

20-3908

United States Court Of Appeals for the Second Circuit

MICHAEL HUND
Plaintiff-Appellee

v.

VINCENT G. BRADLEY, IN HIS OFFICIAL CAPACITY AS
CHAIRMAN OF THE STATE LIQUOR AUTHORITY
Defendant-Appellant

GOVERNOR ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF NEW YORK
Defendant

On Appeal from the United States District Court for the
Western District of New York (Hon. John L. Sinatra, Jr.)

BRIEF OF *AMICUS CURIAE* NEW YORK INDEPENDENT VENUE ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE

JONATHAN CORBETT, ESQ.
958 N. Western Ave. #765
Hollywood, CA 90029
Phone: (310) 684-3870
FAX: (310) 675-7080
E-mail: jon@corbettrights.com
Attorney for Amicus

TABLE OF CONTENTS

STATEMENT OF INTEREST	3
INTRODUCTION	4
ARGUMENT	5
I. The Governor Has Mislead the Courts	5
II. The Governor Has Mislead the Public	8
III. Food Service Establishments Do Not Fear “Executive Orders” – They Fear the SLA	12
CONCLUSION	14
RULE 32(a)(7) CERTIFICATE	15
CERTIFICATE OF SERVICE	16
EXHIBIT A (NYIVA Hearing Transcript Excerpts)	17
EXHIBIT B (NY Times, “New Allegations...”).....	21
EXHIBIT C (NY Times, “9 Top Health Officials...”).....	25
EXHIBIT D (NY DOH, “Advisory: Hospital Discharges...”)	31

STATEMENT OF INTEREST

New York Independent Venue Association¹ (“NYIVA”) is an unincorporated industry group whose members consist of food service establishments within the State of New York that also host music, arts, or other entertainment, as well as other industry professionals who work with such establishments. NYIVA is also the plaintiff in a substantially similar action in the U.S. District Court for the Southern District of New York, challenging the “advertising and ticketing bans” of the State of New York, as enforced by the State Liquor Authority (“SLA”). *See NYIVA v. Bradley*, Case No. 20-CV-6870 (S.D.N.Y.). Proceedings in that case have been stayed pending the resolution of this appeal. Both parties have cited this case, and as *amicus*, NYIVA can provide additional context as to why that court came to a different conclusion from the court below, as well as additional details regarding the background of New York coronavirus restrictions that neither party has yet brought before the Court.

NYIVA has obtained the consent of counsel for all parties to file an *amicus* brief; we therefore file as-of-right under Fed. R. App. P. 29(a)(1)(2).

¹ No party to this action, or their counsel, has participated in the authoring of this brief, nor has any outside party or non-party contributed funding towards the preparation of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION

The pandemic has ravaged the country for a year now, during which time the courts have understandably given great deference to the Executive Orders of Governor Andrew M. Cuomo issued to reduce the spread of coronavirus. But, the time for assuming the good faith of the Governor and his agencies must come to an end. While publicly extolling science, he privately shunned his own scientists. While assuring the public that his decisions are data-driven, he hid unfavorable data from public (and the federal government's) view. And while assuring a judge of the Southern District of New York that he should uphold the SLA's advertising and ticketing ban because it intends the ban only to apply to events that are already independently illegal, it made clear in this case that advertising or ticketing converts an otherwise legal offering into one that is *per se* illegal.

If a restaurant hosts "incidental music" without advertising it, their conduct is legal. But according to the SLA, if a restaurant books exactly the same music but makes a Facebook post about it, both the Facebook post and the musical offering are illegal. It could not be more clear that the SLA is burdening speech, and their tortuous arguments otherwise are designed solely to mislead the Courts. We write to ensure that Defendant-Appellant is unsuccessful in this attempt.

ARGUMENT

I. The Governor Has Mislead the Courts

The government cites NYIVA's case in the Southern District of New York as a case that "directly conflicts" with the court below in this case. Appellant's Brief, p. 3, fn. 1. *Amicus* first writes to explain why the *NYIVA* court came to a different conclusion than the *Hund* court.

In the *NYIVA* case, the government represented to the Court that the advertising and ticketing ban *did not apply* to otherwise lawful events. See Exhibit A, NYIVA Hearing Transcript Excerpts, pp. 7, 8 ("And if an establishment has a way to modify their payment structure in a way that clearly is not turning a restaurant into a concert with food and the music is still just incidental to the dining experience, then the executive orders would seem to allow it and I don't think the SLA's guidance would prohibit it."). The Court thus found that the scope of the SLA's advertising and ticketing ban was limited to events that were independently illegal:

"Defendant's position is that the challenged SLA guidance 'merely states that advertising and selling tickets **to an illegal event** is not permitted.' Defendant's opposition at 2. Fundamentally, as illustrated by our colloquy earlier in today's conference, defendant is right – the guidance by its terms prohibits only advertising of shows – not a ban on advertising music at all food service establishments. It permits advertising incidental music at restaurants."

Exhibit A, p. 22 (*emphasis added*). It is on this basis – that if an establishment was otherwise operating lawfully, the advertising and ticketing ban did not apply – that the *NYIVA* court concluded that the SLA’s policy was constitutional.

NYIVA’s position in the district court was, and still is, that the SLA intended a broader scope than it represented in court, and its lawyers “creatively” narrowed the scope *post hoc* in order to survive judicial review. The government’s opening brief in this case makes it painfully clear that NYIVA was correct and the attorneys for the government in the *NYIVA* case misled that court. Appellant’s Brief, p. 3 (“Holding advertised, ticketed shows is still prohibited by executive orders”), p. 10 (“bars and restaurants are prohibited from hosting ‘advertised and/or ticketed shows’”). In other words, the SLA here argues that the mere act of advertising or ticketing turns an otherwise lawful event into an unlawful one².

Appellant also consistently attempts to mislead the Court by framing Appellee’s challenge as to “main-draw shows,” “holding concerts,” “turn[ing] establishments into concert venues,” and a “prohibition on concerts.” **No one is asking the courts to allow concerts.** Appellants concede that “incidental music” is currently allowed at food service establishments (and that goes whether or not

² It is worthy of note that the SLA has thus far refused to clarify its guidance on its Web site, even though two courts have so far declared it unconstitutional and two appeals courts have refused to stay that ruling pending appeal. It is almost as if the SLA is enjoying the deterrent effect its guidance has even though it is unenforceable.

the music is performed live). Appellant’s Brief, p. 11 (“The SLA permitted bars and restaurants to host live, incidental musical performances...”), *but see* p. 21 (“independent EOs continue to prohibit indoor live musical performances”)³. Appellee has simply asked that it be allowed to advertise or charge admission to enter when it is hosting such legal “incidental music” events complete with seated dining – *not* concerts.

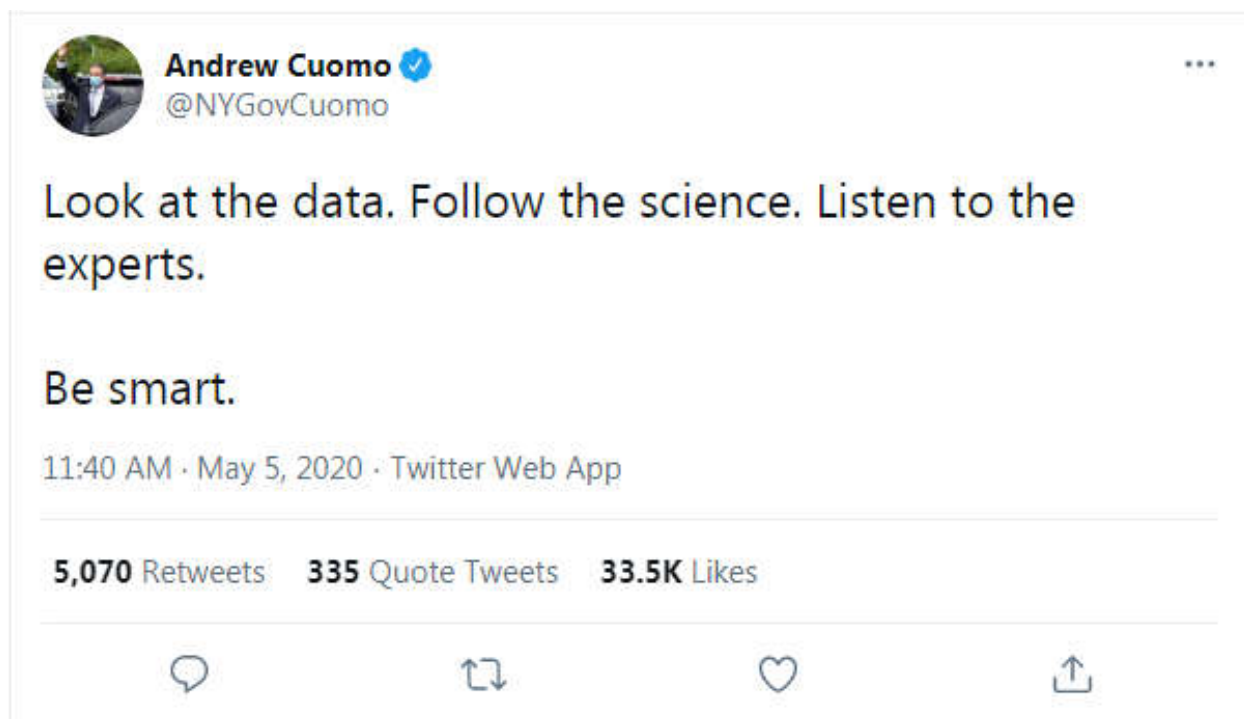
The district court certainly did not abuse its discretion when it saw through the government’s porous argument that it “needs” to ban advertising and ticketing to stop coronavirus, and therefore finding the government cannot meet any level of scrutiny. The rule is simply not necessary at all to accomplish the stated objective, and therefore the district court was correct in holding that it likely violates the rights of Plaintiff-Appellee.

³ The government’s cognitive dissonance here is probably because it is difficult to write a rule that distinguishes between “restaurant with music” and “concert with food,” beyond an “I know it when I see it”-type rule. But the government has already successfully prohibited the latter by requiring table seating at all times. It is entirely unclear why it persists on arguing that banning advertising and ticketing is necessary when it has *already accomplished its goal* with less constitutionally-intrusive means.

II. *The Governor Has Mislead the Public*

The state insists that its “good faith” policies to protect the public health are entitled to deferential review. Appellee’s Brief, p. 38. A review of the political landscape is therefore relevant because it casts doubt on the alleged “good faith” nature of the challenged rules.

As every New Yorker is aware, the ultimate coronavirus policy of the state is a one-man show. The Governor has taken to daily press conferences, multiple daily “tweets,” the Courts, and other public fora to insist that his policies are science and data driven⁴:



⁴ In practice, there is no difference between the policies of “the Governor” and that of the SLA or Chairman Bradley. Bradley serves at the pleasure of the Governor and all actions of the SLA relevant to this case are at the direction of the Governor.

Cuomo, A. M. [@NYGovCuomo], May 5th, 2020. “*Look at the data. Follow the science. Listen to the experts. Be smart.*” Twitter. <https://twitter.com/NYGovCuomo/status/1257696713789378560> ; see also Appellant’s Brief, p. 7 (“measured and data-driven”).

But it turns out that the Governor does not actually use a data-driven approach and does not listen to the experts. As Plaintiff-Appellee has pointed out, the Governor admitted on his own live press conference that this is simply a façade:

“When I say ‘experts’ in air quotes, it sounds like I’m saying I don’t really trust the experts. Because I don’t. Because I don’t.”

Governor Cuomo, January 29th, 2021. See Appellee’s Brief, p. 8; Exhibit B, “New Allegations of Cover-Up by Cuomo Over Nursing Home Virus Toll” (The New York Times). As a result of the Governor’s refusal to listen to his own doctors and medical experts, the state’s medical director for epidemiology, Dr. Elizabeth Dufort, and 8 other public health officials have resigned in protest. Appellee’s Brief, p. 19; Exhibit C, “9 Top Health Officials Have Quit as Cuomo Scorns Expertise” (The New York Times). This is particularly salient because in the court below, in the case in which *amicus* is involved, and in all other cases where the

state's coronavirus response relating to food service establishments was questioned, the government's sole expert was Dr. Dufort.

Respectfully, Governor Cuomo is a politician. He is not a doctor, he is not a scientist, and he is not qualified to supplant the conclusions of those who are. However, it is clear that he has forced his policies in opposition to his own experts – which he may have authority to do, but when he does so it provides a solid reason for the courts to hesitate to presume good faith or give any deference whatsoever to the necessity of these policies. Why would someone acting in good faith, who has no personal subject matter expertise, step on *his own experts* in this way?

The Governor's lack of good faith was also exemplified by a private conference call leaked by the New York Times, wherein the Governor's top aide admitted that the state withheld data on coronavirus infections and deaths in nursing homes from both the public and the United States Department of Justice. Exhibit B. The data was considered politically unfavorable because the state, at the peak of the daily coronavirus deaths and under the Governor's direction, had ordered nursing homes to accept residents who were hospitalized with coronavirus back into the nursing home upon hospital discharge *without regard to whether they were still infected* (!!), which may have contributed to the wildfire-like spread within the state's nursing homes and culminating in 13,000+ nursing home

residents dead from COVID-19. *See Id.*; Exhibit D, “Advisory: Hospital Discharges and Admissions to Nursing Homes.” The Governor has also been accused by a legislator of his own party of threatening him unless he would help to cover this scandal up. Lee, M.J. “Cuomo said ‘he can destroy me’: NY assemblyman alleges governor threatened him over nursing homes scandal.” CNN. <https://www.cnn.com/2021/02/17/politics/cuomo-ron-kim-nursing-home/index.html> (Published Feb. 17th, 2021).

A court could rationally conclude, from the above, that at the least, the state is not candid with those charged with investigating its coronavirus response. But the above can also provide a rational motive for the Governor’s continued insistence that indoor dining be placed in the spotlight as a focus for coronavirus mitigation despite lack of data⁵ to support it: because blaming some other mode of transmission distracts from the fact that the Governor’s nursing home policy may have been the deadliest mistake by a Governor in the history of our nation.

⁵ In December, the Governor conceded that his extensive contact tracing demonstrated only 1.43% of coronavirus transmission could be attributed to the food service industry, while 73.84% of transmissions occurred at private gatherings. Adams, E. & Warerkar, T. “Restaurants and Bars Account for 1.4 Percent of COVID-19 Spread in New York, According to Limited State Contact Tracing Data.” Eater (New York). <https://ny.eater.com/2020/12/11/22169841/restaurants-and-bars-coronavirus-spread-data-new-york> (Published Dec. 11th, 2020).

III. Food Service Establishments Do Not Fear “Executive Orders” – They Fear the SLA

Defendant-Appellant argues that Article III standing is lacking in this case because of a redressability problem: to wit, that enjoining the SLA’s advertising and ticketing ban will not actually provide any relief because Executive Orders independent of the SLA’s rule would still constrain Plaintiff-Appellee from hosting concerts. Appellant’s Brief, pp. 21 – 25. There are three reasons why this argument fails.

First, as discussed *supra*, no one has asked the Court for permission to host “concerts.” The challenge is to the SLA’s rule prohibiting the advertising and ticketing of lawful incidental music – which the government concedes is not prohibited by any Executive Order – and *not* to any prohibition on “concerts.”

Second, the SLA’s rule is an implementation of the Governor’s Executive Orders, which the SLA is charged with enforcing. There is nothing unusual about suing the body that is charged with the enforcement of a disputed law. And, quite clearly, the *details of the implementation* of the Executive Order are what is being challenged, as demonstrated by the fact that the words “advertising” and “ticketing” are entirely absent from any Executive Orders of which the *amicus* has

seen. Those terms were only set out by the SLA, and therefore the SLA is the proper target here.

Third, the Court should understand that when the SLA speaks, food service establishments that rely on alcohol sales to pay the bills are compelled to take notice. The possibility of a fine for violating an Executive Order is one thing, but the possibility of losing one's liquor license is literally the possibility that your business is permanently destroyed *and* the possibility that its owners may never be allowed to engage in such business in the state at any point in the future. If there truly are two separate sources of prohibition here, one of which threatens a few thousand dollars in fines and the other of which threatens complete destruction of a company, an injunction against the latter alone still offers substantial redress of one's injury. That is, if the Court upholds the injunction against the SLA, it would be perfectly rational for a food service establishment to resume advertising and ticketing under the assumption that if the Governor attempts to directly enforce his Executive Orders, he will be unsuccessful because they will be invalidated by a court for the same reasons.

CONCLUSION

At any time, the government could put forth actual data that would demonstrate the “need” that constitutional scrutiny requires. Until it does so, under the circumstances that are present here, the court below can hardly be said to have abused its discretion in finding that the challenged rule is arbitrary. Accordingly, the decision of the Court below should be affirmed.

Dated: New York, New York

Respectfully submitted,

February 21st, 2021

/s/Jonathan Corbett

Jonathan Corbett
Attorney for Amicus NYIVA
958 N. Western Ave., Suite 765
Hollywood, CA 90029
Phone: (310) 684-3870
FAX: (310) 675-7080
E-mail: jon@corbettrights.com

RULE 32(a)(7) CERTIFICATE

This brief complies with Fed. R. App. P. Rule 32(a)(7) because it contains approximately 2,500 words.

Dated: New York, New York

Respectfully submitted,

February 21st, 2021

/s/Jonathan Corbett

Jonathan Corbett
Attorney for Amicus NYIVA
958 N. Western Ave., Suite 765
Hollywood, CA 90029
Phone: (310) 684-3870
FAX: (310) 675-7080
E-mail: jon@corbettrights.com

CERTIFICATE OF SERVICE

I certify that this document was served on all parties via the CM/ECF system
on February 21st, 2021.

Dated: New York, New York

Respectfully submitted,

February 21st, 2021

/s/Jonathan Corbett

Jonathan Corbett
Attorney for Amicus NYIVA
958 N. Western Ave., Suite 765
Hollywood, CA 90029
Phone: (310) 684-3870
FAX: (310) 675-7080
E-mail: jon@corbettrights.com

Exhibit A

NYIVA Hearing Transcript Excerpts

K9N9NYID

Does the regulation prohibit that?

MR. CONRAD: Well, if you look at the guidance, the guidance that's being challenged here just says, "Please note that only incidental music is permissible at this time. This means that advertised and/or ticketed shows are not permissible. Music should be incidental to the dining experience and not the draw itself."

And that's I think the only language at issue here. I don't think it specifically says anything about, for example, table minimums. And I'm not sure that -- I'm not sure where that comes from, their argument that that's been prohibited.

I think just more generally the question isn't really whether selling tickets or anything or per table minimums or cover charges or anything like that is illegal in itself.

The guidance here is only guidance meant to help SLA licensees stay in compliance with the executive orders.

So what is temporarily prohibited here is putting on a concert, a performing art production or something like that.

So the question is whether the mode of sale changes the restaurant service into a concert which is what the executive orders that the -- that are underlying this SLA guidance is trying to avoid.

So the guidance just says that ticketed shows are not permissible. And if an establishment has a way to modify their payment structure in a way that clearly is not turning a

K9N9NYID

1 restaurant into a concert with food and the music is still just
2 incidental to the dining experience, then the executive orders
3 would seem to allow it and I don't think the SLA's guidance
4 would prohibit it.

5 THE COURT: Thank you. So I appreciate that. Good.

6 Anything, counsel for plaintiffs, that you'd like to
7 say in rebuttal or response?

8 MR. CORBETT: Thank you, your Honor. Jonathan
9 Corbett.

10 The problem here is that my clients and all licensees
11 in this State face stiff penalties based on the SLA's
12 interpretation of whatever rules they put up. So for
13 defendants to say that this is simply guidance that maybe the
14 licensee should follow is incorrect. If they don't follow it,
15 they will have their license suspended. They will lose their
16 business. Or at least that's the threat that the SLA makes
17 when they put something like this onto their FAQ page. They're
18 foreshewing speech they're foreshewing the restaurant's ability
19 to charge admission.

20 Again, I hear it as counsel for defendant thinks that
21 the ban might not apply to this or that. We need an order. We
22 need something that says the ban does not apply to lawful
23 music. The ticketing ban does not apply to lawful gatherings,
24 lawful restaurants, whatever it is in order for our clients to
25 be able to go about their business without fear of being

K9N9NYID

1 establishments from advertising the entertainment that is
2 lawfully available" and operates as "a ban on advertising music
3 at food services establishments." Complaint ¶ 3. Defendant's
4 position is that the challenged SLA guidance "merely states
5 that advertising and selling tickets to an illegal event is not
6 permitted." Defendant's opposition at 2. Fundamentally, as
7 illustrated by our colloquy earlier in today's conference,
8 defendant is right—the guidance by its terms prohibits only
9 advertising of shows—not a ban on advertising music at all food
10 services establishments. It permits advertising incidental
11 music at restaurants.

12 (i). Legal Standard.

13 In general, "content-based" restrictions on speech are
14 "presumptively unconstitutional and may be justified only if
15 the government proves that they are narrowly tailored to serve
16 compelling state interests." *Reed v. Town of Gilbert*, 135 S.
17 Ct. 2218, 2226 (2015); *National Institute of Family & Life*
18 *Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

19 However, there are exceptions to the usual rule. "The
20 Constitution [] accords a lesser protection to commercial
21 speech than to other constitutionally guaranteed expression."
22 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Commission*, 447
23 U.S. 557, 563–64 (1980); see also *United States v. Williams*,
24 553 U.S. 285, 298 (2008) (remarking on "the less privileged
25 First Amendment status of commercial speech"). Advertising is

Exhibit B

NY Times, “New Allegations...”

New Allegations of Cover-Up by Cuomo Over Nursing Home Virus Toll

In a private conversation, the governor's top aide admitted that data was withheld on nursing homes, where more than 10,000 New Yorkers have died during the pandemic.



By Jesse McKinley and Luis Ferré-Sadurni

Published Feb. 12, 2021 Updated Feb. 17, 2021

ALBANY, N.Y. — Gov. Andrew M. Cuomo and his administration faced new allegations on Friday that they had covered up the scope of the coronavirus death toll in New York's nursing homes, after a top aide to the governor admitted that the state had withheld data because it feared an investigation by the Trump Justice Department.

The remarks by the top aide, Melissa DeRosa, made in what was supposed to be a private conference call with Democratic lawmakers, came as a cascading series of news reports and a court order have left Mr. Cuomo, a third-term Democrat, scrambling to contain the political fallout over his oversight of nursing homes, where more than 13,000 people have died in the pandemic in the state.

Lawmakers from both parties have called for stripping the governor of the emergency powers that he has exercised during the pandemic, while Republicans have demanded the resignations of top Cuomo administration officials and new federal investigations.

Ms. DeRosa's jarring admission came when she was asked about ongoing delays in giving lawmakers nursing home death data. She said that after the Department of Justice requested information last summer, "basically, we froze."

At the time, the governor's office was also facing similar requests from the State Legislature.

"We were in a position where we weren't sure if what we were going to give to the Department of Justice, or what we give to you guys, and what we start saying, was going to be used against us and we weren't sure if there was going to be an investigation," Ms. DeRosa said during the call, according to a partial transcript later released by the governor's office after her remarks appeared in The New York Post.

The Justice Department never formally opened an investigation, according to Ms. DeRosa. But the intense scrutiny of the governor's record on nursing homes has struck at the core of his carefully cultivated image as a competent chief executive with a deference to facts, as embodied by the daily news conferences that he held early in the outbreak. Mr. Cuomo even published a memoir about his work on the pandemic before it ended, offering "leadership lessons."

The continuing questions about how many people died in nursing homes residents threatens to overshadow Mr. Cuomo's legacy.

Just two weeks ago, the state's attorney general, Letitia James, who has been an ally of the governor, in a damning report accused the Cuomo administration of undercounting coronavirus related deaths connected to nursing homes by the thousands.

Democrats both in the State Senate and Assembly met privately on Friday afternoon to discuss whether the Legislature should curtail the emergency powers that have allowed the governor to set virus-related restrictions and gave him full control over the vaccine rollout. No immediate action was expected.

"Crucial information should never be withheld from entities that are empowered to pursue oversight," Andrea Stewart-Cousins, the Senate majority leader and a Democrat, said in a statement before the meeting, adding that she would discuss "next steps" with her conference.

YOUR CORONAVIRUS TRACKER: We'll send you the latest data for places you care about each day.

Sign Up

Condemnation was even louder from Republicans, who seized on the remarks as evidence of duplicity or even criminality.

"It is time to move past the lies and finally uncover the full truth," said Representative Tom Reed, a Republican from the state's Southern Tier, who called for a federal investigation on Thursday night.

Ahead of Friday's meeting, about a third of the 43-member Democratic conference in the Senate signed a public letter in support of repealing the governor's expanded powers "as expeditiously as possible."

While the state has acknowledged that the pandemic tore through nursing homes last spring, Mr. Cuomo's health department had refused to reveal how many nursing home residents had died after being hospitalized, saying such information was difficult to compile and verify, and was being carefully audited.

Mr. Cuomo has also repeatedly tried to blame the nursing home issue on former President Donald J. Trump and political partisanship, and has pushed back hard on allegations of a cover-up, simultaneously saying that his administration was committed to facts and suggesting — after some additional data was released — that statistics were beside the point.

“We’re below the national average in number of deaths in nursing homes, but who cares?” Mr. Cuomo said in late January, arguing that the percentages were unimportant. “Died in a hospital, died in a nursing home? They died.”



More than 10,000 people have died in New York nursing homes during the pandemic. Gregg Vigliotti for The New York Times

Mr. Cuomo, who was in Washington on Friday to meet with President Biden, has not commented on Ms. DeRosa’s remarks.

The Coronavirus Outbreak ›

Latest Updates ›

Updated 3 hours ago

- The front page of The New York Times puts the pandemic's devastating toll in perspective.
- A Biden official says that China needs to disclose more about the origins of the coronavirus, and that the W.H.O. needs to dig deeper.
- The Indian vaccine giant expected to supply much of the world warns that it has been directed to put its country's needs ahead of exports.

But other Democrats were voicing concern. State Senator Andrew Gounardes, a Democrat from Brooklyn, called the revelations “a betrayal of the public trust,” adding, “There needs to be full accountability for what happened, and the legislature needs to reconsider its broad grant of emergency powers to the governor.”

Early on Friday, Ms. DeRosa, the top nonelected official in the state, sought to clarify the context for her remarks. She described the administration’s delays in getting information to state lawmakers as a kind of triage, because it had needed to prioritize a response to federal authorities.

“I was explaining that when we received the D.O.J. inquiry, we needed to temporarily set aside the Legislature’s request to deal with the federal request first,” she said. “We informed the houses of this at the time,” referring to the upper and lower chambers of the Legislature.

She said that the administration was “comprehensive and transparent in our responses to the D.O.J., and then had to immediately focus our resources on the second wave and vaccine rollout.”

“As I said on a call with legislators, we could not fulfill their request as quickly as anyone would have liked,” she said.

Ms. James’s report forced the state’s health department to make public more than 3,800 previously unreported deaths of residents who died outside a facility, like in a hospital, and had not been included in the state’s official nursing home tally.

Since then, the number of deaths connected to New York nursing homes and long-term care facilities has only ballooned, to about 15,000 confirmed and presumed deaths, from 12,743 in late January, as of this week.

Let Us Help You Better Understand the Coronavirus

- Are coronavirus case counts rising in your region? [Our maps](#) will help you determine how your [state](#), [county](#) or [country](#) is faring.
- Vaccines are rolling out and will reach many of us by spring. [We've answered some common questions](#) about the vaccines.
- Now that we are all getting used to living in a pandemic, you may have new questions about how to go about your routine safely, how your children will be impacted, how to travel and more. [We're answering those questions](#) as well.
- So far, the coronavirus outbreak has sickened more than 106 million people globally. More than two million people have died. [A timeline of the events](#) that led to these numbers may help you understand how we got here.

The administration released the latest figures in response to a court order after a six-month battle between the Cuomo administration and the Empire Center, a conservative-leaning think tank, which requested a full accounting of nursing home deaths under the state's Freedom of Information Law.

The virtual meeting this week between Ms. DeRosa and other senior administration officials, including Mr. Cuomo's health commissioner and budget director, and top Democratic state lawmakers was intended to bridge a growing rift between the governor's office and the Legislature.

In hearings in early August, legislators repeatedly questioned the state health commissioner, Dr. Howard Zucker, on the full extent of deaths linked to nursing homes. They were unsatisfied with Mr. Zucker's failure to disclose the number of resident deaths outside nursing homes and long-term care facilities.

"I'm not prepared to give you a specific number," Dr. Zucker told state lawmakers at the time. "We are looking at all the numbers, we are looking at the data, when the data comes in and I have an opportunity to piece through that, then I will be happy to provide that data to you and to the other members of the committee."

A few weeks later, on Aug. 20, the State Senate and Assembly formally wrote to the health department requesting those figures, as well as additional information.

Then on Aug. 26, the Justice Department requested nursing home data from four states, including New York, to determine whether it would launch a formal investigation into those states' handling of deaths in nursing homes.

Cuomo officials said that as a result, they asked legislative leaders for additional time to respond to their data request as they addressed the federal inquiry.

The administration responded to the Justice Department's questions in writing relatively quickly, by Sept. 9. But state health officials did not respond to the Legislature's questions until this week, nearly six months later.

In Wednesday's meeting, Ms. DeRosa told Democratic lawmakers that Mr. Trump had turned nursing homes "into a giant political football," conceding that the state's lack of transparency may have complicated some lawmakers' re-election campaigns.

And she noted that the data that the state was receiving from nursing homes was often muddled and required strenuous work to clean up.

"I'm just asking for a little bit of appreciation of the context," Ms. de Rosa said, apologizing and promising better data in the future. "I do understand the position that you were put in. I know that it is not fair."

But lawmakers seemed unconvinced.

"We don't have enough time today to explain," Assemblyman Richard N. Gottfried, the Democratic chairman of the health committee, "all the reasons I don't give that any credit at all."

Exhibit C

NY Times, “9 Top NY Health Officials...”

9 Top N.Y. Health Officials Have Quit as Cuomo Scorns Expertise

“When I say ‘experts’ in air quotes, it sounds like I’m saying I don’t really trust the experts,” Gov. Andrew Cuomo said of pandemic policies. “Because I don’t.”



By J. David Goodman, Joseph Goldstein and Jesse McKinley

Published Feb. 1, 2021 Updated Feb. 2, 2021

The deputy commissioner for public health at the New York State Health Department resigned in late summer. Soon after, the director of its bureau of communicable disease control also stepped down. So did the medical director for epidemiology. Last month, the state epidemiologist said she, too, would be leaving.

The drumbeat of high-level departures in the middle of the pandemic came as morale plunged in the Health Department and senior health officials expressed alarm to one another over being sidelined and treated disrespectfully, according to five people with direct experience inside the department.

Their concern had an almost singular focus: Gov. Andrew M. Cuomo.

Even as the pandemic continues to rage and New York struggles to vaccinate a large and anxious population, Mr. Cuomo has all but declared war on his own public health bureaucracy. The departures have underscored the extent to which pandemic policy has been set by the governor, who with his aides crafted a vaccination program beset by early delays.

The troubled rollout came after Mr. Cuomo declined to use the longstanding vaccination plans that the State Department of Health had developed in recent years in coordination with local health departments. Mr. Cuomo instead adopted an approach that relied on large hospital systems to coordinate vaccinations not only of their own staffs, but also of much of the population.

In recent weeks, the governor has repeatedly made it clear that he believed he had no choice but to seize more control over pandemic policy from state and local public health officials, who he said had no understanding of how to conduct a real-world, large-scale operation like vaccinations. After early problems, in which relatively few doses were being administered, the pace of vaccinations has picked up and New York is now roughly 20th in the nation in percentage of residents who have received at least one vaccine dose.

“When I say ‘experts’ in air quotes, it sounds like I’m saying I don’t really trust the experts,” Mr. Cuomo said at a news conference on Friday, referring to scientific expertise at all levels of government during the pandemic. “Because I don’t. Because I don’t.”

His comments reflected a rift between the state’s top elected official and its career health experts of the sort that has occurred across different levels of government during the pandemic. Former President Donald J. Trump warred publicly with Dr. Anthony S. Fauci, the nation’s top infectious disease expert, as well as officials at the Centers for Disease Control and Prevention.

Mayor Bill de Blasio forced out the head of New York City’s respected health department over the summer. Around the country, frustrated and overwhelmed public health officials have resigned in large numbers.

In Albany, tensions worsened in recent months as state health officials said they often found out about major changes in pandemic policy only after Mr. Cuomo announced them at news conferences — and then asked them to match their health guidance to the announcements.

That was what happened with the vaccine plan, when state health officials were blindsided by the news that the rollout would be coordinated locally by hospitals.

But it also occurred earlier with revisions in a host of state rules from the fate of indoor dining and businesses like gyms to capacity limits on social gatherings, according to a person with direct experience inside the department.

YOUR CORONAVIRUS TRACKER: We’ll send you the latest data for places you care about each day.

Sign Up

Earlier in the pandemic, the health officials were often informed about criteria for who was eligible to be tested for the virus — for example, an expansion to include essential workers like transit workers, police and firefighters — from Cuomo news conferences, the person said.

Dr. Howard Zucker, the state health commissioner, has remained in his post, and appears with Mr. Cuomo at news conferences.

But at least nine senior state health officials have left the department, resigned or retired in recent months. They include Dr. Elizabeth Dufort, the medical director in the division of epidemiology; Dr. Jill Taylor, the head of the renowned Wadsworth laboratory — which has been central to the state's efforts to detect virus variants — and the executive in charge of health data, according to state records.

Additionally, the Health Department's No. 2 official left for another job in state government, and another official, who helped oversee contact tracing, is expected to leave the department, also for another state government job.

Dr. Zucker said in a statement that the state was facing “an intense period of extraordinary stress and pressure and a different job than some signed onto.”

He added: “The Times's point is several staff left — true, and many others joined the agency with the talents necessary to confront this new challenge.” The proof, he said, “is in the performance numbers.”

Mr. Cuomo's handling of the pandemic has come under criticism in recent days after the state attorney general, Letitia James, said his administration had undercounted the tally of Covid-19 deaths of nursing home residents by not publicly disclosing deaths of those residents that occurred at hospitals.

Current and former health officials agreed to be interviewed about the crisis inside the public health bureaucracy only on condition of anonymity, saying that they feared retaliation for speaking out against the governor.

“Morale certainly was and continues to be at an all-time low,” one former health official said.

The former official pointed out that during past emergencies, the department rallied and morale soared as officials felt that their talent and experience were valued.

“In the pandemic, the opposite happened,” the former official said.



After a slow rollout, New York's vaccination campaign ranks roughly 20th in the nation. James Estrin/The New York Times

The departures came as the state prepared for and then stumbled through the early weeks of its vaccine campaign, in which experts said speed was paramount because of the threat posed by more contagious variants of the coronavirus.

The Coronavirus Outbreak ›

Latest Updates ›

Updated 3 hours ago

- [The front page of The New York Times puts the pandemic's devastating toll in perspective.](#)
- [A Biden official says that China needs to disclose more about the origins of the coronavirus, and that the W.H.O. needs to dig deeper.](#)
- [The Indian vaccine giant expected to supply much of the world warns that it has been directed to put its country's needs ahead of exports.](#)

Is this helpful?



Vaccination policy was the latest one shaped largely by the governor's office. Before that, officials said the State Health Department was not deeply involved in final decisions that have included allowing public events and mandating business closures based on color-coded "microclusters."

Mr. Cuomo said in an interview that the scale of the pandemic had overwhelmed the state's public health planning.

"It's the Mike Tyson line: 'Everybody has a plan until I punch them in the face,'" Mr. Cuomo said.

Mr. Cuomo said his approach had delivered results in New York, including a positivity rate that has been declining after a peak in early January and better vaccination rates. New York saw the worst of the pandemic in the spring, and roughly 43,000 have died, more than in any other state.

"The scale changes everything," Mr. Cuomo said. "My job is to get the vaccinations done as soon as possible."

In the fall, Mr. Cuomo shelved vaccine distribution plans that top state health officials had been drawing up, one person with knowledge of the decision said. The plans had relied in part on years of preparations at the local level — an outgrowth of bioterrorism fears following Sept. 11 — and on experience dispensing vaccine through county health departments during the H1N1 pandemic in 2009.

As a result, local officials across the state complained that their efforts to vaccinate were undercut by the Cuomo plan.

"Wait a minute, why are we not doing this?" Anthony J. Picente Jr., a Republican who is county executive in upstate Oneida County, said he remembered thinking.

At the New York City Health Department, officials had hoped to significantly expand a system used for childhood vaccinations, in which the city is able to order doses directly from the federal government, one city official said.

But the Cuomo administration, in an October letter to the Trump administration, told federal officials to work only with the state when it came to doling out doses. That made it difficult for the city to create its own vaccination sites, the official said.

State officials said the approach made sense for what was a statewide vaccination effort, and that the state's plan incorporated guidance from the C.D.C. and lessons learned from previous health emergencies.

It is not possible to determine conclusively whether alternative plans at the state and local health departments would have performed better in the early weeks of the rollout. Public health departments have been chronically underfunded, a situation experts have warned of for years.

Covid-19 Vaccines ›

What You Need to Know About the Vaccine Rollout

- Providers in the U.S. are administering about 1.3 million doses of Covid-19 vaccines per day, on average. Almost 30 million people have received at least one dose, and about 7 million have been fully vaccinated. [How many people have been vaccinated in your state?](#)
- The U.S. is [far behind several other countries](#) in getting its population vaccinated.
- In the near future, travel may require [digital documentation](#) showing that passengers have been vaccinated or tested for the coronavirus.
- When can you get the vaccine? What are the vaccine's side effects? Is it safe to take during pregnancy? [We've have answers to many of your questions.](#)

SEE MORE ▼

But elements of the state's approach hindered the rollout, New York City officials contended.

"Extensive red tape and unnecessary rigidity over who we could vaccinate and when — all with the looming threat of millions of dollars in punitive fines — made an extraordinarily difficult task all the more challenging in those first initial weeks of the rollout," said Avery Cohen, a spokeswoman for Mayor de Blasio.

In his own planning for the vaccine rollout, Mr. Cuomo spoke with hospital executives, outside consultants and a top hospital lobbyist in closed-door meetings. In December, Mr. Cuomo announced that the state would rely on large hospital systems as "hubs" to coordinate vaccinations, not simply for their own staff but also for ordinary New Yorkers.

The state designated as a regional vaccination hub in New York City not the city's 6,000-person Health Department, but rather the Greater New York Hospital Association, a trade group with a multimillion-dollar lobbying arm that had been a major donor to the governor's causes.

The approach included narrow eligibility rules and suffered from a lack of urgency by some hospitals. That led to fewer doses being administered in the early weeks, followed by abrupt shifts in policy that created a kind of free-for-all among those searching for vaccine appointments, according to interviews with more than two dozen current and former health officials, county leaders, vaccination experts and elected officials.

“The governor’s approach in the beginning seemed to go against the grain in terms of what the philosophy was about how to do this,” said Dr. Isaac Weisfuse, a former deputy commissioner at New York City’s Health Department who often served as an incident commander during emergencies. “It did seem to negate 15 to 20 years of work.”

Asked about the criticism, Mr. Cuomo said, “If Times reporters think I push hospitals too hard and local governments too hard, I say I’m a fighter for the people of New York and I believe I’m saving lives.”

His aides said hospitals were made hubs because they had the necessary cold-storage capacity, particularly for the Pfizer-BioNTech vaccine; could operate regionally, not just in one county or city; and because health care workers were the first to be vaccinated.

State officials said that Mr. Cuomo followed public health guidance in the vaccine rollout, including from the C.D.C., and that Dr. Zucker, the head of the department, has been closely involved in pandemic decisions.

The governor’s close circle of aides includes Dr. Howard Zucker, the state health commissioner. Peter Foley/EPA, via Shutterstock

The governor speaks regularly with Dr. Michael Osterholm, an infectious disease expert at the University of Minnesota who served on a Covid advisory panel put together by President Biden, and twice a week with Dr. Fauci, the officials said. (Dr. Osterholm and Dr. Fauci declined to comment.)

The governor’s vaccine planning team has consisted mainly of longtime advisers, including Larry Schwartz, a former top aide and deputy county executive in two counties who is now an executive at an airport concession company.

A task force with outside experts, convened by Mr. Cuomo to guide the vaccination plan, met infrequently and was rarely offered the chance to provide guidance.

For help in planning the vaccination campaign, the governor turned to consultants from Deloitte and Boston Consulting Group. The in-house lobbyist for New York’s largest hospital system, Northwell Health, had direct involvement in the rollout.

For about a month, starting in mid-October, the Northwell lobbyist, Dennis Whalen, worked from an office inside the State Health Department and helped shape the state’s approach. Mr. Whalen had worked previously as the department’s No. 2 official.

“If you’re asked to help, you help,” Michael Dowling, the president of Northwell and a longtime ally of Mr. Cuomo, said. “There’s nothing nefarious about this at all.”

It was a Northwell hospital nurse, Sandra Lindsay, who received the first Covid-19 vaccine dose in the nation in mid-December, an iconic moment in the pandemic, and a public relations victory for the private hospital system.

The governor and his aides said the vaccine rollout was hamstrung by the federal government, which they blamed for a lack of vaccine. They also said that poor performance by the local authorities and public hospitals, particularly in New York City, slowed down distribution. Of late, Mr. Cuomo has regularly used his near-daily press briefings to call out hospitals by name that he said were not vaccinating quickly enough.

After opening eligibility to many more people, New York now quickly uses its weekly shipments of vaccine, not including doses sent to the state through a federal program for nursing homes, state data shows.

“We put together an operation where we used all the levers at our disposal to as quickly as possible vaccinate as many people as possible,” said Melissa DeRosa, the governor’s top aide, “and it obviously worked since we’re now oversubscribed and out of vaccine.”

Still, Dr. Denis Nash, a professor of epidemiology at the City University of New York and a former senior city health official, said that giving such a large share of doses directly to hospitals meant that the government lost control of the pace of vaccinations during the program’s first month.

“That was the bottleneck,” Dr. Nash said. “To put hospitals in charge of a public health initiative — for which they have no public health mandate, or the skills, experience or perspective to manage one — was a huge mistake, and I have no doubt that’s what introduced the delays.”

Exhibit D

NY DOH, “Advisory: Hospital Discharges...”



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

DATE: March 25, 2020
TO: Nursing Home Administrators, Directors of Nursing, and Hospital Discharge Planners
FROM: New York State Department of Health

Advisory: Hospital Discharges and Admissions to Nursing Homes

Please distribute immediately to:
Nursing Home Administrators, Directors of Nursing, Directors of Social Work, Hospital Discharge Planners

COVID-19 has been detected in multiple communities throughout New York State. There is an urgent need to expand hospital capacity in New York State to be able to meet the demand for patients with COVID-19 requiring acute care. As a result, this directive is being issued to clarify expectations for nursing homes (NHs) receiving residents returning from hospitalization and for NHs accepting new admissions.

Hospital discharge planning staff and NHs should carefully review this guidance with all staff directly involved in resident admission, transfer, and discharges.

During this global health emergency, all NHs must comply with the expedited receipt of residents returning from hospitals to NHs. Residents are deemed appropriate for return to a NH upon a determination by the hospital physician or designee that the resident is medically stable for return.

Hospital discharge planners **must** confirm to the NH, by telephone, that the resident is medically stable for discharge. Comprehensive discharge instructions must be provided by the hospital prior to the transport of a resident to the NH.

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

Information for healthcare providers on COVID-19 is readily available on the New York State Department of Health public website at <https://coronavirus.health.ny.gov/information-healthcare-providers>. As always, standard precautions must be maintained, and environmental cleaning made a priority, during this public health emergency.

Critical personal protective equipment (PPE) needs should be immediately communicated to your local Office of Emergency Management, with the appropriate information provided at the time of request. Requests **MUST** include:

- o Type and quantity of PPE by size;
- o Point of contact at the requesting facility or system;
- o Delivery location;
- o Date request is needed to be filled by; AND
- o Record of pending orders.

Thank you for your ongoing support and cooperation in responding to COVID-19. General questions or comments about this advisory can be sent to covidnursinghomeinfo@health.ny.gov.