report was false. That is, no one has claimed that the 6,432 figure for in-

³⁶ See *Vital Statistics Deaths by Resident County, Region, Place of Death: Beginning 2003*, N.Y. Dep't of Health (updated Mar. 3, 2021), <https://health.data.ny.gov/Health/Vital-Statistics-Deaths-by-Resident-County-Region-/v6zf-ydez>.

³⁷ *Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis*, N.Y. Dep't of Health (Rev. July 2020; Feb. 2021), https://www.health.ny.gov/press/releases/2020/docs/nh_factors_report.pdf.

³⁸ *Id.* (emphasis added).

³⁹ *Id.* (emphasis added).

facility deaths was incorrect. Although some news publications have been critical of the State’s determination to include only the in-facility deaths and not include also the out-of-facility deaths,⁴⁰ it was plainly stated in the report that the numbers included were from the *New York Times* and included only deaths that had happened “*in* Nursing Homes.”⁴¹ There was nothing false or misleading in the report. Moreover, the report’s conclusion would have been unchanged regardless of whether out-of-facility deaths were included, as reflected in a subsequent addendum to the report.⁴²

Overall, the collection of COVID-19 data has been challenging for all states. As was reported recently, New York and many other states are still today updating and adjusting their official tallies for deaths from COVID-19.⁴³ For example, in December 2020, Washington State announced that it was removing 214 COVID deaths from its tally pending further analysis, but noted that it expected approximately 152 of those reported deaths would be ultimately included after further investigation.⁴⁴ In February 2021, Indiana announced that 1,507 previously uncounted deaths (representing more than 15% of the state’s overall COVID fatalities) would be

⁴⁰ Jesse McKinley, Danny Hakim & Alexandra Alter, *As Cuomo Sought \$4 Million Book Deal, Aides Hid Damaging Death Toll*, N.Y. Times (updated Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/nyregion/cuomo-book-nursing-homes.html>.

⁴¹ *Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis*, N.Y. Dep’t of Health (Rev. July 2020; Feb. 2021), https://www.health.ny.gov/press/releases/2020/docs/nh_factors_report.pdf.

⁴² *Id.*

⁴³ Mitch Smith and Lisa Waananen Jones, *As the U.S. Toll Passes 600,000, Questions Remain About How To Count the Deaths*, N.Y. Times (June 16, 2021), <https://www.nytimes.com/live/2021/06/15/world/covid-vaccine-coronavirus-mask>.

⁴⁴ News Release, Washington State Department of Health, *Department of Health Improves How It Reports COVID-19 Deaths* (Dec. 10, 2020), <https://www.doh.wa.gov/Newsroom/Articles/ID/2508/Department-of-Health-improves-how-it-reports-COVID-19-deaths>.

added to its COVID-19 death toll.⁴⁵ In April 2021, Oklahoma added around 1,800 deaths and West Virginia removed 162 deaths.⁴⁶ In June 2021 Alameda County, California, reduced its COVID-19 deaths from 1,600 to 1,300 after that county changed its rules on what qualified as a “COVID-19 death”; Washington State removed around 30 deaths, some dating to April 2020; and Missouri added 25 deaths after reviewing certain death certificates.⁴⁷ The reality is that all states struggled with collecting and reporting reliable data regarding COVID-19 deaths.

E. The Federal Government Under President Trump Targets Democratic Governors

On August 26, 2020, the Civil Rights Division of the Department of Justice announced—by press release—that it was requesting data from four states, New York, New Jersey, Pennsylvania, and Michigan, because it was “evaluating whether to initiate investigations” under the Civil Rights of Institutionalized Persons Act (CRIPA) into these states’ management of COVID-19 in nursing homes.⁴⁸ The press release stated that these four states were being targeted for potential investigation because they allegedly “required nursing homes to admit COVID-19 patients to their vulnerable populations, often without adequate testing.” The release specifically cited New York’s March 25, 2020 Advisory.

⁴⁵ Melanie Grayce West, *Indiana Identifies 1,500 Additional Covid-19 Deaths*, Wall Street J. (Feb. 3, 2021), <https://www.wsj.com/livecoverage/covid-2021-02-03/card/oR5QXddpzsMY6jGRI58M>.

⁴⁶ Mitch Smith and Lisa Waananen Jones, *As the U.S. Toll Passes 600,000, Questions Remain About How To Count the Deaths*, N.Y. Times (June 16, 2021), <https://www.nytimes.com/live/2021/06/15/world/covid-vaccine-coronavirus-mask>.

⁴⁷ *Id.*

⁴⁸ Press Release, Department of Justice, Office of Public Affairs (Aug. 26, 2020), <https://www.justice.gov/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted>.

The announcement of the DOJ inquiry was made in the midst of rampant politicization of the COVID-19 pandemic response, with President Trump blaming Democratic states and more directly by name, the Democratic governors. As noted, there were at least 12 other states that issued similar guidance to nursing homes, including Kentucky, Utah, Arizona, Florida, Indiana, and Nevada. This guidance to nursing homes tracked federal guidance from the CMS and CDC, as has been confirmed by a recent report by the New York Attorney General on nursing homes.⁴⁹

The available data at the time makes plain that politics—not science or concern for nursing home residents—motivated the CRIPA investigations. At that time, “[t]he state with the worst per capita coronavirus death rate in nursing homes, according to federal data, [wa]s Massachusetts—but its Republican governor received no similar letter. Same for Mississippi, Maryland, and Arizona—all [were] in the top 10 in death rate, all have Republican governors, yet none received a DOJ letter.”⁵⁰ New York and Michigan—which did receive letters—“rank[ed] 11th and 12th on this metric.”⁵¹ And “Florida ha[d] experienced more nursing home deaths (both absolutely and as a percentage of total COVID deaths) than ha[d] Michigan, yet the DOJ actually singled Florida out for *praise* in the press release.”⁵²

Nine days before the DOJ announced the CRIPA inquiry, on August 17, 2020, Governor Cuomo (along with Governor Whitmer of Michigan) addressed the Democratic Convention.

⁴⁹ *Nursing Home Response to COVID-19 Pandemic*, N.Y.S. Office of the Attorney General (Jan. 30, 2021), <https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf>.

⁵⁰ Samuel Bagenstos & Margo Schlanger, *The DOJ’s COVID-19 Nursing Home Inquiry Is Nakedly Corrupt* (Aug. 31, 2020), <https://slate.com/news-and-politics/2020/08/doj-covid-nursing-home-inquiry-trump-corruption.html>.

⁵¹ *Id.*

⁵² *Id.* (emphasis in original).

Both were critical of President Trump’s COVID-19 management. President Trump responded with a Twitter spree, retweeting “11 posts criticizing Cuomo, shared one to which he added his own comment and posted one tweet of his own.”⁵³

Then, during the Republican National Convention, the DOJ—without prior communication—posted the August 26 press release and sought data from only New York, Michigan, New Jersey, and Pennsylvania (all states led by Democrats) for purposes of potentially initiating a federal investigation into state-run nursing homes. The press release asserted, before an investigation was even started or any data collected, that the Governors of these four states had “issued orders which may have resulted in the deaths of thousands of elderly nursing home residents.”⁵⁴ This was, to put it mildly, highly unusual. Generally, an initial request for data from a federal regulator is not announced by press release, nor does the initial request publicly assert in boldface a conclusion that may be drawn from data not yet obtained, let alone analyzed. The press release also oddly extolled the pandemic responses of

⁵³ Jacob Jarvis, *Trump Whips up Tweet Storm After NY Governor Cuomo’s DNC Speech*, Newsweek (Aug. 18, 2020), <https://www.newsweek.com/cuomo-trump-dnc-speech-tweets-1525738>. Additionally, on September 3, 2020, @realDonaldTrump tweeted that Cuomo “should get his puppet New York prosecutors, who have been illegally after me and my family for years, to investigate his incompetent handling of the China Virus, and all of the deaths caused by this incompetence. It is at minimum a Nursing Home Scandal – 11,000 DEAD!” <https://media-cdn.factba.se/realdonaldtrump-twitter/1301516949793505287.jpg>.

It has been reported also that President Trump was afraid that the Democratic party planned to replace Joe Biden with Governor Cuomo as the Democratic nominee for president. According to Michael Wolff, Sean Hannity convinced President Trump of this notion and President Trump is quoted as having said that there was a “very good chance” that Michelle Obama would become the VP on Governor Cuomo’s ticket. Michael Wolff, *Landslide: The Final Days of the Trump Presidency* (July 13, 2021).

⁵⁴ Press Release, Department of Justice, Office of Public Affairs (Aug. 26, 2020), <https://www.justice.gov/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted>.

Florida and Texas, two Republican-led states that President Trump apparently perceived as his allies.⁵⁵

In response, Governors Gretchen Whitmer and Andrew Cuomo issued a joint press release:

This is nothing more than a transparent politicization of the Department of Justice in the middle of the Republican National Convention. It's no coincidence the moment the Trump administration is caught weakening the CDC's COVID-19 testing guidelines to artificially lower the number of positive cases, they launched this nakedly partisan deflection. At least 14 states—including Kentucky, Utah, and Arizona—have issued similar nursing home guidance all based on federal guidelines—and yet the four states listed in the DOJ's request have a Democratic governor. DOJ should send a letter to CMS and CDC since the State's advisories were modeled after their guidance.⁵⁶

The speculation of political motivation was also noted in publications. The Hill reported on September 3:

The Justice Department is currently considering an investigation into whether four Democratic-led states, including New York, violated the civil rights of nursing home residents by requiring nursing homes not turn away other residents for readmission after they had COVID-19. The Trump administration has come under fire as a result, with critics seeing the probe as politically motivated.⁵⁷

⁵⁵ On August 3, 2020, @realDonaldTrump tweeted that his “visits last week to Texas and Florida had massive numbers of cheering people gathered along the roads and highways, thousands and thousands, even bigger (by far) than the crowds of 2016. Saw no Biden supporters, and yet some in the Fake News said it was an equal number. Sad!” <https://media-cdn.factba.se/realdonaldtrump-twitter/1290308363872538624.jpg>.

⁵⁶ Associated Press, *DOJ Seeks Data on Care Home Deaths in 4 Democrat-Led States Including Michigan*, A.P. (Aug. 26, 2020), <https://www.abc10.com/article/news/health/coronavirus/doj-seeks-data-on-care-home-deaths-in-4-democrat-led-states-including-michigan/69-9abdf92e-52c0-4046-aa7d-159715b3ffca>.

⁵⁷ Morgan Chalfant, *Trump Attacks Cuomo over Nursing Homes, COVID-19* (Sept. 3, 2020), <https://thehill.com/homenews/administration/514936-trump-attacks-cuomo-over-nursing-homes-covid->

And the circumstances of this investigation led 22 members of Congress to sign a letter demanding that the DOJ defend its issuance of CRIPA letter inquiries to only these four selected states.⁵⁸

The inference that the investigation was simply a political attack is bolstered by examination of the history and purpose of the CRIPA statute. CRIPA was designed to help the federal government intervene when institutionalized persons, including residents of state-run prisons, adult homes, and skilled nursing homes, encounter “egregious or flagrant” conditions that deprive them of their federal statutory or Constitutional rights and cause them to suffer “grievous harm,” and where the state has shown a “pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities.” 42 U.S.C. § 1997a. In the three years before the DOJ’s targeting of states with Democratic governors, the DOJ had not filed a single CRIPA complaint or settled a single CRIPA matter.⁵⁹

[19](https://thehill.com/policy/healthcare/514896-justice-probe-of-state-nursing-home-covid-19-rules-draws-criticism); see also Nathaniel Weixel, *Justice Dept. Probe of State Nursing Home COVID-19 Rules Draws Criticism*, The Hill (Sept. 3, 2020) (“The Justice Department is coming under fire for what critics see as a politically motivated investigation into coronavirus deaths in state-run nursing homes.”), <https://thehill.com/policy/healthcare/514896-justice-probe-of-state-nursing-home-covid-19-rules-draws-criticism>.

⁵⁸ Letter from 22 Members of Congress to Eric Dreiband, Assistant Attorney General, dated Sept. 23, 2020, https://pascrell.house.gov/uploadedfiles/doj_ltc_letter_final_092320.pdf.

⁵⁹ The bottom line—that this public announcement of a potential investigation was political retribution—is even more clear now that other politically motivated inquiries into journalists and members of Congress have surfaced. As was widely reported recently, in 2017 and 2018, “[a]s the Justice Department investigated who was behind leaks of classified information early in the Trump administration, it took a highly unusual step: Prosecutors subpoenaed Apple for data from the accounts of at least two Democrats on the House Intelligence Committee, aides and family members. One was a minor.” Katie Benner et al., *Hunting Leaks, Trump Officials Focused on Democrats in Congress*, N.Y. Times (June 10, 2021), <https://www.nytimes.com/2021/06/10/us/politics/justice-department-leaks-trump-administration.html?referringSource=articleShare>. After news of the subpoenas broke, John Demers, the Justice Department’s top national security official, resigned. Michael Balsamo, *DOJ Official Resigning Amid Uproar Over Democrats’ Subpoenas: Report*, Huffington Post (June 14, 2021), https://www.huffpost.com/entry/doj-officials-resigns-subpoenas_n_60c76e4be4b09cc99b880d00. And

In October 2020, the DOJ Civil Division sent a subsequent letter to New York. That letter purported to request that New York voluntarily provide additional data related to privately run nursing homes.⁶⁰ The circumstances of that letter cast further doubt on the integrity of the DOJ's inquiries to New York. The October 2020 letter was released to the press just days before Election Day and was provided to New York only after the State reached out to the DOJ to request a copy. The letter was signed by Jeffrey Bossert Clark, then the Acting Assistant Attorney general for the Civil Division. News media have reported that Mr. Trump and Mr. Clark allegedly plotted secretly for Mr. Clark to replace Acting Attorney General Jeffrey Rosen in the final weeks of the administration and to use the power of the DOJ to try to overturn the election results. Mr. Clark's role in the DOJ's inquiries to New York State reinforce the view that the requests for data related to New York's nursing homes was not part of any good faith and impartial effort to enforce federal law, but rather part of an improper and politically motivated attempt to use the DOJ to punish President Trump's detractors.⁶¹

the Justice Department's Inspector General has launched a probe into the matter after a request from Deputy Attorney General Lisa Monaco. *Id.* Inspector General Michael Horowitz said he would examine whether the data subpoenaed by the Justice Department followed department policy and "whether any such uses, or the investigations, were based upon improper considerations." *Id.* Attorney General Merrick Garland also issued a statement: "political or other improper considerations must play no role in any investigative or prosecutorial decisions" and "[c]onsistent with our commitment to the rule of law," "we must ensure that full weight is accorded to separation-of-powers concerns moving forward." *Id.*

⁶⁰ Letter from Jeffrey Bossert Clark to Michael G. Bass (Exhibit 10).

⁶¹ The political motivation behind the CRIPA probe is made plain also by its lack of necessity. The federal government already had data on nursing home COVID infections and deaths that it had collected directly from the nursing homes itself pursuant to federal regulations that required nursing homes to submit such data to the CDC on a weekly basis. It had no need to request that data from New York's DOH. See *Interim Final Rule Updating Requirements for Notification of Confirmed and Suspected COVID-19 Cases Among Residents and Staff in Nursing Homes*, Ctrs. for Medicare & Medicaid Servs. (May 6, 2020), <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurvey/certificationgeninfo/policy-and-memos-states-and/interim-final-rule-updating-requirements-notification-confirmed-and-suspected-covid-19-cases-among>.

F. New York Responds to the DOJ Requests

By letter dated August 26, 2020—the same date as the CRIPA press release—Eric Dreiband, Assistant Attorney General of the Civil Rights Division, sent a letter requesting New York to provide data on public nursing homes.⁶² The letter requested data for,

1. The number of Public Nursing Home residents, employees, other staff, guests, and visitors who contracted COVID-19, regardless of where such persons contracted COVID-19.
2. The number of Public Nursing Home residents, employees, other staff, guests, and visitors who died of COVID-19 including those who died in a Public Nursing Home or after being transferred to a hospital or other medical facility, hospice, home care, or any other location.
3. All State-issued guidance, directives, advisories, or executive orders regarding admission of persons to Public Nursing Homes, including those previously superseded, as well as the dates each such document was in effect.
4. The number of persons who were admitted to a Public Nursing Home from a hospital or any other facility, hospice, home care, or other location after testing positive for COVID19 during the period the guidance or orders were in effect.⁶³

The DOJ's August 26 data request was limited to "public nursing homes," which it defined as those owned by the State or its subdivisions, such as cities and counties. In New York, there are 26 public institutions, which represents about four percent of the State's nursing homes.

Notwithstanding the plainly politically motivated nature of the inquiry, New York State responded two weeks later in a letter from DOH. That September 9, 2020, letter response annexed expansive and detailed data, including statistics on the number of public nursing home

⁶² Letter dated Aug. 26, 2020 from Eric Dreiband, <https://www.justice.gov/opa/press-release/file/1308981/download>.

⁶³ *Id.*

residents who died in such nursing home facilities as well as those who died after being transferred to a hospital.⁶⁴ As a part of its response, DOH provided (i) “data on both confirmed and ‘presumed’ COVID-19 deaths for fatalities occurring *inside a facility*, to the extent that the facilities have reported this data” and (ii) data on confirmed COVID-19 deaths for *out-of-facility deaths*.⁶⁵ The letter response also described at length the scope and limitations of the data that was being provided.

Following New York State’s response, DOJ never contacted New York State to seek clarification of any of the information provided by the State in connection with the CRIPA inquiry. Nor has the DOJ Civil Rights Division ever contended that any aspect of the State’s response was false or misleading. Instead, as noted, on July 22, 2021, the DOJ informed the State that it had “decided not to open a CRIPA investigation” based upon a review of the State’s responses and “additional information available to the [DOJ].”⁶⁶

G. The Administration Responds to New York State Lawmakers’ Requests for Information

At around the same time the DOJ announced its potential CRIPA investigation, New York State lawmakers requested information related to nursing home deaths. On August 20, 2020, the State Senate and Assembly sent letters to DOH with a list of questions about, among other things, nursing home deaths. On February 10, 2021, DOH submitted answers to those questions. In that submission, DOH provided data for nursing home COVID-19 fatalities,

⁶⁴ Letter from N.Y. Dep’t of Health to Eric Dreiband dated Sept. 9, 2020 (Exhibit 11).

⁶⁵ *Id.* (emphasis added).

⁶⁶ Letter from Special Litigation Section Chief Steven H. Rosenbaum to Deputy General Counsel Michael G. Bass dated July 22, 2021 (Exhibit 2).

including out-of-facility deaths.⁶⁷ That same day, members of Governor Cuomo’s administration—including Melissa DeRosa (Secretary to the Governor) and Dr. Howard Zucker (Commissioner of Health)—met via Zoom with a group of New York State legislators.

News reports of that meeting have mischaracterized and taken out of context what occurred. For example, the *New York Post* reported, “Cuomo aide Melissa DeRosa admits they hid nursing home data so feds wouldn’t find out.”⁶⁸ That is simply wrong; she did nothing of the sort. Far from hiding any information from the “feds,” Ms. DeRosa explained to the legislators that the State had truthfully responded to the questions raised by the Department of Justice in the CRIPA request, noting that the Department had “sent a letter asking a number of questions and [the State] had satisfied those questions.” And, when a legislator asked why it had taken so long to produce answers to the legislators’ questions, DeRosa responded that the delay had been caused by the DOJ’s CRIPA request, which had been first announced via press release, and followed President Trump’s blatant efforts to politicize the COVID-19 crisis and attack states led by governors whom he perceived to be his political enemies. Given the need to respond to the CRIPA request—and the political realities of dealing with the Trump Administration—DeRosa said that they “froze.” By “froze” it is plain she meant “held off” on responding to the legislators’ questions and not “hid nursing home data,” as was incorrectly asserted by the *New York Post*. Indeed, in that very same meeting, DeRosa explained that, following the CRIPA request, the Executive Chamber “went to the [legislative] leaders” and asked, “can we please

⁶⁷ DOH Response to N.Y. State Legislators’ Questions Regarding COVID-19 dated Feb. 10, 2021 (Exhibit 12).

⁶⁸ Bernadette Hogan, Carl Campanile & Bruce Golding, *Cuomo Aide Melissa DeRosa Admits They Hid Nursing Home Data So Feds Wouldn’t Find Out*, N.Y. Post (Feb. 11, 2021), <https://nypost.com/2021/02/11/cuomo-aide-admits-they-hid-nursing-home-data-from-feds/>.

pause on getting back to everybody until we get through this period and we know what's what with the" Department of Justice?⁶⁹

H. The Federal Government Declines To Investigate Under CRIPA

In June 2021, after the reports of President Trump's DOJ subpoenaing journalists' and Democratic lawmakers' records came to light, New York sent a letter to the Inspector General of the DOJ.⁷⁰ The letter requested that the Inspector General investigate the federal government's initiation of the inquiry to New York State.

Although there has not yet been any announcement about whether the Inspector General will conduct such an investigation, on July 22, 2021, the DOJ sent a letter to New York, informing New York that it had "decided not to open a CRIPA investigation of any public nursing facility within New York at this time."⁷¹

⁶⁹ WGRZ Staff, *Secretary to Cuomo Issues Statement After Comments Made About Nursing Home Investigation*, ABC10 (Feb. 12, 2021), <https://www.abc10.com/article/news/health/coronavirus/secretary-to-gov-cuomo-issues-statement-after-comments-made-about-nursing-home-investigation/71-426fc337-41c2-4bed-982c-b3174f7b365e>.

⁷⁰ Letter from New York Special Counsel for Public Integrity Victor Olds to Inspector General Horowitz dated June 30, 2021 (Exhibit 1).

⁷¹ Letter from Special Litigation Section Chief Steven H. Rosenbaum to Deputy General Counsel Michael G. Bass dated July 22, 2021 (Exhibit 2).

**THE EXECUTIVE CHAMBER HAS NOT COMMITTED ANY FEDERAL CRIME,
AND THE FEDERAL GOVERNMENT SHOULD DISCONTINUE THIS
INVESTIGATION**

We understand that your Office is investigating whether, in connection with its reporting of data about nursing home deaths, the Governor or any members of the Executive Chamber committed indictable offenses. Based on your interview questions and subpoenas, it appears the investigation is based on a belief, or a theory, that certain false statements were made about the tabulation of nursing home deaths related to the COVID-19 pandemic. Any such belief or theory is unfounded. As explained below, there is no indictable offense in connection with any statements about COVID-related nursing home deaths.

First, the State's decisions about what information related to nursing home deaths to publish, when to publish it, and which information is sufficiently reliable to publish, are public policy decisions. There is also an ongoing and active impeachment inquiry into this subject matter, among other topics. Thus, the Tenth and Eleventh Amendments bar the federal government from second-guessing the State's choices.

Second, any prosecution based on the State's publications would raise significant First Amendment concerns. Public officials do not lose their First Amendment rights upon taking office. And the First Amendment protects office holders from federal retaliation for public statements. To the extent that the federal government seeks to hold the Governor, or any member of the Executive Chamber, criminally liable for the publication of nursing home data, such a prosecution would be barred by the First Amendment.

Third, there has been no violation of any federal statute. Although your Office has not identified which statutes you believe might have been violated, your requests and questions

suggest you might be considering claims under federal statutes barring false statements or fraud. Any indictment under those statutes could not succeed. There is no evidence that any false statement was made and none of the Executive Chamber has received any improper benefit based on the State's disclosures of nursing home deaths.

Fourth, the federal government should decline to prosecute under principles of comity and federalism. Long-standing DOJ practices and guidelines establish that federal prosecutors should generally defer to state prosecutors where the state has a sufficient interest and ability to address the allegations at hand. New York has dedicated and motivated prosecutors and more than ample resources to conduct this investigation. Indeed, the New York Attorney General's Office has already investigated this matter, published a report, and represented that the investigation is ongoing. Thus, the federal government should allow this investigation to proceed in New York.

A. New York State’s Decisions Regarding Publication of COVID-19 Data Are Policy Decisions that Are Protected by the Tenth and Eleventh Amendments

Any prosecution based on the State’s publication of nursing home data would be barred by the Tenth and Eleventh Amendments to the United States Constitution. A state’s decisions about when and how to publish nursing-home-death data—as well as which data the State found to be sufficiently reliable to publish—are public policy determinations. Such decisions fall within the police powers reserved to the states, and the Constitution does not countenance federal second-guessing of those policy decisions. Whereas some states opted not to publish any nursing home death data at all, New York chose to provide certain information to the public. At its core, any prosecution related to nursing-home death data would entail the federal government asserting that New York State made the wrong policy choice about which data to publish. The Constitution does not allow the U.S. criminal code to be wielded for such a purpose.

Under the Tenth Amendment, the States—not the federal government—are given the authority to regulate public health. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . .”). And the States’ powers to regulate public health are at their peak when crises threaten their residents. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (“[States] undoubtedly ha[ve] a compelling interest in combating the spread of COVID-19 and protecting the health of [their] citizens.”); *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1146 (D.N.M. 2020) (“[W]hen the state faces a major public health threat, . . . its Tenth Amendment police and public health powers are at a maximum”); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 28 (1905) (holding that the States’ police power encompasses such

authority reasonably necessary to “guard and protect” public health and public safety, including protecting communities “against an epidemic of disease which threatens the safety of its members”).

Understanding that core police powers—such as regulation of public health—are reserved to the States, the Supreme Court has repeatedly held that principles of federalism and sovereign immunity dictate that the federal government may not use criminal statutes as a vehicle to dictate local policy. *E.g.*, *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020); *McDonnell v. United States*, 136 S. Ct. 2355, 2361-62 (2016) (it is the “[States’] prerogative to regulate the permissible scope of interactions between state officials and their constituents,” not the federal government’s).

Even if a state official had misstated information about the COVID death toll—which, in any event, did not occur here—there would be no federal criminal liability. As the Supreme court observed recently in *Kelly v. United States*, “[m]uch of [State] governance involves . . . regulatory choice.” 140 S. Ct. 1565, 1574 (2020). “If U.S. Attorneys could prosecute . . . every lie a state or local official tells in making such a decision, the result would be . . . a sweeping expansion of federal criminal jurisdiction.” *Id.* at 1574 (quotation marks omitted). “In effect,” the Court held, “the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking.” *Id.* The bottom line: federal prosecutors may not use the criminal code “to set standards of disclosure and good government for local and state officials.” *Id.* (quotation marks and alteration omitted).

Here, the decisions at issue fall within the police powers reserved under the Tenth Amendment and are, thus, protected from federal second-guessing. New York was the state hit

hardest and swiftest by the COVID-19 virus. Quick and decisive action was required, and the State responded with actions that saved thousands of lives. This entailed making many tough decisions, including issuing the DOH March 25 Advisory, which aligned with CMS guidance and allowed hospital patients to return to nursing homes, and publishing data to inform its residents of the COVID-19 trends and toll. Within the chaos of the pandemic, and the confusion of wrangling 613 nursing homes to report daily on various topics, the Executive Chamber decided which of the data it received was sufficiently reliable to publish and beneficial to release to the public. Those choices are public policy decisions that fall under New York’s broad police powers reserved under the Tenth Amendment. *Bimber’s Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 776 (W.D.N.Y. 2020) (“While reasonable minds may differ, New York is not required to respond to a public-health emergency as Plaintiffs would like. Nor may the State’s actions taken in reliance on expert scientific advice be second-guessed, for it is particularly when officials act ‘in areas fraught with medical and scientific uncertainties’ that their latitude is ‘especially broad.’” (quoting *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613)); see also *Jacobson*, 197 U.S. at 30 (“It is no part of the function of a court or a jury to determine which one of two modes was likely to be most effective for the protection of the public against disease That [is] for the [State] to determine in the light of all the information it had or could obtain.”).

Because New York was acting within its constitutionally reserved powers, any legal action against an individual related to the State’s publication of nursing-home deaths would be barred by the Tenth and Eleventh Amendments.⁷² The federal government may believe, in

⁷² A suit against a government employee for actions taken in his or her official capacity is a suit against the State itself. See *Mary Jo C. v. NY. State & Loc. Ret. Sys.*, 707 F.3d 144, 151-52 (2d Cir. 2013) (“The immunity recognized by the Eleventh Amendment extends beyond the states themselves to state agents

hindsight, that certain data should have been released earlier, should have been presented differently, or should have included more information; it may even argue (incorrectly) that the State published inaccurate data. But no matter the theory, the State’s decisions about when and how to release data to the public during the midst of a worldwide health crisis, and which data it found to be sufficiently reliable to publish to the public, are core public policy determinations.

Based on your interview questions and subpoenas, it appears that your Office has a belief, or a theory, that New York State made the wrong decision in the publication of its data—a decision that the State made voluntarily and in the absence of any federal requirements or guidelines for how it should do so.⁷³ But that theory is not actionable under any federal criminal statute. As the Supreme Court reiterated in *Kelly*, the federal government may not use criminal statutes “to set standards of disclosure and good government for local and state officials.” Any prosecution on these facts would do just that and, therefore, cannot succeed.

and state instrumentalities that are, effectively, arms of a state.” (quotation marks omitted)). In the same way, to prosecute criminally a State employee for actions done in an official capacity would be to attempt to impose criminal liability on the State itself. *Cf. Ippolito v. Meisel*, 958 F. Supp. 155, 161 (S.D.N.Y. 1997) (barring plaintiff’s allegation of criminal conspiracy against state officials on, among other things, the ground of sovereign immunity).

⁷³ Ironically, the Federal Government chose to collect significantly less data than New York State from nursing homes. For example, when CMS published requirements for nursing home data reporting about COVID-19—which did not begin until May 2020, much later than it had begun in New York—CMS did not require that the nursing homes go back to the beginning of the pandemic and collect or report retrospective data.

B. The First Amendment Protects New York’s Right To Publish Data to the Public

There is no indictable offense based on the State’s posted death numbers or the July 6 report because all the statements of New York officials are protected by the First Amendment. Public officials do not lose their First Amendment rights upon taking office. *E.g.*, *Bond v. Floyd*, 385 U.S. 116, 136 (1966). To the contrary, “[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.” *Id.* at 135-36 (noting that *even* “***erroneous statements must be protected to give freedom of expression the breathing space it needs to survive.***” (emphasis added)); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

Here, the publication of nursing home data is speech entitled to First Amendment protection. This is true even if we accept the (incorrect) premise that the nursing home data that was published was inaccurate. The First Amendment protects both correct and “erroneous statements.” *Bond*, 385 U.S. at 136. And for good reason—during the Trump presidency the “truth” became a moving target. If the First Amendment protected only truthful statements Governors (or Presidents) might be prosecuted for telling their residents that they should try to cure COVID-19 by, for example, taking “hydroxychloroquine,”⁷⁴ “hit[ing] their bod[ies] with a

⁷⁴ *Coronavirus: Hydroxychloroquine Ineffective Says Fauci*, BBC (July 29, 2020) (“Hydroxychloroquine was first touted by Mr Trump in March. Two months later he surprised journalists by saying he had begun taking the unproven medication to ward off the virus.”), <https://www.bbc.com/news/world-us-canada-53575964>.

tremendous, . . . ultraviolet or just very powerful light,”⁷⁵ or taking an “injection” of “disinfectant.”⁷⁶ No legislator would face prosecution for these statements, and no one is arguing that President Trump should be held criminally liable for such statements. At bottom, the First Amendment protects government officials’ speech. Here, the publication of nursing home deaths is speech fully entitled to that protection. Any prosecution based on New York’s publication of data, particularly, the choice to publish in-facility and not out-of-facility nursing home deaths, is barred by the First Amendment.

⁷⁵ Eliza Relman, *Trump Directs Experts To See Whether They Can Bring ‘Light Inside The Body’ To Kill the Coronavirus, Even as His Own Expert Shuts Him Down*, Business Insider (Apr. 23, 2020) (“‘Suppose that we hit the body with a tremendous, whether it’s ultraviolet or just very powerful light,’ Trump said at the White House coronavirus press briefing, adding: ‘Supposing you brought the light inside the body, which you can do either through the skin or in some other way.’”), <https://www.businessinsider.com/trump-wants-bring-light-inside-the-body-to-kill-coronavirus-2020-4>.

⁷⁶ Dartunorro Clark, *Trump Suggests ‘Injection’ of Disinfectant To Beat Coronavirus and ‘Clean’ the Lungs*, NBC News (Apr. 23, 2020; updated Apr. 24, 2020), <https://www.nbcnews.com/politics/donald-trump/trump-suggests-injection-disinfectant-beat-coronavirus-clean-lungs-n1191216>.

C. New York Has Not Violated Any Federal Statute

Although you have not identified any statutes you think might have been violated, for the limited purpose of this Memorandum we presume that a criminal action premised on false statements would be brought under 18 U.S.C. §§ 1001 (false statements), 1343 (wire fraud), 666 (federal program fraud), or 31 U.S.C. § 3729 (false claims). As explained below, there has been no indictable offense under these statutes.

1. Disclosure of Nursing Home Data Did Not Violate § 1001

The federal government could not prove violation of 18 U.S.C. § 1001. Section 1001 proscribes one from “knowingly and willfully . . . mak[ing] any materially false, fictitious, or fraudulent statement or representation” “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” *United States v. Litvak*, 808 F.3d 160, 170 (2d Cir. 2015) (quoting 18 U.S.C. § 1001(a)(2)). “[I]n order to secure a conviction under [18 U.S.C.] § 1001(a)(2), the Government must prove that a defendant (1) knowingly and willfully, (2) made a materially false, fictitious, or fraudulent statement, (3) in relation to a matter within the jurisdiction of a department or agency of the United States, (4) with knowledge that it was false or fictitious or fraudulent.” *Id.* (emphasis omitted).

Although we are speculating, the subpoenas you have issued suggest that you might believe that false statements were made either (i) in the July 6, 2020 Department of Health Report and other Department of Health publications of nursing home data to the public at large or (ii) in the September 9, 2020 CRIPA response. As explained below, neither provides a basis for criminal liability.

i. New York Did Not Make Any False Statement with Respect to Its Publication of Nursing Home Data

First, the Government could not obtain a § 1001 conviction because there has not been any false statement. It is a complete defense to a charge of making false statements that the statement was not false. *United States v. Mandanici*, 729 F.2d 914, 921 (2d Cir. 1984); *see also Bronston v. United States*, 409 U.S. 352, 359-62 (1973); Leonard B. Sand, *Federal Jury Instructions* at 36-32 (2007) (“As with the perjury statute, the literal truth of the allegedly false statement is a defense to making a false statement in violation of section 1001.”). Even where a statement is misleading, there has been no criminal violation where the statement is true. *Mandanici*, 729 F.2d at 921 (“[A] defendant may not be convicted under § 1001 on the basis of a statement that is, although misleading, literally true.”); *United States v. Mahaffy*, 285 F. App’x 797, 799 (2d Cir. 2008); *United States v. Carey*, 152 F. Supp. 2d 415, 424 (S.D.N.Y. 2001) (recognizing that the literal truth defense applies to false statement prosecutions under §1001, court dismissed false statement and perjury prosecutions).

DOH’s Website Posts and July 6, 2020 Report. There is no false statement in the July 6, 2020 report or any of DOH’s public statements about nursing home deaths. In both its posts on its website and the July 6 report, DOH noted conspicuously that it was publishing only in-facility deaths. In the July 6 report, DOH stated that 6,432 people had died from COVID-19 “*in* Nursing Homes.”⁷⁷ Similarly, “the state website had always been clear that deaths it listed did ‘*not*

⁷⁷ *Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis*, N.Y. Dep’t of Health (rev. July 20, 2020) (emphasis added), <https://www.health.ny.gov/press/releases/2020/docs/nhfactorsreport.pdf>.

include deaths outside of a facility.”⁷⁸ There has been no allegation that the State’s data on in-facility deaths were false or inaccurate. Thus, because there was no false statement, there can be no claim under § 1001.

Commentators have complained that more information (out-of-facility deaths) also should have been published. But the State’s declination to provide more information does not render its other statements false. The State had no duty to report any data at all, so it was within the State’s discretion to decide which data to publish or not to publish, for any reason or no reason at all. *See United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008) (“[T]here must be a legal duty to disclose in order for there to be a concealment offense in violation of § 1001(a)(1).”).

News outlets have also been critical of the State’s decision to publish in the July 6 report only in-facility deaths even though previous versions of the report included also out-of-facility deaths. As an initial matter—although not relevant to the § 1001 analysis—there were good reasons not to include the out-of-facility deaths in the final report. Particularly, as noted by Beth Garvey (special counsel and senior adviser to the Governor), “[t]he out-of-facility data [were] omitted after DOH could not confirm it had been adequately verified.”⁷⁹ But in any event it does not matter for this analysis—even if the July 6 report had been edited solely for political gain, it was stated plainly in the July 6 report that the figures were limited to *in-facility* deaths. Thus,

⁷⁸ Jesse McKinley & Luis Ferré-Sadurní, *N.Y. Severely Undercounted Virus Deaths in Nursing Homes, Report Says*, N.Y. Times (Jan. 28, 2021) (emphasis added), <https://www.nytimes.com/2021/01/28/nyregion/nursing-home-deaths-cuomo.html>.

⁷⁹ Joe Palazzolo, Jimmy Vielkind & Rebecca Davis O’Brien, *Cuomo Advisers Altered Report on Covid-19 Nursing-Home Deaths*, Wall Street J. (Mar. 4, 2021), <https://www.wsj.com/articles/cuomo-advisers-altered-report-on-covid-19-nursing-home-deaths-11614910855>.

because those numbers were not false, the numbers published in the report cannot support a § 1001 prosecution.

The September 9, 2020 CRIPA Response. There is also no false statement in the September 9, 2020 CRIPA response. As to nursing home deaths, the CRIPA request sought data for nursing home residents (as well as employees, staff, and guests) who died of COVID-19 including both in- and out-of-facility deaths.⁸⁰ The State complied and provided data in response to those requests. This included data for confirmed out-of-facility deaths as well as confirmed and presumed in-facility deaths. We are aware of no allegation that the data provided in the CRIPA response were inaccurate in any way. Indeed, the DOJ declined to investigate under CRIPA based specifically on New York’s responses. In the July 22, 2021, letter from the DOJ, it stated, “We have reviewed the information you provided along with additional information available to the Department. Based on that review, we have decided not to open a CRIPA investigation of any public nursing facility within New York at this time.”⁸¹ Accordingly, there has been no false statement and, thus, there is no possible argument for § 1001 criminal liability.⁸²

⁸⁰ Letter dated Aug. 26, 2020 from Eric Dreiband, <https://www.justice.gov/opa/press-release/file/1308981/download>.

⁸¹ Letter from Special Litigation Section Chief Steven H. Rosenbaum to Deputy General Counsel Michael G. Bass dated July 22, 2021 (Exhibit 2).

⁸² To the extent the federal government attempts to assert that minor errors in the computation of data could qualify as a false statement, such errors would not qualify as § 1001 violations based on lack of materiality and intent. *See United States v. Litvak*, 808 F.3d 160, 170 (2d Cir. 2015).

ii. DOH’s Public Statements Do Not Fall Within the Federal Government’s Jurisdiction

Statements in the July 6 report, on the DOH website, and in responses to the New York State legislators also cannot be the subject of a § 1001 prosecution because they were not made to the federal government and do not fall within the jurisdiction of the federal government.

Under § 1001, to be actionable, a statement must be made “in relation to a matter within the jurisdiction of a department or agency of the United States.” 18 U.S.C. § 1001. A federal department or agency has jurisdiction under § 1001 “when it has the power to exercise authority in a particular situation,” as distinguished from “matters peripheral to the business of that body.” *United States v. Davis*, 8 F.3d 923, 929 (2d Cir. 1993) (quoting *United States v. Rodgers*, 466 U.S. 475, 479 (1984)). Although statements need not be made directly to the federal government to fall under a department’s or agency’s jurisdiction, an arm of the federal government must at least have supervisory authority over the entity that did receive the false statement. *Id.* (citing *United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir. 1983)).⁸³

DOH’s or Chamber’s statements to the public or New York legislators do not fall within the second prong of the § 1001 test because they were not made in relation to a matter within the jurisdiction of any agency or department of the federal government. These statements were posted publicly on DOH’s website or sent directly to state lawmakers. They were not made to the federal government.⁸⁴ And the federal government does not have supervisory authority over

⁸³ In fact, where the statement is made to an entity other than the federal government, there is no § 1001 jurisdiction unless the federal government “has the power to exercise authority in [that] particular situation.” *United States v. Rodgers*, 466 U.S. 475, 479 (1984).

⁸⁴ The State’s responses in September and January to the DOJ inquiries cited the July 6, 2020 DOH report. However, the State did not offer the July 6 report as a response to the DOJ requests. Rather, it

DOH, Chamber, or any recipient of the statements. See *United States v. White Eagle*, 721 F.3d 1108, 1117 (9th Cir. 2013). As a result, none of these public statements fall within the federal government’s jurisdiction and are not actionable under § 1001.

iii. The Federal Government Cannot Prove a False Statement by Omission Because New York Was Under No Legal Duty To Report

To succeed on an omission (concealment) theory, the federal government must show “that the defendant had a *legal duty* to disclose the material facts at the time he was alleged to have concealed them.” *United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985) (emphasis in original). Put differently, “concealment of a fact that no one has a legal duty to disclose may not be a violation of [§ 1001].” *United States v. Perlmutter*, 656 F. Supp. 782, 789 (S.D.N.Y.), *aff’d*, 835 F.2d 1430 (2d Cir. 1987); see also *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008) (“[T]here must be a legal duty to disclose in order for there to be a concealment offense in violation of § 1001(a)(1).”); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986) (indictment alleging concealment in violation of 18 U.S.C. § 1001 failed when there was no duty to disclose).

As discussed above, some commentators have noted that the State omitted out-of-facility deaths in its public tabulations and asserted that this obscured how many nursing home deaths there really were. We disagree strongly with this premise. But, in any event, it is irrelevant to the § 1001 analysis because the State had no legal duty to publish that information, and certainly not one imposed by the federal government. Thus, a § 1001 omission theory cannot succeed on

simply noted to the DOJ that much of the information requested by the requests was already available through the July 6 report and other sources, including the DOH website and data independently collected by the Centers for Medicare & Medicaid Services.

these statements. *United States v. White Eagle*, 721 F.3d 1108, 1117 (9th Cir. 2013) (holding there was no concealment sufficient to find a § 1001(a)(1) violation when the defendant had made some statements but concealed certain other information; the court held, “that incomplete report—while misleading—did not contravene a specific reporting duty”).

Similarly, the CRIPA response cannot support an omission theory under § 1001 because the request did not create a duty to respond—the request was just that, a *request*, not a demand. The plain language of the request establishes this point. In the CRIPA request, Assistant Attorney General Dreiband stated that “the Division *respectfully requests*” information related to public nursing homes⁸⁵—not “demands” or “requires.” Because it was a request, New York was not required to (although it elected to) respond. Without a requirement to respond there is no duty, and absent a duty there can be no false statement by omission under § 1001. *United States v. Safavian*, 528 F.3d 957 (D.C. Cir. 2008) (noting that there was “no indication of the particular facts or information” that should be disclosed, and that the regulation at issue contained no indication that it applied to the defendant’s conduct and therefore reversing the conviction under § 1001(a)(1) because there was no duty to disclose). And, in any event, the CRIPA response stated what information was being included and what information was not being provided. Put differently, the statements made by New York were neither false nor misleading. For these reasons, a misstatement-by-omission theory cannot succeed.

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⁸⁵ Letter dated Aug. 26, 2020 from Eric Dreiband (DOJ), <https://www.justice.gov/opa/press-release/file/1308981/download>.

At bottom, the government cannot succeed on a § 1001 claim. There was simply no false statement. Although people can debate—and they have—whether New York should have publicly disclosed out-of-facility nursing home deaths earlier, there is no reasonable argument that such a policy decision constitutes a federal crime. In each statement discussed above, New York was clear about what information it was and was not providing. Thus, there was no false statement and no conceivable case to bring under § 1001.⁸⁶

2. There Is No Evidence of Property Fraud

Any prosecution under the property fraud statutes—18 U.S.C. §§ 1343 (wire fraud), 666 (federal program fraud), or 31 U.S.C. § 3729 (false claims) (below referred to together as the “property fraud statutes”)—would also fail.

i. There Is No Evidence of a False Statement or Fraudulent Act

For the reasons explained in the prior section of this Memorandum, the federal government could not obtain a property fraud conviction because there has been no false statement or fraudulent act. Each statute requires a false or deceptive act. 18 U.S.C. §§ 1343 (requiring a “scheme or artifice to defraud”), 666 (making it unlawful to “embezzle[], steal[], obtain[] by fraud, or otherwise without authority knowingly convert[] to the use of any person other than the rightful owner or intentionally misapplies, property” over \$5,000 and properly belongs to the government), 31 U.S.C. § 3729 (requiring proof of a “a false or fraudulent claim for payment or approval” or use of “a false record or statement material to a false or fraudulent claim”). As explained in the preceding section, no false statement has been made to the federal

⁸⁶ Although in this Memorandum we need not delve into the issues, the Government would also not be able to prove the other elements of § 1001, namely intent and knowledge of falsity. *United States v. Litvak*, 808 F.3d 160, 170 (2d Cir. 2015) (quoting 18 U.S.C. § 1001(a)(2)).

government (or anyone else). So a prosecution premised on any of the property fraud statutes would fail.

ii. There Is No Evidence Any Member of the Executive Chamber Obtained Property Due to the Disclosure of Nursing Home Data

A property fraud claim also cannot succeed because New York has not—and none of its employees has—obtained any property. To succeed under the property fraud statutes, the government must prove that the *object* of the deceit was to obtain some traditional form of property. *Kelly v. United States*, 140 S. Ct. 1565, 1571, 1574 (2020); *Skilling v. United States*, 561 U.S. 358, 405-06 (2010); *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *McNally v. United States*, 483 U.S. 350, 359-61 (1987). Without a traditional property requirement, prosecutors would be free to “set[] standards of disclosure and good government for local and state officials,” something the Supreme Court has ruled it may not do. *Kelly*, 140 S. Ct. at 1574. Indeed, the Supreme Court has consistently reined in federal prosecutors’ attempts to use the criminal code to dictate their views of good government. *See McDonnell v. United States*, 136 S. Ct. 2355, 2361-62 (2016); *Skilling*, 561 U.S. 358; *Cleveland*, 531 U.S. at 15; *McNally*, 483 U.S. at 356, 361.

Most recently, the Court decided *Kelly v. United States*, 140 S. Ct. 1565 (2020), the “Bridgegate” case. In 2013, officials in the New Jersey public officials realigned, without prior announcement, 12 toll lanes on the George Washington Bridge. The public officials claimed that they did so to conduct a traffic study. Really, they did so for political retribution: to punish the mayor of Fort Lee for refusing to support Governor Christie’s reelection bid. The federal government found out, and charged the public officials with wire fraud and federal program

fraud under §§ 1343 and 666(a)(1)(A). The jury convicted, the defendants appealed, the Third Circuit affirmed, and the Supreme Court took up the case.

In a unanimous opinion, the Supreme Court reversed and vacated the convictions. The Court found that under the government’s expansive view of the statute, “the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking.” *Id.* at 1574. “The property fraud statutes,” the Court held, “do not countenance that outcome.” Not every nefarious act, dirty trick, or “corrupt act by state or local officials is a federal crime.” *Id.* Rather, the Court held that to prove a property fraud the Government must do just that: “prove *property* fraud.” *Id.* at 1571 (emphasis added). That is, the Government must show “not only that [the defendants] engaged in deception, but [also] that *an object of their fraud was property.*” *Id.* (quotation marks omitted and alterations accepted; emphasis and alterations added); *see also id.* (“That requirement, this Court has made clear, prevents these statutes from criminalizing all acts of dishonesty by state and local officials. . . . [The property fraud statutes] did not authorize federal prosecutors to set standards of disclosure and good government for local and state officials.”).

Here, any prosecution premised on New York’s non-disclosure of nursing home resident deaths would violate the holding in *Kelly* because no property was obtained improperly. This is true for a few reasons. *First*, we are unaware of any federal funding tied to the State’s statements about nursing home deaths. And if such funding were available, it would have been illogical for New York officials to *understate* nursing home deaths. To the contrary, if there were federal funds to be had, surely it would have been offered as aid to states with higher death

rates. Put differently, New York would have had an incentive to *inflate* nursing home deaths, not underreport them.

Second, there is no indication that any State official obtained any property because of the publication of nursing home deaths. Even if we accept, for the sake of argument, that New York State officials knowingly provided incorrect numbers with the express purpose of creating the impression that the nursing home related COVID deaths were not as bad in New York as they actually were, it would not be actionable under the property fraud statutes. As *Kelly* (and its ancestry) makes plain, the object of the deceit must be the pursuit of actual, traditional property. Here, at most the government could argue (albeit, incorrectly) that the State published incomplete information with the object of making itself look good. That would not be actionable as property fraud. All such a prosecution would do is seek to “set standards of disclosure and good government for local and state officials”—something it simply cannot do. *Kelly*, 140 S. Ct. at 1571 (quotation marks and alteration omitted).

Some news outlets have unfairly associated the publication of nursing home data and Governor Cuomo’s book. For example, the *New York Times* reported that in the lead up to the publication of the July 6 DOH report Governor Cuomo’s aides revised the nursing home death numbers in the July 6 report. The *Times* also stated that its review of “the development of Mr. Cuomo’s lucrative book deal revealed how it overlapped with the move by his most senior aides to reshape a report about nursing home deaths in a way that insulated the governor from criticism and burnished his image.”⁸⁷

⁸⁷ Jesse McKinley, Danny Hakim & Alexandra Alter, *As Cuomo Sought \$4 Million Book Deal, Aides Hid Damaging Death Toll*, N.Y. Times (Mar. 31, 2021; updated Apr. 28, 2021), <https://www.nytimes.com/2021/03/31/nyregion/cuomo-book-nursing-homes.html>.

As an initial matter, the implication of *Times*'s article is wrong—there was no connection between the Governor's book and the publication of nursing home deaths. But in any event, it is irrelevant to the analysis at hand. Even if there were some scheme to downplay nursing home deaths in order to make the Governor look better to the public, and in turn that heightened public stature allowed him to obtain more money for his book, it would not be actionable under the property fraud statutes. Even in that preposterous scenario, there would be no federal criminal violation because the object of the scheme would be good publicity, not property. *Accord Kelly*, 140 S. Ct. at 1573 (“[A] property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.”).

Even more, in this hypothetical, the book advance and sales could not serve as the “property” objective of the purported fraud for a couple of reasons. First, the connection is far too tenuous. *United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007) (Easterbrook, J.) (vacating wire fraud conviction where the government had argued that local official had steered a state contract to a vendor to improve her stature in her boss's view and which later led to a raise of her salary). And second, such an interpretation would fail on vagueness grounds. The absurdity of such a theory is apparent once one considers its broader implications. Politicians across the country consistently publish books about their political endeavors—have they committed property fraud if, in the run up to publication they made false statements of self-serving puffery? Under that theory, if the book advance and sales could serve as the basis for a property fraud conviction, every politician in the country who has written a book could be subject to federal imprisonment. Such an interpretation would lead to “a sweeping expansion of federal criminal jurisdiction” because “U.S. Attorneys could prosecute as property fraud every

lie a state or local official tells”—a result not allowed under the Constitution. *Kelly*, 140 S. Ct. at 1574.

Others in the media have asserted that the July 6 DOH report was modified solely based on political (rather than scientific) motivations.⁸⁸ This is wrong: the conclusions of the July 6 DOH report were equally supported irrespective of whether the report covered only in-facility, or both in- and out-of-facility nursing home COVID deaths. But even if it were true, it could not serve as the basis for criminal liability. As made clear in *Kelly*, a fraudulent act by a state official does not qualify as property fraud without the actor obtaining some tangible property. Put differently, the *Kelly* decision bars federal prosecutors from “criminalizing all acts of dishonesty by state and local officials.” *Kelly*, 140 S. Ct. at 1571. There is no evidence of any false statement or fraudulent act, or that any property was obtained because of the publication of nursing home data. Thus, any prosecution under the property fraud statutes could not succeed.

⁸⁸ J. David Goodman and Danny Hakim, *Cuomo Aides Rewrote Nursing Home Report To Hide Higher Death Toll*, N.Y. Times (Mar. 4, 2021; updated July 14, 2021), <https://www.nytimes.com/2021/03/04/nyregion/cuomo-nursing-home-deaths.html>.

D. The Federal Government Should Discontinue Its Investigation

There has been no federal criminal violation. On that basis alone, the federal government should end its investigation and decline any prosecution. Moreover, the federal government should decline to prosecute under principles of comity and federalism. While we firmly believe that *no* criminal statutes—federal or state—have been violated, New York State is well-equipped to investigate—and highly interested in investigating—the issues discussed here. “[L]ong-standing DOJ practices and guidelines . . . establish that federal prosecutors should generally defer to state prosecutors and only get involved when the State has demonstrated that it is either unwilling or unable to undertake a zealous and competent prosecution.”⁸⁹ As noted in the Justice Manual, the federal government should decline prosecution where “(1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.” Justice Manual § 9-27.220. Each of these factors supports a declination to continue this investigation.

1. Further Investigation Would Not Serve a Substantial Federal Interest

Further investigation here would serve no substantial federal interest. This is true for two reasons. *First*, as explained previously, it is not the federal government’s role to second-guess the State’s policy decisions. Even in normal times, “[m]uch of [State] governance involves . . . regulatory choice,” and “U.S. Attorneys [may not] prosecute as property fraud every lie a state or local official tells in making such a decision.” *Kelly*, 140 S. Ct. at 1574. This is doubly so when the regulatory choices are made in the height of a public health crisis, when the need for quick

⁸⁹ Adam Harris Kurland, *The Enduring Virtues of Deferential Federalism: The Federal Government’s Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses*, 70 *Hastings L.J.* 771, 782 (2019).

and decisive action is necessary. Many people—including doctors, nurses, and government leaders—faced impossible, life and death choices during the pandemic. They were required to make quick decisions with little information. Many healthcare workers were granted legal immunity for certain decisions during the pandemic so that they could make the tough choices without fear of a hindsight-driven prosecution. This principle should play into our judgment of political leaders’ choices too. For example, Dr. Fauci and other U.S. health leaders initially advised Americans not to wear masks, although Dr. Fauci has admitted that he made that statement in part because “he was concerned that there wouldn’t be enough protective equipment for health care workers.”⁹⁰ Although Dr. Fauci’s statements may have been false, they are not criminally actionable. We needed Dr. Fauci and the federal government to make the public statements they saw fit to protect the American people.

So too here, it is not the federal government’s place “to set standards of disclosure and good government for local and state officials.” *Id.* (quotation marks and alteration omitted). Put differently, prosecutors do not get to play Monday morning quarterback over state policy decisions. There has been no criminal violation—only regulatory choices made in the middle of a public health crisis. Thus, the federal government has no interest that prosecution may redress.

Second, contrary to the federal government’s interests, prosecution here would promote the appearance that the federal government punishes political dissidents. To be sure, the federal government has an interest in rooting out corruption, even in state and local politics. But this investigation finds its roots not in criminal conduct, but in a president’s desire to punish his

⁹⁰ *Did Fauci Say Not To Wear Masks?*, Facts First, CNN Politics, https://www.cnn.com/factsfirst/politics/factcheck_e58c20c6-8735-4022-a1f5-1580bc732c45.

detractors. The CRIPA probe was initiated to punish President Trump’s opponents. Governors across the country made decisions regarding nursing homes identical to those at issue in New York, but the DOJ—and the President—singled out four Democratic governors. Republican governors—many from states with higher percentages of COVID-related nursing home deaths than New York—were not targeted; on the contrary, they were praised. The CRIPA request led to hyper focus on New York, which has in turn led to this and several other investigations. Even though the DOJ has now declined to investigate under CRIPA and regardless of the motives of this investigation, this investigation is stained with the same appearance of impropriety as the initial CRIPA request. The signal this investigation itself sends—which would be amplified exponentially by an indictment—is that failure to get in line will lead to prosecution. But a lack of fealty is not grounds for criminal punishment—not under the laws of the United States.

The federal government’s involvement here does not promote integrity in politics, nor does it discourage corruption. To the contrary, it promotes an appearance of impropriety. Thus, prosecution here would serve no substantial federal interest.

2. Effective Prosecution Alternatives Are Available in New York

The federal government should decline prosecution also because DOH, the Governor, and his aides are subject to effective investigation and prosecution in New York. *See* Justice Manual §§ 9-27.220, .240. Under the Justice Manual, “In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including”: “The strength of the other jurisdiction’s interest in prosecution” and “[t]he other jurisdiction’s ability

and willingness to prosecute effectively.” *Id.* § 9-27.240. These considerations favor a declination to prosecute.

First, the strength of New York’s interest in prosecution. New York has a far stronger interest in regulating the decisions of its politicians than the federal government. The Justice Manual instructs,

The attorney for the government should consider the relative international, federal, state, and tribal interests with regard to the alleged criminal conduct. Some offenses, even though in violation of federal law, are of particularly strong interest to the authorities of the jurisdiction in which they occur (e.g., local, state, or foreign), either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by foreign, state, or local investigators, or some other circumstance. Whatever the reason, when it appears that the federal interest in prosecution is less substantial than the interest of local, state, or foreign authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a federal prosecution.

Id. Here, the strongest interest lies with New York, not the federal government. As the Supreme Court has long held, “[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity.” *Bond v. United States*, 572 U.S. 844, 858 (2014); *see also Kelly v. Robinson*, 479 U.S. 36, 47 (1986) (“The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States.”). Because the Tenth Amendment reserves these rights to the States, “the primary responsibility for ferreting out [local] political corruption must rest, until Congress [properly] directs otherwise, with the State, the political unit most directly involved.” *United States v. Craig*, 528 F.2d 773, 779 (7th Cir. 1976).

New York has particular interest in this case because the allegations all center on conduct by members of the New York government. Thus, the federal government should defer to State investigations.

Second, New York’s ability and willingness to prosecute effectively. New York has both the means and willingness to investigate decisions by local politicians. “In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources that are necessary to undertake prosecution promptly and effectively.” Justice Manual § 9-27.240.

New York has many laws—both criminal and ethical—that allow for effective oversight of political conduct. *See, e.g.*, Public Officer’s Law § 74(3)(d) (local officials “should [not] use or attempt to use his or her official position to secure unwarranted privileges”); N.Y. Penal Law § 190.60 (scheme to defraud in the second degree); N.Y. Penal Law § 190.65 (scheme to defraud in the first degree). And New York has multiple investigative bodies that are more than equipped to handle complex prosecutions involving conduct by politicians.

Evidencing New York’s ability to investigate the issues discussed here are the multiple State and local investigations that are currently ongoing. The Executive Chamber has received subpoenas from the New York Attorney General (regarding the Governor’s book and priority COVID testing), the Manhattan District Attorney’s Office (regarding nursing homes), the New York State Assembly (regarding an impeachment investigation), and the New York Joint Commission on Public Ethics (regarding priority testing and the Governor’s book).

Additionally, the New York Attorney General has already investigated DOH’s publication of nursing home deaths and has represented that its investigation is ongoing.⁹¹

New York State is well equipped and motivated to handle local political decisions and, when faced with misconduct, to prosecute such misconduct.

3. There Is an Adequate Non-Criminal Alternative to Prosecution

Finally, in this case a non-criminal alternative to prosecution exists. The Justice Manual recognizes that “resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity,” Justice Manual § 9-27.250, and the Supreme Court has held that federal officials should not use the criminal code to set “standards of disclosure and good government for local and state officials,” *McNally*, 483 U.S. at 356, 361; *Kelly*, 140 S. Ct. at 1574 (the federal government should not “use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking”). Taken together, it is plain that the federal government should decline to prosecute here because there is a viable alternative: the ballot box. There has been no criminal conduct and if the electorate believes—though incorrectly—there has been political misconduct, they may hand down their verdict at their polling place. The proper forum for settling the discussed allegations is by voting, not criminal prosecution.

⁹¹ *Nursing Home Response to COVID-19 Pandemic*, N.Y. State Office of the Attorney General (Jan. 30, 2021), <https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf>.

AVOIDING THE CRIMINALIZATION OF POLITICS

As a last point, the federal government should decline to prosecute this case because such an action would substitute improperly the criminal process for the political process. When the electorate of a state believe that lawmakers have deprived them of candid reasons for policy decisions, the solution is to vote. The Supreme Court has repeated this principle time and again. *See, e.g., Kelly*, 140 S. Ct. at 1571, 1574; *McDonnell*, 136 S. Ct. 2355, 2361-62. And it has done so for good reason. To employ the opposite regime would be to collapse our political system in on itself. If State employees are guilty of a crime here, then there is no end to what other political conduct could qualify as federal fraud. Any official who misrepresents their motive for an otherwise-lawful decision has thereby defrauded the government of “property” (her own labor if nothing else) and, if he or she used interstate wires, is guilty of a federal crime. If routine decisions by local politicians become criminal simply because of concealed political reasons for that decision, then every official becomes a target, which would paralyze the government.

Such a system would be untenable. Officials could be held criminally liable for ordering “[s]peedy pothole repair for neighborhoods that support the incumbent,” *United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003), promoting the interests of their donors, *McCormick*, 500 U.S. at 272, and drawing districts to favor their own political party, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494-95 (2019). In each of these instances of politics-as-usual, the officials are unlikely to concede that they were promoting their own interests (politically or personally) by taking the action at issue, but none of these falsities qualifies as a federal crime. Criminal prosecution is not the check nor the balance on this part of our political system. As noted by Judge Easterbrook in *Blagojevich*, “It would be more than a little surprising . . . if the

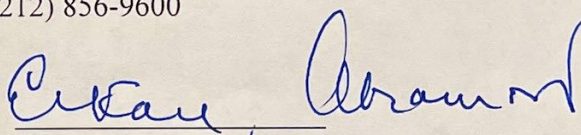
judiciary found in the . . . mail fraud statute[] a rule making everyday politics criminal.” *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015).

Over the last few decades there have been repeated attempts by federal prosecutors to criminalize political misdeeds. The Supreme Court has rejected them. In *Kelly*, it was political retribution; in *McNally*, the “intangible right” to an honest state government; and in *McDonnell*, acceptance of luxury gifts offered to induce a meeting. Each of these cases has at least two common elements: (i) each of the acts by the public official was reprehensible and (ii) each act was not a federal criminal violation. Here, the allegations against the Executive Chamber in the media—even if accepted as true—are far less salacious than those in *Kelly*, *McNally*, and *McDonnell*. At bottom, the only disagreement to be had is whether the right political choice was made by the members of the Executive Chamber. But that debate is—under Supreme Court canon—emphatically not within the authority of the federal criminal code. To find otherwise would allow criminalization of everyday politics. And that cannot be correct.

CONCLUSION

We respectfully request that your Office consider these arguments before moving ahead with its criminal investigation into New York's publication of nursing home deaths related to COVID-19. We look forward to a continuing dialogue with your Office in this matter.

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