No. 25-

IN THE

Supreme Court of the United States

DANIEL N. ARBEENY, AS THE ADMINISTRATOR FOR THE ESTATE OF NORMAN ARBEENY, AND SEAN A. NEWMAN, ADMINISTRATOR FOR THE ESTATES OF MICHAEL J. NEWMAN, AND DOLORES D. NEWMAN INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

ANDREW J. CUOMO, MELISSA DEROSA, HOWARD A. ZUCKER, GREATER NEW YORK HOSPITAL ASSOCIATION, KENNETH RASKE, NORTHWELL HEALTH, INC., AND MICHAEL DOWLING,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Andrew J. Cuomo is the former Governor of the State of New York from 2011 until his resignation in 2021. On March 25, 2020 the Cuomo administration issued a COVID-19 Transfer Directive to all New York hospitals and nursing homes requiring that all nursing homes must comply with the expedited receipt of residents from hospitals while, at the same time, prohibiting nursing homes from testing any hospital transferee for COVID-19.

All Respondents, to be separately described, worked in concert to effectuate an abrupt, compulsory and large-scale transfer of the state's then hospitalized COVID-19 patients to the state's nursing homes despite the immediately announced condemnation of this action by the leading patient-oriented medical experts in the field of elderly care.

Promptly thereafter and as predicted by the outside medical experts, the number of COVID-19 deaths at the state's nursing homes grew by the thousands which the Respondents then endeavored to cover up, until it became too obvious to hide. The Directive was finally rescinded on May 10, 2020, but by that point, 9,000 COVID-positive patients had been transferred and 15,000 patients residing there during the period March 25-May 10, 2020, eventually died of COVID-19.

The questions presented are:

1. How could the Second Circuit have reasonably concluded that the State Respondents Governor Cuomo and Ms. DeRosa, his Chief of Staff, could not have

comprehended that the Directive would violate the Petitioners' rights when both Respondents have publicly stated that they played "no role" in the development of the Directive and had no knowledge of the lethal nursing home aspects of the Directive until April 20, 2020?

2. How could the Second Circuit have reasonably concluded that State Respondent Dr. Zucker, the Commissioner of the New York State Department of Health ("NYSDOH") could not have comprehended that the Directive would violate the Petitioners' rights when, as he admitted as part of a congressional investigation, that he had never seen the Directive until the day it was promulgated?

3. Did the State Respondents forfeit their right to assert the qualified immunity defense by engaging in conduct outside of the scope of their "official acts" in the form of delegating a government function to the private sector with no independent government input?

4. Were the hospital-related Respondents not just participants but the actual authors of the text of the March 25 Directive thereby converting themselves into "state actors" in the admitted absence of independent governmental action?

5. Whether, in light of this Court's reversal and remand to the Second Circuit in *National Rifle Assoc. of Am. v. Vullo*, 602 U.S. 190 (2024) with emphasis on the obligation to draw reasonable inferences in the claimant's favor at the Motion to Dismiss stage, the Second Circuit erred by not allowing discovery to proceed given the shocking factual findings already in the pleadings?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner Estate of Norman Arbeeny by and through its Administrator, Daniel N. Arbeeny, was a plaintiff-appellant in the Second Circuit.

Petitioner Estates of Michael J. and Dolores D. Newman by and through Sean S. Newman, were plaintiff-appellants in the Second Circuit.

Petitioner Statewide Class consists of all individuals who were New York nursing home residents when a COVID positive patient was admitted on or after the March 25, 2020 Directive, and who subsequently contracted then died of COVID-19. The Statewide Class was a plaintiff-appellant in the Second Circuit.

Respondent Andrew Cuomo was the Governor of New York serving in office from 2011 to 2021, and was a defendant-appellee, in his official capacity, in the Second Circuit.

Respondent Melissa DeRosa was the Secretary (Chief of Staff) to the Governor of New York from 2017 until 2021, and was a defendant-appellee, in her official capacity, in the Second Circuit.

Respondent Howard A. Zucker, the NYSDOH Commissioner from 2015 to 2021, and was a defendant-appellee, in his official capacity, in the Second Circuit.

Respondent Greater New York Hospital Association ("GNYHA") is a trade association engaged in advocacy

on behalf of approximately 160 hospitals and health systems doing business in the State of New York. It was a defendant-appellee in the Second

Circuit as was its President and Chief Executive Officer, Respondent Kenneth Raske.

Respondent Northwell Health, Inc., is the largest health care provider in the State of New York. It was a defendant-appellee in the Second Circuit as was its Chief Executive Officer, Respondent Michael Dowling.

LIST OF RELATED PROCEEDINGS

Daniel Arbeeny, et al. v. Andrew Cuomo, et al., No. 22-cv-02336 (LDH) (LB) (E.D.N.Y.) decision and order granting defendants' motion to dismiss issued on January 10, 2025.

Daniel Arbeeny, et al. v. Andrew Cuomo, et al., No. 24-2856, Second Circuit affirming the judgment of the District Court on November 4, 2025.

Joseph Ferrari, et al. v. Andrew Cuomo, et al. No. 23 Civ. 7715 (KPF) (S.D.N.Y.) dismissing action challenging the Mar. 25, 2020 Directive on March 31, 2025.

Estate of Nicholas A. Alexander v. Andrew Cuomo, et al, No. 24-cv-02179 (NCM) (ST) (E.D.N.Y.) dismissing action challenging the Mar. 25, 2020 Directive on January 16, 2026.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

DECLARATION, CONSTITUTION AND STATUTES

AUTHORITIES

Cited Authorities

Page

Page

Page

INTRODUCTION

This case has always consisted of two distinct but closely intertwined aspects, namely unlawful deprivation of life and public corruption. At its midst, it is undisputed that 15,000 thousand elderly and disabled individuals residing in New York nursing homes died of COVID-19.

The causal factor in these individuals dying alone and in the most painful circumstances were actions taken in concert by the Respondents in this case to transfer thousands of still-infected COVID-19 hospital patients to the state's nursing homes under a mandatory directive issued on March 25, 2020. Inexplicably, this Directive prohibited nursing homes from conducting their own COVID-19 testing to determine infectious threat levels to their existing residents.

On a Motion to Dismiss, the U.S. Court of Appeals for the Second Circuit ruled on November 4, 2025 that these circumstances lacked sufficient merit even to warrant discovery under the doctrine of qualified immunity accorded to public officials.

The Supreme Court standard on qualified immunity cases, as will be easily met here, is whether the behavior of the governmental officer "shocks the conscience" and violates the "decencies of civilized conduct." *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998).

In a context such as this, the Supreme Court has also made it clear that "whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded." *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009).

Here, in addition to the similarly well-established obligation as to "Assuming the complaint's allegations to be true, as we must" (*Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 29 (2011), the Appellants' factual pleadings coincide with the findings of the New York State Attorney General report that: (1) thousands of nursing home residents died from COVID-19 within the first four months "after the March 25 Directive went into effect" (Nursing Home Response to COVID-19, p. 37); and, (2) that the Governor's office and the NYSDOH "undercounted COVID-19-related nursing home resident deaths by as much as 50 percent." *Id*., at p. 12.

And yet, the Second Circuit found these developments to fall short of the "shock the conscious" level that would have allowed for the elicitation of additional factual information by means of discovery.

In addition, this Court had just recently remanded an immunity case to the Second Circuit with the admonition, in the unanimous opinion by Justice Sotomayor, that at the Motion to Dismiss stage: "[g]iven the obligation to draw reasonable inferences in the [claimant's] favor and consider the allegations as a whole," the Second Circuit was "free to revisit the qualified immunity question in light of this Court's opinion." *National Rifle, supra,* at 199.

On remand, the Second Circuit declined to do so other than to note that "we ordered the parties to submit supplemental briefs bearing on the issue of qualified immunity," and then reaffirmed its decision. *National Rifle Assoc. of Am. v. Vullo II* (No. 22-842 (July 17, 2025) (Cert. pending.)

Respondent Cuomo and DeRosa, as the top governmental officials in the state have publicly (and astoundingly) denied "playing any role" in the development in this official Directive of the State of New York that was issued while they were holding office and which ultimately resulted in the death of 15,000 New Yorkers.

Respondent Zucker, despite being the Commissioner of the state's Department of Health also admitted by then in a sworn statement before the U.S. Congress that he never saw the March 25 Directive promulgated by his own agency before it was announced.

And still the Appellate Court found this conduct not to shock the conscious nor to allow under the Rules of Federal Civil Procedure for additional fact-finding.

Also in the appellate briefing, during oral argument, and as to be further discussed in full detail, the Hospital Respondents were almost certainly the genesis of the March 25 Directive, as well as the behind the scene promoters of this ostensible "state" action, which wrecked death upon thousands of New York nursing home residents and devastation upon their families.

Thus, in the face of credible factual pleadings that Governor Cuomo and the NYSDOH had turned over this critical governmental function to the Hospital Respondents who were the Governor's largest campaign contributors and who stood to gain immense additional income from the Directive, the Second Circuit determined – 15,000 deaths later – that no full factual examination was to be allowed.

This Court should grant certiorari to signify that such a shocking betrayal of the public trust in the surrendering of life and death decision-making to compromised non-government parties cannot dismissed in the absence of a full evidentiary record.

OPINIONS BELOW

Neither the District Court's decision nor the Second Circuit's decision have been formally reported. These are reproduced at Pet.App.13a and Pet.App.1a, respectively.

JURISDICTION

The Second Circuit entered judgment on November 4, 2025, and this petition is timely because it is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254.

PROVISIONS INVOLVED

The Declaration of Independence provides as relevant here that first among a person's "unalienable Rights" is "Life."

The Fifth Amendment to the United States Constitution provides as relevant here: "No shall person be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides as relevant here: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S. Code § 1983 provides, as relevant here: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

I. Factual Background

On December 1, 2019, in Wuhan, China, there occurred what would eventually be confirmed as the first case of a COVID-19 death. On January 19, 2020, the first reports of the virus reaching the United States occurred in Washington State with an individual who had just returned after traveling to visit family in Wuhan.

By the end of February, a report to the Center for Disease Control ("CDC') revealed that at a state nursing home in Kirkland, Washington approximately 27 of its 108 residents were showing comparable systems and fatalities. This signaled a warning across the entire country with headlines such as this eventually showing "staggering losses at home after home." USA TODAY, *A National Disgrace: 40,600 Deaths Tied to US Nursing Homes* (June 1, 2020).

Respondent Cuomo was fully cognizant of this acute threat as on March 10, 2020, he said the following in response to a question during a live television interview:

> [T]hat's my nightmare and that's where you're going to see the pain and the damage from this virus. Senior citizen homes, nursing homes, congregate senior facilities. *The Lead* with Jake Tapper, CNN (Mar. 10, 2020).

Yet, two weeks later, Cuomo signed off on an Executive Directive vastly exacerbating the very same circumstances that he had just described as a "nightmare" scenario.

At another public forum when a reporter asked Respondent Cuomo about the safety of the "state 'directive' that people cannot be denied admission or readmission" to a nursing home, the following dialogue transpired:

> Governor Cuomo: "If you are tested positive for the virus, are you allowed to be admitted to a nursing home, is the question?
>
> Reporter: Or readmitted?
>
> Governor Cuomo: It's a good question. **I don't know.**[1]

1. NEW YORK POST: *Cuomo Didn't Know Coronavirus Patients Are Being Sent Back to Nursing Homes* (April 21, 2020) (Emphasis added).

How can these contradictory events make any sense wherein Respondent Cuomo says on March 10, 2020 that COVID-19 patients in nursing homes is a "nightmare" situation yet two weeks later on March 25, he issues a Directive under his name mandating that very consequence; and, then three weeks after that on April 20, 2020, he states publicly that he is unaware of his own Directive calling for hospitals with COVID patients to forcibly be admitted to nursing homes.

Appellants, on the other hand, advanced a very credible explanation for this sequence of events drawing, for example, from an extensive series of articles entitled "The Covid Storm," where the *Wall Street Journal* reported, that the catastrophic hospital-to-nursing-home scheme was the brainchild of the Hospital Respondents which "found themselves at odds with some nursing homes that refused to readmit residents who had been hospitalized with coronavirus (Sept. 11, 2020). More specifically, the *Wall Street Journal* reported that Respondent Raske:

> "contacted Mr. Cuomo's team for help with nursing homes" and "Within days, Mr. Cuomo's team approved an order from the state's health department that said nursing homes couldn't refuse to admit patients simply because they had tested positive."

Consistent with this causal nexus was an independent research project by the Empire Center for Public Policy ("Empire Center") into the publicly disclosed records of Respondent Cuomo's schedule which showed 288 entries for meetings or telephone calls with the Hospital Respondents from February through April, 2020. *2020*

Hindsight Rebuilding New York's Public Health Defenses After the Coronavirus Pandemic, p.20 (June 1, 2021).[2]

Not unrelated to the foregoing is the role of the Hospital Respondents as the leading industry source of campaign contributions to the former governor's political campaigns. For example, when Respondent Cuomo had a serious primary challenge in 2018, GNYHA made a $1 million donation to one of his campaign arms. NEW YORK TIMES: *After Hospitals' Donation to New York Democrats, a $140 Million Payout* (Oct. 3, 2019).

Another indication that Hospital Respondents were the genesis of the COVID-19 Directive can be found in an April 2, 2020 Letter sent by Respondent Raske to GNYHA's membership brags that the association had **"drafted and aggressively advocated for"** the related New York COVID-19 legislation granting immunity to all health care facilities and staff from civil or criminal liability for any harm in treating the COVID-19 patients (Emphasis added).

Numerous other newspaper articles published at that time attributed the actual origination of the March 25 Directive to the Hospital Respondents, *e.g.*, the Feb. 26, 2021 edition of STAT Healthcare News, an authoritative journal about health, medicine, and the life sciences, reported that "New York's influential hospital lobby was pleading with Cuomo to issue policy on transfers

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2. *See also*, Hammond, Empire Center: *Cuomo's Schedules for the Peak of New York's Pandemic Show Limited Contact with Outside Experts:* One call involving Respondent Raske took place on March 17, 2020, eight days before the issuance of the Directive.

to nursing homes." *Andrew Cuomo's Covid-19 Nursing Home Fiasco Shows the Ethical perils of Pandemic Policymaking.*"

In response to the growing criticism from outside medical experts,[3] the state's nursing homes and, of course, the Petitioners and other family members, the NYSDOH released a report on July 6, 2020 purporting to claim that most COVID-19 deaths in nursing homes were caused by other factors such as nursing staff[4] This report, in which the Hospital Respondents participated and Respondent Dowling personally endorsed, was met with universal disdain, and was eventually withdrawn and republished by the NYSDOH in substantially revised form. The New York Times further reported that *Cuomo Aides Rewrote Nursing Home Report to Hide Higher Death Toll* (Mar. 4, 2021).

Eventually, this long sequence of lies, deceit and subterfuge proved impossible to contain, especially after Judge Kimberly O'Connor at the New York State Supreme Court, ruled on Feb. 3, 2021 that the NYSDOH had unlawfully refused to respond to a "straightforward" request for the state's total number of nursing home deaths from COVID-19. (*In The Matter of Empire Center*

3. These included the American College of Health Care Administrators, National Center for Assisted Living, and Society for Post-Acute and Long-Term Care Medicine which said as soon as the Directive was released: "We strongly object to this policy Directive and approach to developing surge capacity."

4. New York State Department of Health Issues Report On COVID-19 In Nursing Homes. Archived from the original on January 29, 2021. Retrieved February 20, 2021.

for Public Policy v, New York State Department of Health, 150 N.Y.S. 3d 497.) The Order in that case compelled that the actual NYSDOH nursing home numbers would have to be made public.

At about the same time (Jan. 28, 2021), the State Attorney General, Letitia James, published a Report confirming what the Petitioners and other family members had been saying for almost a year, namely that the State Respondents, with the cooperation of the Hospital Respondents, were massively undercounting the number of COVID-19 nursing home deaths in New York by excluding those residents who were moved from nursing homes to hospitals in their final dying days.

Finally, after months of stonewalling requests from state lawmakers, subpoenas from Congress, the lawsuit by the Empire Center, and the aforementioned State Attorney General Report, Respondent DeRosa admitted in a closed-door meeting with State Legislators on February 10, 2021 that the number of nursing home and other long-term care residents who had died from COVID-19 was at least 15,000. PBS: *"Cuomo Administration 'Froze' over Nursing Home Data Requests"* (Feb. 12, 2021). That number is to be compared to a figure of 8,700 that the State Respondents publicized only two weeks before.[5]

And yet, both courts below in this case awarded deference to the lying side rather than the dying side, and did so in the face of all of the foregoing not just in

5. *See also:* CNN: *Cuomo Said 'He Can Destroy Me*, quoting Assembly Kim (suspected as the source), "Gov. Cuomo called me directly to threaten my career if I did not cover up for Melissa."

the Petitioners' recitation of the facts but on the basis of independent press reports such as Pro Publica:[6]

> In the weeks that followed the March 25 order, COVID-19 tore through New York state's nursing facilities, killing more than 6,000 people — about 6% of its more than 100,000 nursing home residents. *Fire Through Dry Grass: Andrew Cuomo Saw COVID-19's Threat to Nursing Homes. Then He Risked Adding to It* (June 16, 2000).

In the same report, Pro Publica points out that, when asked, the "Cuomo administration would not say who conceived of the order." Petitioners deserve the opportunity to press that question further with all the Respondents under oath and all the relevant documents on the table.

II. The Lower Courts Proceedings

Petitioner Arbeeny filed the initial lawsuit against the State Respondents *pro se* and in a timely manner on April 21, 2022. After Mr. Arbeeny retained counsel, a First Amended Complaint filed on October 6, 2022.

On March 28, 2023, Petitioner Newman, represented by the same counsel representing Mr. Arbeeny commenced a largely similar Complaint against the State Respondents, which also included the Hospital Respondents. On April 17, 2023, the District Court, acting *sua sponte,* consolidated the two cases.

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6. Pro Publica is an independent, non-profit company based in New York.

Without holding an oral argument, the District Court issued a Docket Order on September 30, 2024, without an accompanying opinion granting all Respondents' Motions to Dismiss. On October 24, 2024, Petitioners filed a Notice of Appeal.

On January 10, 2025, the Honorable LaShann DeArcy Hall issued the Memorandum and Order on the case, followed by the Judgment on January 14, 2025.

Petitioners' allegations asserted, in the first instance, the deprivation by all Respondents as to the lives of their family members as preserved under both the Fifth and Fourteenth Amendments of the U.S. Constitution (not to mention reference in the Declaration of Independence) and protection as well under 42 U.S.C. § 1983.

Without attempting to be too graphic, the use of state regulatory power to coerce the sudden and widespread presence of infected COVID-19 patients into the congregated facilities of a nursing home was the equivalent of introducing the nerve agents such as anthrax or sarin into the ventilation system at their living quarters.

Again seeking not to be too explicit, a Second Circuit case (*Banks v. Yokamick*, 177 F. Supp. 2d 239, 250 (SDNY 2001)) nevertheless draws an apt analogy to this case when comparing "killing a person by cutting off his oxygen supply rather than by shooting him." *Id.* at 231. That is what unfortunately describes this situation as a COVID-19 death is by asphyxiation and that was the causal result of the March 25 Directive transferring COVID-infected hospital patients into New York nursing homes. The point

is, methodology aside, the end result was the same — and the constitutional violation of life without due process of law was the same.

But the District Court ruled that action, even when taken against a doubly "protected" category of elderly and disabled individuals under both federal and state law, was "precluded by the doctrine of qualified immunity." Pet.App.33a.

Emblematic of the deficiencies in that Opinion and Ruling was the District Court granting factual deference to the wrong party. When, for example, the Petitioners (Plaintiffs then) stressed that there were 288 meetings and telephones calls between the State and Hospital Respondents at the precise time the Directive was being implemented, the District Court dismissed that as follows: "Notably, Plaintiffs do not allege that any of the 228 meetings and calls between Cuomo and the Hospital Defendants were related to the issuance of the Advisories."[7] Pet.App.22a.

By the time the case came before the Second Circuit, the factual record was even more damaging as to the complicit behavior of the Respondents. In a transcribed interview before the U.S. Congress, Respondent Cuomo "testified that he played no role in the issuance of the March 25 Directive and was not aware of its impact on nursing homes until he was asked about it at a press conference on April 20, 2020." (Interview of Andrew

7. Here again, the District Court adopts the Respondents' term of "Advisory" even though commonplace usage would hardly not comport "No resident shall be denied" to denote optionality.

Cuomo by House Select Subcomm. on the Coronavirus Pandemic, at 224 (June 11, 2024)).

At her transcribed interview before the same congressional committee, State Respondent Melissa DeRosa, the Secretary (Chief of Staff) to the former governor at that time,[8] also stated that "she played no role in the development of the Directive and only learned about it at the same press conference held on April 20, 2020." *Id.*

To reiterate, the Governor of the state and his Chief of Staff confessed to playing "no role" in the development of a policy during their term that resulted in the death of 15,000 New Yorkers and continued "unaware" of its specific impact at nursing homes until asked about it by a reporter at a subsequent press conference.

Nevertheless, Second Circuit affirmed the decision in a Summary Opinion. In its view, "The rights Plaintiffs assert are "are articulated at too high a level of generality for qualified immunity purposes" (Pet.App.6a.); further stating that: "Nor would a reasonable official **have known** that he was violating such rights in promulgating the Directive. . . ." Pet.App.7a (Emphasis added).

As to the Hospital Respondents, the Second Circuit dismissed that with a conclusory comment that "A private party does not act under color of law when its asks public

8. Under New York political practice, the Chief of Staff role is performed by the Secretary to the Governor. *Cf.* POLITICO: "As Secretary to the Governor, Melissa DeRosa was Cuomo's top aide and the most powerful unelected official in the Executive Chamber of the state government. (Aug. 8, 2021)

officials to intervene for its benefits at the expense of someone else. Pet.App.10a.

In so stating, the Second Circuit also discounted the critical point that the Hospital Respondents are not just any "private party," but the medical professionals at the highest level of state leadership in an industry where the foundational ethical principle is to "Do no harm."[9] What were Northwell's 13,500 physicians doing while this was going on?

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT DECISION DEFIES LOGIC, PRECEDENT AND PROPORTIONALITY

As referenced just above, the Second Circuit reliance that no reasonable official would have **known** that the March 25 Directive violating Petitioners' rights is flatly contradicted by the very statements Respondents Cuomo and DeRosa made to the Congress made that they had no knowledge of the March 25 Directive's prohibition on testing hospital transferees for COVID-19 until April 20, 2020. The same lack of personal knowledge pertains to Respondent Zucker who said in sworn testimony that he never saw the Directive until it was issued.

It is baffling how the Second Circuit can retroactively opine on the knowledge of the State Respondents when

9. The verbatim Latin phrase "*Primum non nocere*" is actually a stricter standard as it means "First, do no harm," which in this instance meant that the interests of the existing nursing home residents should have been the first consideration.

the March 25 Directive was promulgated when the Respondents themselves have said they had no role in its development and no knowledge of the most important provision contained in the Directive when it was issued.

Courts have held, with virtual unanimity, that examining evidence of the public official's state of mind is the proper means to evaluate a defense of qualified immunity. *See Grant v. City of Pittsburgh,* 98 F.3d 116, 124 (3d Cir. 1996). The answer can't be that absolution for the State Respondents turns on the basis of their lack any knowledge whatsoever.

But here, the Second Circuit not only makes an exculpatory judgment *in absentia* in the favor of the Respondents, but does so in the opposite direction of the compelling precedents under Rule 12(b)(6), namely that the court is to evaluate the sufficiency of the complaint "in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in the plaintiff's favor." *Anchor Bank, FSB v. Hofer,* 649 F.3d 610, 614 (7th Cir. 2011), *citing Wilson v. Price*, 624 F.3d 389, 391 (7th Cir. 2010).

Also in the category of utter illogic is the Second Circuit's rejection of Petitioners' position that Respondents' actions violated the Federal Nursing Home Reform Act of 1987 ("FNHRA").[10] *Maine v. Thiboutot*, 448 U.S. 1, 4–5 (1980); confirmed unanimously in a more recent § 1983 case by Justice Jackson. *Health and Hospital Corp of Marion County v. Talevski,* 599 U.S. 166 (2023).

10. 42 U.S.C. §§ 1395i-3, 1396r.

The appellate opinion begins appropriately with the acknowledgment that "FNHRA enumerates a broad range of resident rights that '[a] nursing home facility must protect and promote'" 42 U,S.C. § 1396(r)(c)(1)(A)). Pet.App.5a. But the Second Circuit then veers off to say that while "State and federal government officials have a clear statutory role as the *enforcer*[11] of rights conferred by the statute," nothing in the statute "would have put a reasonable official on notice that those rights of residents as against nursing homes applied to government officials." Pet.App.6a.

In other words, and, in fact, in the Second Circuit's own words: "the enforcer of the statute" somehow enjoys immunity from violating the language of the very statute for which it is the enforcer. That makes no sense.

FNHRA has a specific statutory clause entitled: "Enforcement process" stating that: "If a State finds … that the facility's deficiencies immediately jeopardize the health or safety of its residents, the State shall take immediate action to remove the jeopardy and correct the deficiencies." *Id*., at (h)(1)(A). To this language, the Second Circuit would interpose some form of exception for government officials charged with enforcing the self-same statute? Here again, at the Motion to Dismiss stage, when a court operates under a responsibility to draw deference in the Plaintiffs' favor, this does the opposite.

The particular significance of Justice Jackson's opinion in *Talevski* is that it provided clarity in preserving the pathway for plaintiffs to assert claims under § 1983

11. Emphasis in original.

without the arcane debate over preconditions such as the Spending Clause limitation.[12]

In *Talevski,* Justice Jackson says "nothing doing" by way of some obfuscation because §1983 is available "to enforce every right that Congress validly and unambiguously creates; we will not impose a categorical font-of-power condition that the Reconstruction Congress did not." *Id*,. at 210. The concurring views of Justices Gorsuch and Barrett reinforce that opinion by stating, respectively, that FNHRA "qualifies as a 'law' for purposes of §1983," (*Id*.) and that "the term 'laws' encompasses all federal laws." *Id*., at 211.

In short, there is no basis whatsoever for the Second Circuit to project that there is some predicate rendering §1983 nonapplicable to Petitioners' claim when this Court's language is clearcut:

> And because '§1983 generally supplies a remedy for the vindication of rights secured by federal statutes,' rights so secured are deemed 'presumptively enforceable' under §1983. *Gonzaga Univ. v Doe* 536 U. S. 273, 284. *Id*,. at 204.

Next, the Circuit Summary Order seeks to dispute that Petitioners claim is "a clearly established right to life" with the inexplicable observation that those cases in support on thereof stand only "for the proposition that "*when a constitutional* violation caused the death of the victim [may] a plaintiff bring suit under Section § 1983 to recover for loss of life. Pet.App.8a.

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12. *See*, 137 Harv. L. Rev. 380 (Nov., 2023).

Petitioners respectfully advance that a long line of cases such as *Banks, supra* are precisely aligned with this case, in that the Respondents' concerted and collective actions in constructing and implementing the March 25, 2020 Directive was the proximate cause of the COVID-19 deaths of the Petitioners' family members and 15,000 other frail and elderly persons residing in New York nursing homes.[13]

Another relevant aspect of limited immunity analyses can be gleaned from the opinion of Justice Gorsuch in *Browder v. City of Albuquerque* 787 F.3d 1076 (10th Cir. 2015) when he was on the Tenth Circuit. In that case, among others, Judge Gorsuch endorsed that Circuit's "sliding scale" approach toward qualified immunity cases under which "the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." (At 1082)

Can one imagine a more egregious case than a situation where the Respondents' actions educed 15,000 deaths then followed by a massive cover-up campaign? But in the face of those undisputed facts, the Second Circuit's Summary Order ended the pursuit of the facts with the conclusion that: "The rights Plaintiffs assert are defined "too broadly." (Pet.App.7a), thus also avoiding this very salient point also made by then Judge Gorsuch in Browder:

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13. Note here also, § 16 of the New York State Constitution: "The right of action, now existing to recover damages for injuries resulting from death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations."

> After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt" *See Northen v. City of Chicago,* 126 F.3d 1024, 1028 (7th Cir.1997) (*Id.* 1082-83).

In pertinence to this case, U.S. Rep. Ami Bera, M.D. (D-CA), the former Chief Medical Officer of Sacramento County who offered a very early warning about the virus breakout on Feb. 27, 2020, characterized the New York Directive as exactly the type of flagrantly incomprehensible behavior as described above by Judge Gorsuch.

> For the life of me, I can't understand why anyone would take a COVID positive patient and put them in a nursing home where, you know, that's **medical malpractice** in my mind, and that is a decision I can't understand. (Hearing before the House Select Subcommittee on the Coronavirus Pandemic (May 17, 2023)). (Emphasis added,)

This statement that March 25 Directive constituted nothing less than medical malpractice comes from an individual who is: (1) a medical doctor; (2) a U.S. Congressman; (3) the medical director of care management for the seven-hospital Mercy Healthcare system; (4) former Chief Medical Officer of Sacramento County; and,

(5) clinical professor at the UC Davis School of Medicine; and, as noted, sounded one of the earliest warnings on the dangers of what came to known as COVID-19.

By the same token, this Court's decision in *Taylor v. Riojas*, 592 U.S. 7 (2020), (per curiam) vacating and remanding a Fifth Circuit ruling that the law was not clearly established when prisoners were housed in what the Court viewed as "particularly egregious" conditions (p.3), falls into the same category where the actions of government officials are *ipso facto* ineligible for qualified immunity.[14]

Lastly in this context, it remains unclear why the Summary Order in this case completely ignored the Supreme Court's rather pointed reproach to the Second Circuit in the *Vullo* remand, *supra*, for "failing to draw reasonable inferences in the [claimant's] favor in violation of this Court's precedents. *Cf. Iqbal,* 678–679; *and Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 570 (2007)."

Be that as it may, no responsible person contends that the Respondents have done other than pursue an across-the-board pattern of deceit and dissembling during the entire New York's nursing home scandal, thus making it all the more astonishing that the end result of this litigation to date has been the lying side prevailing over the dying side.

14. Also to be noted here is that the *Taylor* case proceeded under 42 U.S.C. § 1983 whereas both the lower court decisions here involved repudiated this logical nexus.

II. THE SECOND CIRCUIT DECISION CONFLICTS WITH THIS COURT'S LANDMARK IMMUNITY CASE

Few would argue against the proposition that a landmark decision on immunity was delivered by this Court on July 1, 2024 in the case of *Trump v. United States.* No. 23–939. While occurring at the very highest governmental level, that case was decided on grounds which are likewise highly pertinent to this case.

The first point of relevance is the clearcut focus on drawing immunity distinctions between official and unofficial acts, and declaring that for the latter, "there can be no immunity" (p.15). While this may seem obvious, it remains a critical threshold issue, as it was in *Browder supra, which relied heavily on the factual aspect that the officer involved, while driving a police vehicle, was off-duty when the fatal (and reckless) driving incident occurred.*

Secondly, when addressing the significance of the distinction between official and unofficial acts, this Court observed in Trump that because the lower courts:

> categorically rejected *any* form of Presidential immunity, they did not analyze the conduct alleged in the indictment to decide which of it should be categorized as official and which unofficial. (p. 16) …
>
> This necessarily **factbound** analysis is best performed initially by the District Court. We therefore remand to the District Court to

> determine in the first instance whether this alleged conduct is official or unofficial. *Id.,* at p.30 (Emphasis added).

Thus, this Court deemed it appropriate to refrain from acting on that case in full for "the lack of factual analysis by the lower courts" *Id.,* at p.28. This approach comports entirely with what Justice Sotomayor wrote in the *Vullo* opinion while adding the additional point that Petitioners are perfectly willing to undertake:

> Of course, discovery in this case might show that the allegations of [claimants] are false, or that certain actions should be understood differently in light of newly disclosed evidence.

Petitioners respectfully request that in this case, with 15,000 credibly pleaded state-induced deaths at stake, the same logical process, indeed rule precedence, followed by this Court in *Trump* and in *Vullo* should pertain. To do otherwise via the Second Circuit's grant of qualified immunity at the motion-to-dismiss stage is to allow Respondents to continue to blandly disown any connection to the enormous and deathly consequences of their own COVID-19 actions.

In their Complaint, and throughout all the subsequent submissions, Petitioners have set forth factual assertions verified by contemporaneous news articles as well as subsequent state and federal investigations signifying the substantial campaign and other close working relationships between the Hospital Respondents and Respondent Cuomo in his capacity as Governor of the State of New York.

Political candidates and their campaign contributors are private actions, as distinct from official actions, thus making the case ever more urgently for full factual development in this instance with respect to both the State Respondents and the Hospital Respondent as to which of their activities (jointly and individually) fall into the distinct categories of official versus unofficial.

As noted, the Second Circuit rejected this factual prerequisite with the facile generalization that "a private party does not act under color of law when its asks public officials to intervene for its benefits at the expense of someone else." Pet. App.7a. But it is not as simple as that.

This Court ruled in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), that a private-sector party "transforms into a state actor subject to the Constitution when its actions are "fairly attributable" to the state. The same principle governed in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001)* where an association's "intertwined action" with a state governmental official, meant that it should also be "treated as that of the State itself."

The Supreme Court has fully set forth a series of "tests" to guide in the determination as to when the "public-function" carries over to private parties and in doing so has also consistently said that the analysis remains a highly fact-intensive.

More precisely, the *Lugar, et al.* decisions recognize four separate tests to evaluate when a private entity should be treated as a state actor: (1) the public function test; (2) the state compulsion test; (3) the nexus test; and, (4) the joint action test. *Lugar*, at 939.

This case meets all four of the above-referenced points with the "public function" consisting of the NYSDOH inherent responsibility to promulgate COVID-19 policies to protect public safety. The state "compulsion" test was, of course, the March 25, 2020 Directive. The "nexus" test was, as already outlined in public reports, the long-standing political/campaign ties between the State actors and Hospital Respondents, and the "joint action" test was overwhelmingly satisfied by way of the 288 meetings and conferences calls that occurred during the 30-day period focused around the March 25, 2020 issuance of the Directive.

But rather than allow what this Court has openly prescribed as a "necessarily factbound analysis," the District Court and Second Circuit conducted none of this analysis and shut down the process thereby denying Petitioners' access to the most important aspect of the judicial fact-finding process, namely "'under oath" depositions and document discovery.

In doing so the lower courts also acted in direct contradiction of *Matrixx*, where, in a similar medical context, this Court, after careful factual analysis, said: "We believe that these allegations suffice to "raise a reasonable expectation that discovery will reveal evidence" satisfying the materiality requirement, citing *Bell, supra.*

In suggesting a mandated remedy by way of remand to allow discovery, Petitioners are by no means implying that sufficient grounds do not already exist for a full ruling in their favor under the fully met principle that acting 'under color of law' does not require that persons be an

officer of the State when they are a willful participant in joint activity with the State or its agents." *U.S. v. Price*, 383 U.S. 787, 794 (1966).

Nor are Petitioners reluctant to cite the *Price* case involving, as it did, the willful infliction of death and thus proceeding under 18 U.S.C § 242 which is the criminal component of 42 U.S.C. § 1983 under which this case is also proceeding in part as a civil matter.

In *Price*, Justice Fortas further enunciated with respect to both the state officers and the private individuals deemed to be acting in concert with the state officers:

> the court again necessarily concluded that an offense under § 242 is properly stated by allegations of willful deprivation, under color of law, of life and liberty without due process of law. **We agree**. *Id*., 793. (Citations omitted.) (Emphasis added.)

Neither the Fifth Amendment, the Fourteenth Amendment, nor § 1983 contain a willfulness component making the *Price* precedent even more applicable here. Still, the Second Circuit (and the District Court) seemed to have some difficulty in grasping the concept that deprivation of life is a *per se* constitutional violation (whether direct or as directed) as Justice Fortas plainly said in *Price*: "No other result would be permissible."

More specifically, the Second Circuit opinion dismissed Petitioners' claims as to deprivation of life on constitutional grounds as somehow "circular." Pet. App.8a.

But what is circular about a poisonous element (i.e., sizable numbers of infected COVID-19 patients), being placed into the most crowded living conditions filled with the most vulnerable population amidst a death-inducing virus that is highly transmittable from person to person.

The March 25 Directive was the opposite of what should have been pursued, namely quarantining COVID-19 patients until they were no longer contagious. Instead, the collective action of all the Respondents via the March 25 Directive imposed against the will of the nursing home patients as expressed directly and through their families. As such, it comprised a deprivation of the nursing home residents' rights, privileges and immunities secured and protected by the Fifth and Fourteenth Amendments to the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of state law.

The specific lack of due process consisted of the State Respondents having completely turned over their public responsibility (and duty) to develop COVID-19 protections for the elderly and disabled nursing home residents to the Hospital Respondents. By their own admission, the State Respondents conceded that they "played no role" in the creation the March 25 Directive but handed that critical state function over to the Hospital Respondents which have never denied that they were the ones who fulfilled that function and did so to their own financial benefit.

That is an abuse, indeed an abandonment, of executive power by the State Respondents and, *ipso facto*, the exercise of state power by the Hospital Defendants.

When Respondent Zucker, who is both a lawyer and a doctor, was asked, pursuant to a congressional investigation: "When did you first see a copy" of the Directive, his astounding reply was as follows:

> "**So I actually do not remember seeing this advisory.**[15] I was there, along with others from the Governor's Office when the decision was made to issue the advisory, and then it was put it into motion…" *Id*., at 223. (Emphasis added.)

How does it not shock the conscious that the highest ranking officials in the State of New York were uninvolved in the creation of a government document issued under their names that resulted in the death of 15,000 New Yorkers?

Although this Court has said in *Filarsky v. Delia,* 566 U.S. 377, ___ (2012), "Distinguishing among those who carry out the public's business based on the nature of their particular relationship with the government also creates significant line-drawing problems," that is not the case in this situation. The State Respondents have fully admitted that they had nothing to do with designing the March 25 Directive and have never proffered any evidence of governmental input.

Even worse, as noted, Respondents Cuomo and DeRosa admitted to being unaware as to the most critical and lethal component of the Directive as it impacted the

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15. "Advisory" was the Respondents' term of usage regarding the March 25, 2020 document despite its usage of the phrases: "must comply," "prohibited," and "No resident shall be denied."

nursing home community except from the standpoint of eventually admitting that they worked to cover up the number of ensuing nursing home deaths.

Insofar as Respondent Zucker is concerned, his role in this disastrous episode appears to be nothing more than adding his name to top of the March 25 Directive and standing behind what was done under his auspices until that became impossible.

Regarding the Hospital Respondents, it is worth noting that their submissions below cited *Ginsberg v. Healey Car & Truck Leasing, Inc.* 189 F.3d 268, 272 (1999), as did the Second Circuit Summary Order Pet. App.10a. That is somewhat perplexing as that case from this Circuit states:

> "where a private party makes a 'legitimate request for assistance, the private party is not "jointly engaged" in the official's conduct as long as the official '**exercises independent judgment**' in how to respond" to the request." (Emphasis added.)[16]

In this case, there has never been any claim independent judgment advanced on the part of the State Defendants as indeed the State Respondents themselves having stipulated to their noninvolvement in the project and no evidence that any governmental subordinates may have done so.

In summary, the controlling legal principle is straightforward: while there is no prohibition on

16. See also *Malley v. Briggs*, 475 U.S. 335, 346 (fn. 9) (1986).

government officials relying on information or even the drafting of documents by lobbyists or other outside private parties, that line is breached when, as here, there is no evidence of critical knowledge, let alone independent evaluation by those duly charged with the sacrosanct responsibility to promote or, at a minimum, preserve the public welfare.

III. FOLLOWING THE MONEY

Given that half the COVID-19 deaths in New York occurred at nursing homes or other elder care facilities versus one-third or less in every other state,[17] the overriding question which arises is how this could occur in the city and state renowned for its medical research centers, prestigious teaching hospitals, and many of the largest municipal health care systems in the country.

Even more pointedly, how could the State of New York become, in fact, the worst offender during the entire Coronavirus crisis as per this article from the American Association of Retired Persons ("AARP") observing that New York "led the way" for other states to similarly go in the wrong direction:"

> "Some of the states hardest hit by the coronavirus are mandating that hospital patients recovering from COVID-19 be transferred to nursing homes, in some cases forcing uninfected residents to move elsewhere.

17. NEW YORK TIMES: Nearly One-Third of U.S. Coronavirus Deaths are Linked to Nursing Home (June 1, 2021).

> The result: Some of the country's frailest patients in need of long-term care are being moved around like dominos. And some nursing home residents are facing yet more risk of COVID exposure.
>
> - **New York** led the way in late March, with a sweeping directive intended to free up much-needed hospital beds by ordering nursing homes to take COVID-19-positive patients.
>
> - **Massachusetts** followed with its own order but has apparently dialed it back after criticism.
>
> - **New Jersey** instructed nursing homes that they could not reject medically stable patients diagnosed with COVID.
>
> - **California** issued its own stern order only to soften it a couple of days later, after an outcry from advocates for patients. AARP: *Nursing Homes Balk at COVID Patient Transfers From Hospitals* (April 21, 2020).

Starting first with the article's comment that the nursing home transfer policy was "to free up much-needed hospital beds." That premise, as it turned out, proved to be completely fallacious as even this early study demonstrates the disastrous New York decision-making process.

> "The importance of accurate early predictions applies even more to predictions for bed utilisation, where wrong expectations can

> lead to wrong decisions. For example, **a major mistake in New York** was the decision to send COVID-19 patients to nursing homes … Nursing homes are full of highly vulnerable people and outbreaks in nursing homes resulted in high fatalities. In New York alone, over 5,800 deaths[18] occurred in nursing homes. Eventually **this was a sizeable fraction of the COVID-19 death burden, and importantly, it might have been avoidable to a large extent**.[19] (Emphasis added.)

Also pertinent for present purposes, is this article pointing out that Massachusetts and California quickly pulled back on the initial New York "look-alike" plan in the face of public opposition. The same is true for New Jersey which did so in less than two weeks after its nursing home mandate was published on Mar. 31, 2020.

That was not the case, however, for the State of New York where 42 days had elapsed under the March 25 Directive and 9,000 COVID-19 hospital patients (most likely involuntarily themselves) transferred to the equally unwilling nursing home residents.[20]

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18. This article, published in August 2020, utilized numbers released before the disclosure of the Respondents' cover-up.

19. Eur. J. Epidemiology: *A Case Study in Model Failure? COVID-19 Daily Deaths and ICU Bed Utilisation Predictions in New York State* (Aug. 2020).

20. To be noted here as well, the lower courts' failure to grasp the broad range of constitutional deprivations inherent in the March 25 Directive.

And during this entire period including the cover-up with respect to almost one-half of the New York nursing home deaths, none of the Hospital Respondents spoke out in opposition. In fact, Respondent Dowling was frequently the opening presenter at the daily COVID-19 conferences held by Respondent Cuomo.

In their submissions below, the Hospital Respondents have virtually ignored those sections of the Respondents' Complaint (¶¶ 51,96-98,176c) relating to the financial inducements involved in clearing out present patients for the arrival of newly "anticipated" COVID-19 patients.

By way of backdrop, Respondent Northwell is a 501(c)(3) nonprofit manager of hospitals with more than 100,000 employees. It operates medical facilities throughout New York and Connecticut and also operates Northwell Holdings as a for-profit venture fund. Northwell's annual revenues in 2024 were $18.6 billion, up from $16.9 billion in 2023.

Northwell's Chief Executive Officer, Respondent Dowling, received approximately $10 million in annual compensation according to the organization's 2023 IRS information filing (Form 990). That report lists another 15 Northwell executives with annual compensation in amounts of $1 million or higher.

Respondent Raske's most recently reported annual compensation from the non-profit side of Respondent GNYHA was in excess of $3 million. But in addition to that, a recent news article reported that, from the for-profit of GNYHA's business operation, Respondent Raske drew $12.6 million in compensation in a single year. (NEW

YORK FOCUS: "How the Hospital Lobby Pummeling Hochul's Budget Brought in a Billion Dollars" (Feb. 29, 2024)[21]

In terms of the COVID-19 financial windfall in terms of caring for new Covid-19 patients had the industry's false projections turned out to be accurate, the first component was action on the part of the U.S. Congress to "increase the weighting factor that would otherwise apply to the diagnosis-related group to which the **discharge** is assigned by 20 percent." 42 U.S.C. § 1395ww(d)(4)(C). (Emphasis added.)

The important word in the foregoing language is the word "discharge" in the structure of the payment process. The Medicare/Medicaid reimbursement system functions under a Diagnosis-Related Group (DRG) payment system based on the anticipated and bundled care needed by patients during the hospital stay. The hospital is paid a fixed amount for the DRG, regardless of how much money it spends for the actual treatment prior to discharge. VERYWELL HEALTH: "*How a DRG Determines How Much a Hospital Gets Paid*" (Nov. 14, 2025)

The next important term by way of payment mechanics is "medically stable" which occurs when the treating hospital physician "believes, within a reasonable medical probability and in accordance with recognized medical standards that a patient is safe for discharge.

21. That article further observed "While the nonprofit Greater New York Hospital Association lobbied, a lucrative for-profit arm may have run up costs for hospitals."

This aspect of the payment process also relates to the particulars of the pending litigation in that the March 25 Directive uses this exact wording and, importantly, relegates its determination exclusively to the hospital:

> "Residents are deemed appropriate for return to a NH [nursing home] upon a determination by the **hospital physician or designee** that the resident is **medically stable** for return." (Emphases added).

Again, it is instructive (and, again, not coincidental) to observe the same wording in another one of the compulsory provisions set forth in the March 25 Directive:

> "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." (Emphasis added.)

These words are not there by accident and their usage in the Directive controls the when, how, and in what amount the Medicare/Medicaid reimbursements flow.

Fitting these components specifically into the March 25 Directive is a straightforward line of logic There was a universal, albeit erroneous, presumption at the time that the need for hospital beds would be overwhelming. In that situation, a COVID-19 patient under full Medicare or Medicaid certified bed occupancy including a ventilator, could then command almost $40,000 a day. But it would

only work to maximum income levels from a revenue standpoint by first clearing out as many beds as possible under and then moving them as quickly as possible under the DRG day limits.

Hence, the immediate implementation of the rapid transportation of almost 10,000 individuals enabling payment to New York hospitals for their COVID-19 patients "on their way out" followed by their departure creating space for the replacement inflow of patients (and revenue) as fast as possible per the terms of the sole control of hospital-designed March 25 Directive.

Had Respondents been permitted discovery, let alone a trial, there would have be hundreds of New York nursing home clinicians willing to attest in their firsthand knowledge that thousands of the transferred hospital patients were COVID infected and far from ready to be discharged under the mirage of being "medically stable."

If there were any doubts about the financial considerations driving the execution of COVID-19 policy in New York, one only has to look at how Respondents' non-use of the federally provided alternative discharge facilities, namely the quickly modified Javits Center and *U.S.S. Comfort* (Compl. ¶ 77). These discharge facilities were the worst-case scenario from the standpoint of the Hospital Respondents (and the adopted view of State Respondents) because their being federal facilities, the patient care was free and thus the revenue flow to the hospitals would have been nil.

Consequently, the transformed Javits Center folded up quickly with very few patients given its vast size as a

convention center. Likewise, the *U.S.S. Comfort* sailed off after only a 30-day stay with only 100 patients onboarded and 90% of its available bed space never used.

Once again, one must ask how it was even conceivable for medical professionals in the State of New York to promote a scheme that would ultimately render their COVID-19 remedies more lethal than the underlying disease they were duty bound to treat. And, by the same token, how could the political leadership of the State of New York turn their public responsibility (and duty) over to the private sector with no internal or other independent evaluation or scrutiny other than what was received from the Governor's largest campaign contributor.

IV. SUMMARY REVERSAL IS ALSO WARRANTED

In another health care-related case, this Court deemed summary reversal as appropriate where a decision is "both incorrect and inconsistent with clear instruction in the precedents of this Court." *Marmet Health Care Ctr., Inc. v. Brown,* 565 U.S. 530 (2012) (per curiam).

Moreover, nothing could portray the instant case procedurally closer than the *Vullo* decision where the Second Circuit appears to have twice disregarded the message of this Court regarding dismissal at the Motion to Dismiss "[g]iven the obligation to draw reasonable inferences" in the favor of the claimants. (At 195.)

In that same regard, Petitioners cannot fail to call attention to that portion of the District Court's opinion, while citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), that "a court need not first determine whether an officials'

actions violated a statutory or constitutional right in order to find that the qualified immunity doctrine applies," but then goes on to state that "it is only for exceptional cases." (Pet.App. 30a.)

Up to 15,000 New York nursing home residents died pursuant to the March 25, 2020 Directive issued and implemented under the power, purview and public corruption of the Respondents in this case, and that is not deemed "exceptional"?

That commentary alone coupled with a summary signoff by the Second Circuit warrants a summary reversal

CONCLUSION

In answer to the frequently posed question over this course of this Petition, namely how was it even conceivable for the political and medical leadership in the State of New York to promote a scheme that, in terms of actual impact, rendered their COVID-19 remedies more lethal than the underlying disease, the tragic answer is that the money factor overwhelmed every other consideration.

The real medical experts in the field of long-term care for the elderly and the ill (fn. 4, *supra*) warned immediately after the Directive was issued that:

> "This is a short-term and short-sighted solution that will only add to the surge in COVID-19 patients that require hospital care. Based upon what we currently know about how this virus can spread in institutional settings, the

> hospitalizations and case fatality rate, this action by a state will put the many frail and older adults who reside in nursing homes at risk."

But the Respondents deliberately allowed the death spiral they launched to continue, covered up the death toll and then published a false report through the NYSDOH in a further effort to hide their responsibility.

Regarding deprivation of life, the Second Circuit "circularity" argument could not be more erroneous. The March 25 COVID-19 Directive was the lineal, logical and causal event in the unnecessary, grotesquely painful, and, in most cases, solitary death of 15,000 New Yorkers.

By any standard, this pattern of behavior "shocks the conscience" and for this reason the Petition should be granted.

February 2, 2026

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 4, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-2856

DANIEL N. ARBEENY, AS THE ADMINISTRATOR FOR THE ESTATE OF NORMAN ARBEENY INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND SEAN S. NEWMAN,

Plaintiffs-Appellants,

v.

ANDREW M. CUOMO, MELISSA DEROSA, HOWARD A. ZUCKER, M.D., NORTHWELL HEALTH, INC., MICHAEL DOWLING, GREATER NEW YORK HOSPITAL ASSOCIATION, KENNETH RASKE,

*Defendants-Appellees.**

Filed November 4, 2025

* The Clerk of Court is respectfully directed to amend the caption accordingly.

Appendix A

Present:

JOSÉ A. CABRANES,
MICHAEL H. PARK,
BETH ROBINSON,
Circuit Judges.

Appeal from the judgment entered on January 10, 2025 of the United States District Court for the Eastern District of New York (Hall, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

On March 25, 2020, amid fears that Covid-related hospitalizations would exceed hospitals' capacity, the New York State Department of Health ("NYSDOH") promulgated an advisory prohibiting nursing homes from denying admission "solely based on a confirmed or suspected diagnosis of COVID-19." App'x at 399. On April 7, 2020, the NYSDOH promulgated a similar advisory to adult care facilities. These two advisories (the "Directives") were controversial, with critics warning that transferring asymptomatic patients from hospitals without testing would increase the risk of transmission in long term care facilities. The NYSDOH repealed the Directives on May 10, 2020, but by that time, over 9,000 Covid-positive patients had been transferred to long term care facilities, and over 15,000 patients in nursing homes and assisted living facilities ultimately died of Covid.

Appendix A

Plaintiffs are children of residents of nursing homes and adult care facilities who died after contracting Covid and after the NYSDOH issued the Directives. They brought claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 for deprivation of constitutional rights and rights under the Federal Nursing Home Reform Act, ("FNHRA"), as well as a wrongful death claim under New York law. They appeal from a January 10, 2025 order of the United States District Court for the Eastern District of New York (Hall, *J.*) granting Defendants' motions to dismiss. The district court dismissed the claims against Defendants Andrew M. Cuomo, Melissa DeRosa, and Dr. Howard A. Zucker (together, the "State Defendants") as barred by the doctrine of qualified immunity. It dismissed the Section 1983 claims against Defendants Greater New York Hospital Association, Kenneth Raske, Northwell Health, Inc., and Michael Dowling (together, the "Hospital Defendants") because it concluded that they did not act under color of state law, and it dismissed the Section 1985 claims for failing to plead animus. The district court declined to exercise supplemental jurisdiction over Plaintiffs' remaining state-law claims. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

"We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Dolan v. Connolly*, 794 F.3d 290, 293 (2d Cir. 2015). And we review a district court's decision not to exercise supplemental jurisdiction over

state-law claims for abuse of discretion. *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62, 84 (2d Cir. 2013).

I. The State Defendants

"The doctrine of qualified immunity protects 'government officials performing discretionary functions' from 'liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Francis v. Fiacco*, 942 F.3d 126, 139 (2d Cir. 2019) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). When a defendant invokes qualified immunity, courts consider whether a plaintiff has pled facts showing "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow*, 457 U.S. at 818). "The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 613 (2015). Instead, "clearly established law must be particularized to the facts of the case." *Francis*, 942 F.3d at 146 (quotation marks omitted).

"[I]t is not necessary to find a 'case directly on point' in order to show that the law governing a plaintiff's claim is clearly established." *Terebesi v. Torreso*, 764 F.3d 217, 237 n.20 (2d Cir. 2014) (quoting *al-Kidd*, 563 U.S. at 741). But "[t]he rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (cleaned up). Even if a plaintiff's rights are "clearly established," an official "will still be entitled to qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights." *Outlaw v. City of Hartford*, 884 F.3d 351, 367 (2d Cir. 2018).

The district court concluded that Plaintiffs' claims against the State Defendants failed to identify rights that were clearly established such that reasonable officials would have known that the Directives were unlawful. We agree and affirm the dismissal of the claims against the State Defendants.

Plaintiffs first argue that the FNHRA clearly establishes rights relating to the quality of treatment and conditions of nursing home residents. They argue that these rights are clearly established by "[t]he plain statutory language of the FNHRA" and by the Supreme Court's opinion in *Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166, 180-81 (2023). We disagree.

The Supreme Court held in *Talevski* that the provisions of the FNHRA that "refer to rights of nursing-home residents to be free from unnecessary physical or chemical restraints and to be discharged or transferred only when certain preconditions are satisfied" can be enforced through a private right of action under Section 1983. 599 U.S. at 171. The FNHRA enumerates rights of nursing home residents that "[a] nursing facility must protect and promote." 42 U.S.C. § 1396r(c)(1)(A). Here, Plaintiffs seek to enforce FNHRA rights against the State Defendants. But it was and is not clearly established that *government officials* have a legal duty to protect the rights set forth in the FNHRA. State and federal government officials have a clear statutory role as the *enforcer* of rights conferred by the statute. *See Talevski*, 599 U.S. at 182 (describing how state and federal officials must, among other responsibilities, inspect nursing facilities for compliance with FNHRA standards and may sanction noncompliant facilities, including through exclusion from Medicaid). But nothing in the text of the FNHRA, its regulations, or caselaw would have put a reasonable official on notice that those rights of residents as against nursing homes applied to government officials.

Plaintiffs' constitutional claims fare no better. They assert that there are clearly established rights to be free from cruel, unhuman, or degrading treatment; to be free from state-created danger; to safe conditions; to bodily integrity; and to life. But these rights are articulated at too high a level of generality for qualified immunity purposes. "Qualified immunity is no immunity at all if clearly established law can simply be defined as the right

to be free from a given constitutional injury." *Clark v. Valletta*, No. 23-7377-cv, 2025 WL 2825324, at *6 (2d Cir. Oct. 6, 2025) (quotation marks omitted). The rights Plaintiffs assert are defined too broadly and rely on cases involving very different facts. Nor would a reasonable official have known that he was violating such rights by promulgating the Directives in the early months of the Covid pandemic.

Plaintiffs cannot point to any cases involving rights to be free from cruel treatment or state-created danger in similar circumstances. Plaintiffs' cases identifying the right to be free from cruel treatment involve very different factual scenarios, such as kidnapping and torture by military forces. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Paul v. Avril*, 901 F. Supp. 330, 331 (S.D. Fla. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 169 (D. Mass. 1995). And Plaintiffs' state-created danger cases are similarly inapposite because they involve situations in which "a government official takes an affirmative act that creates an opportunity for a third party to harm a victim (or increases the risk of such harm)." *Lombardi v. Whitman*, 485 F.3d 73, 80 (2d Cir. 2007). Neither doctrine has been applied to a public-health crisis or to the unintentional conduct of third parties like returning hospital patients.

The cases recognizing a right to safe conditions also arise out of very different circumstances, typically when a plaintiff is *involuntarily* confined by the state. *See Brooks v. Giuliani*, 84 F.3d 1454, 1466 (2d Cir. 1996) (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)).

Nor have Plaintiffs identified analogous cases involving the right to bodily integrity. The cases examining this right typically arise in the inapplicable context of consent to medical procedures. *See Blouin ex rel. Est. of Pouliot v. Spitzer*, 356 F.3d 348, 359-60 (2d Cir. 2004). The cases Plaintiffs cite are district court cases relating to different conditions, the dangers of which are well understood, unlike Covid in Spring 2020. *See Stewart v. Metro. Transp. Auth.*, 566 F. Supp. 3d 197, 208-10 (E.D.N.Y. 2019) (lead paint); *Davis v. N.Y. City Hous. Auth.*, 379 F. Supp. 3d 237, 257 (S.D.N.Y. 2019) (extreme cold).

Similarly, Plaintiffs have not shown that the Directives violate a clearly established right to life. The cases Plaintiffs cite stand for the proposition that "*when a constitutional violation* caused the death of a victim," a plaintiff may bring suit under Section 1983 to recover for loss of life. Appellants' Br. at 32 (quoting *Berry v. City of Muskogee*, 900 F.2d 1489, 1501 (10th Cir. 1990)) (emphasis added). It would be circular to conclude that this clearly establishes the right Plaintiffs assert here.

Finally, even if Plaintiffs had identified clearly established rights, the State Defendants "will still be entitled to qualified immunity if it was objectively reasonable for [them] to believe that [their] acts did not violate those rights." *Outlaw*, 884 F.3d at 367. The Directives were promulgated in the early months of the Covid pandemic when "the Supreme Court ha[d] not addressed the limits imposed by due process on a State's power to manage infectious diseases." *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 190 (2d Cir. 2020).

Under the unique circumstances of this case, a reasonable official could have believed that the Directives were a legitimate exercise of government power at the time they were implemented. Accordingly, the State Defendants are entitled to qualified immunity.

II. The Hospital Defendants

Plaintiffs appeal the dismissal of their Section 1983 and Section 1983 conspiracy claims against the Hospital Defendants.[1] A Section 1983 claim may be brought only "against state actors or private parties acting under the color of state law." *Betts v. Shearman*, 751 F.3d 78, 84 (2d Cir. 2014) (quotation marks omitted). As relevant here, a private party acts under the color of state law for purposes of a Section 1983 claim "when the private actor is a willful participant in joint activity with the State or its agents." *Id.* (quotation marks omitted). Although a Section 1983 conspiracy claim is distinct from one of joint action, the analysis "is very similar." *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002).

To support their theory of joint action, Plaintiffs allege that the Directives were promulgated "at the behest of the Hospital Defendants," that the Hospital Defendants provided "massive campaign contributors [sic] to Public Defendant Cuomo" and his allies, and that the State Defendants had at least 288 meetings with "the hospital lobby" leading up to the Directives. Appellants' Br. at 46-

1. Plaintiffs also brought claims under Section 1985, but they do not challenge the dismissal of those claims on appeal.

47. Plaintiffs also allege that Defendants Raske and the Greater New York Hospital Association drafted legislation providing immunity for health care facilities and staff for harm caused by providing services to Covid patients.

A private party does not act under color of state law when it asks public officials to intervene for its benefit at the expense of someone else. On the contrary, "Section 1983 does not impose civil liability on persons who merely stand to benefit from an assertion of authority under color of law." *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 273 (2d Cir. 1999).[2] We thus conclude that the Hospital Defendants did not act under color of state law and affirm the district court's dismissal of the federal claims against them.

III. State Law Claims

The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over Plaintiffs' state-law wrongful death claims. Plaintiffs ask us to reinstate their state-law claims if we reverse the dismissal of their federal claims, but do not suggest that the district court otherwise erred. We thus affirm the dismissal of Plaintiffs' state-law claims.

* * *

2. Although Plaintiffs allege that the Hospital Defendants made political contributions, they do not allege that these contributions were bribes in exchange for the Directives. *Cf. Dennis v. Sparks*, 449 U.S. 24, 28 (1980) (parties who bribed a judge for an injunction "were acting under color of state law").

We have considered Plaintiffs' remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

s/Catherine O'Hagan Wolfe

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED JANUARY 10, 2025

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

22-cv-02336 (LDH) (LB)

DANIEL N. ARBEENY, AS THE ADMINISTRATOR OF THE ESTATE OF NORMAN ARBEENY (DECEASED) INDIVIDUALLY,

Plaintiff,

SEAN S. NEWMAN, AS THE ADMINISTRATOR OF THE ESTATES OF MICHAEL J. NEWMAN (DECEASED) AND DOLORES D. NEWMAN (DECEASED) INDIVIDUALLY, AND ON BEHALF OF OTHERS,

Plaintiffs,

v.

ANDREW M. CUOMO, MELISSA DEROSA, HOWARD A. ZUCKER, M.D., GREATER NEW YORK HOSPITAL ASSOCIATION, KENNETH RASKE, NORTHWELL HEALTH, INC., MICHAEL DOWLING, AND JOHN DOES A-Z,

Defendants.

Filed January 10, 2025

Appendix B

MEMORANDUM AND ORDER

LASHANN DEARCY HALL, United States District Judge:

Daniel Arbeeny, as the Administrator of the Estate of Norman Arbeeny and Sean S. Newman, as the Administrator of the Estates of Michael J. Newman and Dolores D. Newman individually, and on behalf of others ("Plaintiffs"), bring the instant action against Andrew M. Cuomo, former Governor of New York, Melissa DeRosa, former Chief of Staff to Governor Cuomo, Dr. Howard A. Zucker, former Commissioner of the New York State Department of Health ("NYSDOH") (collectively, the "State Defendants"), Greater New York Hospital Association ("GNYHA"), Kenneth Raske, President and Chief Executive Officer of GNYHA (together, "GNYHA Defendants"), Northwell Health, Inc. ("Northwell"), Michael Dowling, President and Chief Executive Officer of Northwell (together, "Northwell Defendants") (together with GNYHA Defendants, the "Hospital Defendants"), and John Does A-Z, asserting claims pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985 for deprivation of their constitutional rights and rights under the Federal Nursing Home Reform Act ("FNHRA"). Plaintiffs also assert a wrongful death claim under New York Estate Powers & Trust Law ("NYEPT") § 5-4.1. Defendants each move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint in its entirety.

Appendix B

BACKGROUND

In March 2020, when a rise in COVID-19-related hospitalizations began to put a strain on New York State's healthcare infrastructure, state officials determined that there was an "urgent need" to expand hospital capacity to meet the demand for patients with COVID-19 requiring acute care. (*See* Glavin Decl. Supp. Cuomo's Mot. Dismiss ("Glavin Decl."), Ex. 1 ("NH Advisory") at 1, ECF No. 68-1.)[1] Governor Cuomo directed hospitals to immediately increase bed capacity by at least 50%. (Second Am. Compl. ("SAC") ¶ 52.) Kenneth Raske and Micheal Dowling, on behalf of GNYHA and Northwell respectively, spoke with Cuomo and his team on multiple occasions. (*Id.* ¶ 49.) During those discussions, they urged Cuomo to issue policy on transfers of patients to nursing homes. (*Id.* ¶ 52.) Among other things, Raske and Dowling indicated such policy was necessary because the hospitals couldn't afford to house recovered nursing-home residents long-term and models showed they soon "could be swamped." (*Id.* ¶ 52–53.)

On March 25, 2020, the NYSDOH issued an advisory to nursing homes (the "NH Advisory") directing that "[n]o

1. In rendering its decision on the motions to dismiss, the Court has considered the NH Advisory, the ACF Advisory, and the NYSDOH Report, which were all attached to Defendant Cuomo's motion to dismiss and were incorporated by reference in the complaint. On a motion to dismiss, the Court "may consider documents that 'are attached to the complaint,' 'incorporated in it by reference,' 'integral' to the complaint, or the proper subject of judicial notice." *United States v. Strock*, 982 F.3d 51, 63 (2d Cir. 2020) (quoting *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007)).

resident shall be denied re-admission or admission to the [nursing home] solely based on a confirmed or suspected diagnosis of COVID-19" and that nursing homes were "prohibited from requiring a hospitalized resident who is determined medically stable, under the advisory, to be tested for COVID-19 prior to admission or readmission." (NH Advisory at 1.) Hospital discharge planners were to confirm that a resident was determined to be "medically stable for return" by a hospital physician and provide "[c]omprehensive discharge instructions" to the nursing homes prior to the transfer. (*Id.*) Nursing homes were expected to maintain standard precautions and make "environmental cleaning" a priority. (*Id.*) On April 7, 2020, the NYSDOH issued a similar advisory to adult care facilities (the "ACF Advisory"), prohibiting such facilities from denying admission and readmission to COVID-19-recovered residents. (Glavin Decl., Ex. 2 ("ACF Advisory") at 1, ECF No. 68-2.) The ACF Advisory further directed that "[a]ny denial of admission or re-admission must be based on the ACF's inability to provide the level of care required for the prospective resident, pursuant to the hospital's discharge instructions." (*Id.*) According to the second amended complaint, as a result of the NH Advisory and the ACF Advisory (together, the "2020 Advisories"), over 9,000 COVID-19-positive residents were admitted to nursing homes and adult care facilities, and over 15,000 of their residents died from COVID-19. (SAC ¶¶ 75–76.)[2]

2. On July 6, 2020, the NYSDOH issued a report, later revised on February 11, 2021, assessing the factors associated with COVID-19 infections and fatalities in nursing homes during the pandemic. (Glavin Decl., Ex. 3 ("NYSDOH Report") at 1, ECF No. 68-3.) The revised report concluded that approximately 6,326

The 2020 Advisories were withdrawn on May 10, 2020. (*Id.* ¶ 75.)

Plaintiffs are the children of decedents Norman Arbeeny, Michael J. Newman, and Dolores D. Newman (collectively, the "Decedents"). (SAC ¶¶ 1, 4, 7.) The Decedents were residents of nursing homes and adult care facilities in the State of New York who died between March and April 2020 after contracting COVID-19 and after the NYSDOH issued the 2020 Advisories. (*Id.* ¶¶ 1–2, 4–5, 7–8, 50.)

Norman Arbeeny, aged 89, was admitted to Cobble Hill Health Center ("CHHC"), a nursing home in Brooklyn, New York on March 20, 2020. (*Id.* ¶¶ 20–23.) At some point before his release from CHHC on April 8, 2020, Mr. Arbeeny developed a low-grade fever. (*Id.* ¶¶ 25–26.) Upon Mr. Arbeeny's discharge from CHHC, Mr. Arbeeny was placed under 24-hour at-home nursing

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COVID-19-positive residents were admitted to nursing homes and adult care facilities between March 25, 2020 and May 8, 2020, that there had been 6,432 COVID-19 fatalities in nursing homes as of June 26, 2020, and that the data did not support "[a] causal link between the admission policy and infections/fatalities." (*Id.* at 4–5, 7.) The report instead attributed these infections and fatalities to COVID-19 transmission from nursing home employees, with the rate of employee infections corresponding to the spread of COVID-19 throughout the most impacted regions in the state. (*Id.* at 3.) Some state officials and media outlets reported that Cuomo, DeRosa, and the NYSDOH made a concerted effort to downplay the number of COVID-19 deaths in nursing homes and adult care facilities and failed to report "at least 4,100" additional fatalities from April 2020 to February 2021. (SAC ¶¶ 130–39.)

care. (*Id.* ¶ 27.) Mr. Arbeeny's symptoms began to worsen, and he was tested for COVID-19 on April 20, 2020. (*Id.* ¶ 29.) Mr. Arbeeny died the next day, on April 21, 2020. (*Id.* ¶ 30.) Later that day, test results indicated that Mr. Arbeeny was positive for COVID-19. (*Id.* ¶ 31.)

Michael J. Newman, aged 84, was admitted to Grandell Rehabilitation and Nursing Center ("GRNC"), a nursing home in Long Beach, New York, on February 7, 2020. (*Id.* ¶¶ 32, 35.) At the time of his admission Mr. Newman "was in declining health." (*Id.* ¶ 34.) On March 29, 2020, Mr. Newman developed a fever, and his lungs began to fill with fluid. (*Id.* ¶ 37.) Mr. Newman died that same day and was posthumously diagnosed with COVID-19. (*Id.*)

Dolores D. Newman, aged 78, was admitted to Long Island Living Center ("LILC"), an adult care facility in Long Island, New York, on December 26, 2019. (*Id.* ¶¶ 38, 41.) On April 10, 2020, Ms. Newman developed a cough and a headache, and had difficulty breathing. (*Id.* ¶ 43.) On April 11, 2020, Ms. Newman was transported to a hospital and diagnosed with COVID-19. (*Id.*) Ms. Newman died at the hospital on April 14, 2020. (*Id.* ¶ 44.)

STANDARD OF REVIEW

A complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible when the alleged

facts allow the court to draw a "reasonable inference" of a defendant's liability for the alleged misconduct. *Iqbal*, 556 U.S. at 678. While this standard requires more than a "sheer possibility" of a defendant's liability, *id.*, "[i]t is not the [c]ourt's function to weigh the evidence that might be presented at trial" on a motion to dismiss. *Morris v. Northrop Grumman Corp.*, 37 F. Supp. 2d 556, 565 (E.D.N.Y. 1999). Instead, "the [c]ourt must merely determine whether the complaint itself is legally sufficient, and in doing so, it is well settled that the [c]ourt must accept the factual allegations of the complaint as true." *Id.* (internal citation omitted).

DISCUSSION

I. THE HOSPITAL DEFENDANTS

A. Section 1983 Claims

Plaintiffs raise Section 1983 and Section 1983 conspiracy claims against the Hospital Defendants. (SAC ¶¶ 171–235.) To state a claim under Section 1983, a plaintiff must plausibly allege that the conduct at issue was "committed by a person acting under color of state law" and that it "deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Cornejo v. Bell*, 592 F.3d 121, 127 (2d. Cir. 2010) (citing *Pitchell v. Callan*, 13 F.3d 545, 547 (2d Cir. 1994)). "To support a claim against a private party on a [Section] 1983 conspiracy theory, a plaintiff must show (1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional

injury; and (3) an overt act done in furtherance of that goal causing damages." *Lee v. L. Off. of Kim & Bae, PC*, 530 F. App'x 9, 9–10 (2d Cir. 2013) (citing *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324–25 (2d Cir. 2002)). The Hospital Defendants argue that Plaintiffs' Section 1983 and Section 1983 conspiracy claims against them must be dismissed because Plaintiffs fail to plead that the Hospital Defendants, as private parties, were acting under the color of state law or that they acted in concert with the State Defendants to inflict an unconstitutional injury. (GNYHA Defs.' Mot. Dismiss ("GNYHA Mot.") at 10–16, 23, ECF No. 74; Northwell Defs.' Mot. Dismiss ("Northwell Mot.") at 6–15, ECF No. 65.) The Court agrees.

Acts of a private party can only serve to sustain a Section 1983 claim if the challenged action is "fairly attributable to the state" or if the non-state actor was a "'willful participant in joint activity' with the state or its agents." *Logan v. Bennington Coll. Corp.*, 72 F.3d 1017, 1027 (2d Cir. 1995) ("[A] state action occurs where the challenged action of a private party is fairly attributable to the state.") (internal citation and quotations omitted); *Betts v. Shearman*, 751 F.3d 78, 84 (2d Cir. 2014) ("[A] private actor acts under color of state law when the private actor is a willful participant in joint activity with the State or its agents.") (internal citation and quotations omitted). Otherwise, private conduct, no matter how wrongful, is not "under color of state law" and, as such, does not fall within the ambit of a Section 1983 claim. *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999).

Appendix B

Plaintiffs do not dispute that the Hospital Defendants are private entities whose actions cannot be attributable to the state. Instead, Plaintiffs argue that the Hospital Defendants acted under color of state law because they actively participated, or conspired to participate, in the issuance of the 2020 Advisories, alongside the State Defendants. (Pl.'s Opp'n Hospital Defs.' Mot. Dismiss ("Pl.'s Hospital Defs.' Opp'n") at 4–13, ECF No. 79.)

Although a Section 1983 conspiracy claim is distinct from one of joint action, courts in this circuit typically conduct the same analysis in evaluating these claims. *See Betts*, 751 F.3d 78, 84 n.1 (2d Cir. 2014) ("A Section 1983 conspiracy claim is distinct from one of joint action."); *Ciambriello*, 292 F.3d at 324–25 (holding that the analysis of the plaintiff's Section 1983 conspiracy claim "is very similar to the analysis performed" for the Section 1983 claim and upholding the dismissal of both claims for the same reasons); *see also Lee*, 530 F. App'x at 9–10 (applying the same analysis to evaluate whether the plaintiff sufficiently alleged joint action or conspiracy by a private party under Section 1983); *Spear v. Town of W. Hartford*, 954 F.2d 63, 68 (2d Cir. 1992) (same); *Rice v. City of New York*, 275 F. Supp. 3d 395, 403 (E.D.N.Y. 2017) ("Although a Section 1983 conspiracy claim is distinct from one of joint action the concepts of acting 'jointly' or in 'conspiracy with' state actors are intertwined.") (internal citations and quotations omitted); *Stewart v. Victoria's Secret Stores, LLC*, 851 F. Supp. 2d 442, 445 (E.D.N.Y. 2012) (The concepts of acting "jointly" or in "conspiracy with" state actors are intertwined . . . Even if considered as conceptually separate theories, both require the pleading

of facts sufficient to show something more than conclusory allegations.) That is, to sufficiently plead either joint activity or conspiracy with state actors, a plaintiff must allege specific facts that set forth a plausible theory of agreement and concerted action between the private party and the state actor. *See Stewart*, 851 F. Supp. 2d at 445. Thus, a complaint must allege facts demonstrating that the private party and the state actor "share[d] some common goal to violate the plaintiff's rights" and "that the private entity acted in concert with the state actor to commit an unconstitutional act." *Betts*, 751 F.3d at 84–85 (quoting *Spear*, 954 F.2d at 68) (internal quotations omitted). To support their claims, Plaintiffs direct the Court to eleven allegations that Plaintiffs contend sufficiently plead concerted action between the Hospital Defendants and the State Defendants. (Pl.'s Hospital Defs.' Opp'n at 5–7.) They do not.

First, Plaintiffs direct the Court to the purported allegations that in "early 2020," Defendant Cuomo appointed Defendant Dowling to head the Medicaid Redesign Team and, at the same time, Defendant Raske was serving as a "member of the state commission."[3] (*Id.* at 5.) As a threshold matter, Plaintiffs failed to raise these allegations in their Second Amended Complaint and, as such, the Court need not consider them. *Peacock v. Suffolk Bus Corp.*, 100 F. Supp. 3d 225, 231 (E.D.N.Y. 2015) ("It is well-settled that a plaintiff cannot amend his complaint by asserting new facts or theories for the first

3. Plaintiffs fail to specify the "state commission" of which Raske is alleged to be a member.

time in opposition to a motion to dismiss . . . Such claims are not properly before the Court and the Court need not consider them." (internal citations and alterations omitted)). Nonetheless, these allegations cannot support an inference of concerted action to violate the Decedents' constitutional rights. That is, Plaintiffs do not allege that the Medicaid Redesign Team or the "state commission" were involved in the issuance of the 2020 Advisories. And, allegations of conduct that is unrelated to the state's alleged unlawful actions cannot support Section 1983 claims against a private party. *See Hollman v. Cnty. of Suffolk*, No. 06-CV-3589, 2011 U.S. Dist. LEXIS 63882, 2011 WL 2446428, at *6 (E.D.N.Y. June 15, 2011) ("[A]ctivities [that] are wholly unrelated to the alleged injury at issue in the instant case . . . are inapplicable to the state action analysis.")

Second, Plaintiffs point to allegations that, throughout March and April 2020, Defendant Cuomo's schedule reflected 228 meetings or calls "with the hospital lobby" and that, in the month leading up to the issuance of the NH Advisory, and shortly thereafter, Defendants Raske and Dowling met with Cuomo on several occasions. (Pls.' Hospital Defs. Opp'n at 5–6.) Notably, Plaintiffs do not allege that any of the 228 meetings and calls between Cuomo and the Hospital Defendants were related to the issuance of the 2020 Advisories. Of course, "[a]lleging merely that a private party regularly interacts with a state actor does not create an inference of agreement to violate a plaintiff's rights." *Morpurgo v. Inc. Vill. of Sag Harbor*, 697 F. Supp. 2d 309, 338 (E.D.N.Y. 2010), *aff'd*, 417 F. App'x 96 (2d Cir. 2011) (internal citations and quotations omitted).

Without more, the fact that the Hospital Defendants and Cuomo communicated regularly around the time that the 2020 Advisories were issued is insufficient to plead that they were acting in concert with the State Defendants. *See Bryant v. Steele*, 93 F. Supp. 3d 80, 91–92 (E.D.N.Y. 2015) (citing *Fisk v. Letterman*, 401 F. Supp. 2d 362, 377 (S.D.N.Y. 2005)) ("[M]ere '[c]ommunications,' even regular ones, 'between a private and a state actor, without facts supporting a concerted effort or plan between the parties, are insufficient to make the private party a state actor.'").

Third, Plaintiffs highlight allegations regarding the influence of the hospital lobby on the Cuomo administration and its health policy. (Pls.' Hospital Defs. Opp'n at 5–6.) For example, Plaintiffs point to allegations that the hospital lobby donated significant sums to Cuomo's campaign and successfully advocated for legislation benefitting health care facilities. (*Id.*) Plaintiffs also direct the Court to news reports that the "hospital lobby was pleading with Cuomo to issue policy on transfers to nursing homes" and that Defendant Raske "contacted Mr. Cuomo's team for help with nursing homes" days before Cuomo's approval of the NH Advisory. (*Id.*) These allegations at most suggest that the Hospital Defendants solicited the State Defendants to issue the 2020 Advisories through lobbying efforts. However, mere solicitation of state actors without participation in state activity does not amount to concerted action. *See Sherman v. City of New York*, No. 18-CV-5359, 2019 U.S. Dist. LEXIS 83010, 2019 WL 2164081, at *6 (E.D.N.Y. May 16, 2019) ("A private party does not act under color of law when he merely elicits but does not join in an exercise of official state authority.") (quoting *Serbalik*

v. Gray, 27 F. Supp. 2d 127, 131–32 (N.D.N.Y. 1998)) (internal quotations and alterations omitted); *see also Missere v. Gross*, 826 F. Supp. 2d 542, 567–68 (S.D.N.Y. 2011) (holding that lobbying and pressuring officials to take action was not sufficient to establish that a private party was a state actor). Where a state actor "exercises independent judgment in how to respond to a private party's legitimate request for assistance, the private party is not 'jointly engaged' in the [official's] conduct." *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 272–73 (2d Cir. 1999) (internal citation omitted) (holding that "Section 1983 does not impose civil liability on persons who merely stand to benefit from an assertion of authority under color of law.").

Fourth, Plaintiffs point to allegations that, after the 2020 Advisories were withdrawn, Cuomo enlisted Dowling, Raske, and two other individuals to provide a report on the impact of the 2020 Advisories on nursing homes, and that Cuomo endorsed a book written by Defendant Dowling about the pandemic. (Pls.' Hospital Defs.' Opp'n at 5–6.) However, like the allegations regarding Dowling's appointment to the Medicaid Redesign Team and Raske's involvement in the "state commission," these allegations are untethered to the wrongful conduct alleged in this case. Indeed, Plaintiffs make no effort to tie Dowling's book, or Cuomo's endorsement of it, to the issuance of the 2020 Advisories. Instead, Plaintiffs curiously rely on conduct that post-dates the issuance and withdrawal of the 2020 Advisories in an effort to convince the Court that the Hospital Defendants acted in concert with the State Defendants. (*See id.*) It does not. It is axiomatic that

conduct post-dating the alleged constitutional violation cannot support an inference that a defendant acted in concert with state officials or jointly participated in said violation.

B. Section 1985 Claim

Plaintiffs' Section 1985 claim fares no better. To support a conspiracy claim pursuant to Section 1985, Plaintiffs must allege: "(1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States." *Gray v. Town of Darien*, 927 F.2d 69, 73 (2d Cir. 1991). Importantly, to make out a Section 1985 claim Plaintiffs must plead that the alleged conspiracy was motivated by "some racial, or perhaps otherwise class-based, invidious discriminatory animus." *United Bhd. of Carpenters & Joiners of Am., Loc. 610, AFL-CIO v. Scott*, 463 U.S. 825, 835, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983). Here, Plaintiffs do not make any allegations that would support an inference that any Defendant was motivated by discriminatory animus toward elderly individuals. Plaintiffs do not allege that the Defendants "selected their course of action because of" the Decedents' age. *See Thomas v. Roach*, 165 F.3d 137, 147 (2d Cir. 1999). Nor do Plaintiffs refer to any statements made by the Defendants that would suggest that their actions were motivated by the Decedents' age. *See Khan v. City of New York*, No. 14-CV-4665, 2016 U.S. Dist.

LEXIS 16558, 2016 WL 1128298, at *7 (E.D.N.Y. Feb. 1, 2016), *report and recommendation adopted*, No. 14-CV-4665, 2016 U.S. Dist. LEXIS 37080, 2016 WL 1192667 (E.D.N.Y. Mar. 21, 2016). In fact, Plaintiffs' allegations suggest that the whatever motivation that the Hospital Defendants had was "financial, not discriminatory," which is insufficient to support a Section 1985 conspiracy claim. *See Doe v. Fenchel*, 837 F. App'x 67, 69 n.2 (2d Cir. 2021). Indeed, Plaintiffs allege that the Defendants' actions were "financially motivated at their core" and that their "real motivation" for soliciting the issuance of the 2020 Advisories was the fact that hospitals were paid significantly more under Medicare for patients with COVID-19 than those without. (*See* SAC ¶ 97, 176; *see also* ¶¶ 95–96, 131, 225.) Accordingly, Plaintiffs' Section 1985 claims against the Defendants must be dismissed. *See Panchitkhaew v. Cuomo*, No. 19-CV-6206, 2024 U.S. Dist. LEXIS 58250, 2024 WL 1347518, at *3 (E.D.N.Y. Mar. 29, 2024) (dismissing Section 1985 claim where Plaintiffs failed to assert any allegation that might support an inference that Defendants conspired to deprive a protected class of any specified constitutional rights).

II. THE STATE DEFENDANTS

Plaintiffs' remaining Section 1983 claims against the State Defendants are precluded by the doctrine of qualified immunity. Qualified immunity shields government officials performing discretionary functions from suits for money damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v.*

Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The doctrine is intended to "give[] government officials breathing room to make reasonable but mistaken judgments" and "protect[] all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (citing *Malley v. Briggs*, 475 U.S. 335, 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)) (internal quotations omitted). As such, state officials are entitled to qualified immunity under Section 1983 unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *D.C. v. Wesby*, 583 U.S. 48, 62–63, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)).[4]

In evaluating whether to grant qualified immunity, courts have historically first assessed whether the state actor violated a federal statutory or constitutional right before determining whether that right was clearly

4. "[Q]ualified immunity is 'an immunity from suit rather than a mere defense to liability [and] it is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). As such, the availability of qualified immunity should be decided by a court "[a]t the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991); *see also Pearson*, 555 U.S. at 231–32 ("[T]he driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery." (internal citations and quotations omitted)).

established at the time of the official's alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). This protocol, known as the "*Saucier* protocol," was born out of the Supreme Court's 2001 decision in *Saucier v. Katz*, which expressly held that, for courts conducting a qualified immunity analysis, the question of whether a plaintiff alleged that an official's conduct violated a constitutional right "must be the initial inquiry." *See id.* The Court in *Saucier* reasoned that "[i]n the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established." *Id.* This explication of legal principles necessarily facilitates the elaboration of the law from case to case. *Id.*

Some eight years after *Saucier*, the Supreme Court opened the door for courts to depart from its protocol. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). That is, in *Pearson v. Callahan*, the Supreme Court concluded that a court need not first determine whether an official's actions violated a statutory or constitutional right in order to find that the qualified immunity doctrine applies. *See id.* Instead, according to the Court, "[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.*; *see also Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 186 (2d Cir. 2020) ("[A] court need not determine whether a defendant violated a

plaintiff's rights if it decides that the right was not clearly established."). Such latitude avoids, what is in some cases, "an essentially academic exercise" where the resolution of the constitutional question is not necessary to find that qualified immunity applies. *See Pearson*, 555 U.S. at 237–38. This is particularly so when (1) "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right," (2) "the constitutional question is so factbound that the decision provides little guidance for future cases," (3) "[a] decision on the underlying constitutional question in a Section 1983 damages action . . . may have scant value when it appears that the question will soon be decided by a higher court," (4) "resolution of the constitutional question requires clarification of an ambiguous state statute," (5) at the pleading stage, "the precise factual basis for the plaintiff's claim or claims may be hard to identify" and thus "the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed," (6) "the briefing of constitutional questions is woefully inadequate" which creates a "risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented," or (7) "a court [can] rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question [of] whether the relevant facts make out a constitutional question at all." *See id.* at 237–40 (citations and quotations omitted).

Admittedly, this Court has not previously accepted the Supreme Court's invitation to bypass the inquiry into whether challenged conduct violates a federal statutory

or constitutional right. The reason for this is consistent with the reasoning articulated by the Supreme Court in *Saucier*. Inquiry into whether a statutory or constitutional right has been violated is necessary to clearly establish the law that will serve to protect against potential future abuses by state actors. *Saucier*, 533 U.S. at 201 (holding that "[t]he law might be deprived of [the elaboration of a clearly established right] were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."). As such, in this Court's opinion, it is only in the exceptional case where the *Saucier* protocol should be abandoned in favor of the one articulated in *Pearson*. This is such a case. Accordingly, the Court's inquiry here begins with whether Plaintiffs' claimed constitutional rights and statutory rights under the FNHRA were clearly established when the 2020 Advisories were issued.

"A right is 'clearly established' when 'the contours of the right are sufficiently clear that a reasonable official would understand that what they are doing violates that right.'" *Soukaneh v. Andrzejewski*, 112 F.4th 107, 116 (2d Cir. 2024) (quoting *Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011)) (alterations omitted). Put another way, "'existing precedent must have placed the statutory or constitutional question *beyond debate*.'" *Liberian Cmty.*, 970 F.3d at 186–87 (quoting *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017)) (emphasis in original). Where "reasonable officers could disagree on the legality of the action at issue in its particular factual context," under then-existing legal precedent, qualified immunity should be granted. *Soukaneh*, 112 F.4th at

116 (quoting *Guan v. City of New York*, 37 F.4th 797, 806 (2d Cir. 2022)); *see also Wesby*, 583 U.S. at 63 (2018) ("'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." (internal citations and quotations omitted)); *Southerland v. City of New York*, 680 F.3d 127, 141 (2d Cir. 2012) ("[E]ven where the law is 'clearly established' . . . the qualified immunity defense [] protects an official if it was 'objectively reasonable' for him at the time of the challenged action to believe his acts were lawful." (quoting *Taravella v. Town of Wolcott*, 599 F.3d 129, 134 (2d Cir. 2010))); *Walczyk v. Rio*, 496 F.3d 139, 166 (2d Cir. 2007) (Sotomayor, J., concurring) ("[W]hether a right is clearly established is *the same question* as whether a reasonable officer would have known that the conduct in question was unlawful." (emphasis in original)).

Of particular relevance here, the Supreme Court has repeatedly instructed courts "not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. As such, to sufficiently plead that a right was clearly established, "[a] plaintiff must show with a high degree of specificity, that the rule he seeks to apply prohibited the officer's conduct." *Liberian Cmty.*, 970 F.3d at 186–87 (citing *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015)) (internal quotations omitted); *see also Mara v. Rilling*, 921 F.3d 48, 68–69 (2d Cir. 2019) ("[T]he law must be so clearly established with respect to the *particular* conduct and the specific context at issue that every reasonable official would have understood that his conduct was unlawful." (emphasis in original) (internal citations and quotations omitted)); *Reichle*, 566 U.S. at 665 ("[W]e have previously explained

that the right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official." (internal citations and quotations omitted)). Although this standard does not require a plaintiff to allege that there is a case directly on point with their alleged facts, "controlling authority or a robust consensus of cases of persuasive authority" dictate whether a right is clearly established. *Liberian Cmty.*, 970 F.3d at 186 (internal citations and quotations omitted); *see also Soukaneh*, 112 F.4th at 122 ("The analysis under this element 'turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" (quoting *Colvin v. Keen*, 900 F.3d 63, 75 (2d Cir. 2018)); *Matusick v. Erie Cnty. Water Auth.*, 757 F.3d 31, 60 (2d Cir. 2014) ("The salient question [] is whether the case law at the time in question would have put reasonable officers on fair warning that their conduct violated the plaintiff's rights." (internal citation and quotations omitted)).[5]

5. Courts routinely find that readily distinguishable cases cannot serve as a basis to find that a right was clearly established in a separate context. For example, in *Radwan v. Manuel*, a student who played soccer for the University of Connecticut brought claims against the school for violating her First Amendment rights when they terminated her scholarship in response to her raising her middle finger to a television camera after the team won a tournament. 55 F.4th 101, 118 (2d Cir. 2022). The student argued that it was clearly established that showing the middle finger, even if offensive, expresses a viewpoint and that punishing her for expressing a viewpoint violated her First Amendment rights. *Id.* To support her argument, the student relied on a case, *Papish v. Board of Curators of the Univ. of Mo.*, 410 U.S. 667, 93

Here, Plaintiffs allege that the State Defendants, in issuing the 2020 COVID Advisories, violated Decedents' statutory rights under the FNHRA and certain constitutional rights. (SAC ¶ 181.) The State Defendants argue that they are immune from Section 1983 liability because these rights were not clearly established such that reasonable officials would have found the 2020 Advisories to be unlawful at the time that they were issued. (*See* Cuomo Mot. to Dismiss ("Cuomo MTD") at 17–22, ECF No. 67; DeRosa Mot. to Dismiss ("DeRosa MTD") at 18–20, ECF No. 72-1; Zucker Mot. to Dismiss ("Zucker MTD") at 20–23, ECF No. 70.) The Court agrees with the State Defendants.

A. Rights Under the FNHRA

The FNHRA was enacted to protect the health, safety, and dignity of residents in nursing facilities that receive Medicaid funding. *See* 42 U.S.C.A. § 1396r; 42 C.F.R. § 483.10. Under the FNHRA, "[a] nursing facility

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S. Ct. 1197, 35 L. Ed. 2d 618 (1973), where the Supreme Court held that a university violated a student's First Amendment right to free speech when it expelled the student after she published "indecent" content in her independent newspaper. *Id.* The Second Circuit in *Radwan* rejected the plaintiff's argument, holding that "[e]xpelling a university student because of a disagreement with the content of an article in an independent student newspaper . . . is not the constitutional equivalent of disciplining a university student for displaying a vulgar or offensive gesture while playing for a university's sports team." *Id.* The court found that, because the plaintiff's situation differed from the context of the previous case, the plaintiff failed to plead that her free speech rights, in the context of her involvement in a school-sponsored event, were clearly established at the time. *Id.* at 118–20.

must protect and promote the rights of each resident," which includes rights to choose their physician and to participate in planning their treatments, be free from restraints and abuse, retain privacy and confidentiality, receive reasonable accommodations, voice grievances, organize groups and participate in activities, and refuse transfers, among others. 42 U.S.C.A. § 1396r(c)(1)(A)(i)-(xi); 42 C.F.R. § 483.10 (enumerating additional resident rights). Therefore, according to Plaintiffs, the FNHRA "unambiguously confers a multitude of rights upon Plaintiffs" and the "plain statutory language of the FNHRA renders those rights as clearly established for the purposes of defeating qualified immunity." (Pls.' Opp'n to State Defs.' Mots. to Dismiss ("Pls.' State Defs. Opp'n") at 16–17, ECF No. 76.)[6]

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6. In full, Plaintiffs allege that under the FNHRA, Decedents had clearly established rights to "be cared for in such a manner and in such an environment as will promote quality of life;" "receive nursing and related services and specialized rehabilitative services so as to attain and maintain the highest practicable physical, mental, and psychosocial well-being;" "be cared for in such a manner so as to attain and maintain the highest practicable physical, mental, and psychosocial wellbeing;" " reside in a safe, sanitary, and comfortable environment designed to prevent the development of disease and infection;" "reside in a facility designed, constructed, equipped, and maintained in a manner to protect the health and safety of residents, personnel, and the general public;" "be treated with dignity and care in a manner and in an environment that promotes maintenance or enhancement of their quality of life, recognizing their individuality, and with their rights protected and promoted;" "be treated with respect and dignity;" "make choices about aspects of their life that are/were significant to them;" "receive the necessary care and services in

In support of their argument, Plaintiffs rely on the Supreme Court's 2023 holding in *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 143 S. Ct. 1444, 216 L. Ed. 2d 183 (2023). In *Talevski*, the plaintiff brought a Section 1983 claim against a county-run nursing facility on behalf of a deceased resident who had been chemically restrained with medications that exacerbated his dementia and was then transferred to another facility 90 minutes away without notification to his family and without the facility satisfying necessary preconditions. *Id.* at 171–73. The plaintiff alleged that the nursing home's treatment of the decedent violated his rights under the FNHRA to be free from unnecessary physical or chemical restraints and to be discharged or transferred only when certain preconditions are satisfied. *Id.* Ultimately, the Supreme Court held that the plaintiff was permitted to bring a Section 1983 claim against the nursing home because the FNHRA confers individually enforceable rights on nursing home residents. *Id.* at 180.

Plaintiffs' reliance on *Talevski* is misplaced. Prior to the Supreme Court's ruling in *Talevski*, courts around the country, and within the Second Circuit, were split as to whether the FNHRA conferred a private right of action enforceable under Section 1983. *See, e.g. Mauro v. Cuomo*, No. 21-CV-1165, 2023 U.S. Dist. LEXIS 38964, 2023 WL 2403482, at *3 (E.D.N.Y. Mar. 8, 2023) ("Courts in [the Second] Circuit are split as to whether the FNHRA

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such a manner so as to attain and maintain the highest practicable physical, mental, and psychosocial well-being;" and "reside in a safe, sanitary, and comfortable environment designed to prevent the development of diseases and infections." (SAC ¶ 56.)

creates a private right of action.") (collecting cases); *Boykin v. 1 Prospect Park ALF, LLC*, 993 F. Supp. 2d 264, 281 (E.D.N.Y. 2014) ("The federal courts are split as to whether various provisions of FNHRA confer individual rights that are enforceable through section 1983 for Medicaid beneficiaries who reside at substandard, state-run nursing homes.") (collecting cases). This disagreement at the time of the issuance of the 2020 Advisories forecloses a finding that a reasonable officer would have known that the issuance of the advisories would violate residents' rights under the FNHRA. Or, as put by the Supreme Court, "[i]f judges [] disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy." *Reichle*, 566 U.S. at 670 (citing *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)).

Even more damning to Plaintiffs argument is the timing of the issuance of the *Talevski* opinion. That is, *Talevski* was decided in 2023—three years after the 2020 Advisories were issued in this case. It is axiomatic that for a case to provide the basis to claim that the law articulated therein was clearly established to defeat a claim of qualified immunity, the case must predate the conduct at issue. Where there are no existing court decisions that would give an official fair warning that such conduct was proscribed by law, there can be no clearly established right. *See Matusick*, 757 F.3d at 61 (holding that there was no clearly established right where, at the time of officers' alleged constitutional violation of the right to intimate association, "the nature and the extent of the right [were] hardly clear," "the source of the intimate association right

ha[d] not been authoritatively determined," and there were no court decisions that would have provided fair warning to a reasonable officer at the time that the right to intimate association would extend to the plaintiff's relationship).

In any event, *Talevski* is plainly distinguishable. In *Talevski*, the Supreme Court noted that the case was about "particular provisions" of the FNHRA referring to the rights of nursing-home residents "to be free from unnecessary physical or chemical restraints and to be discharged or transferred only when certain preconditions are satisfied" and "whether nursing-home residents can seek to vindicate those FNHRA rights in court." *See Talevski*, 599 U.S. at 171; 42 U.S.C. § 1396r(a). Here, Plaintiffs bring claims against state officials for the issuance of public health regulations governing the admission of residents to nursing homes and adult care facilities in the midst of an unprecedented global pandemic. *Talevski* does not contemplate the circumstances presented by the instant case. In other words, *Taleveski* did not place the statutory or constitutional questions raised in this case beyond debate. *See al-Kidd*, 563 U.S. at 741 (finding that to be deemed clearly established "existing precedent must have placed the statutory or constitutional question beyond debate.") At most, *Talevski* stands for a general proposition that the FNHRA confers a private right of action, which can be enforced against state-run nursing facilities under Section 1983. This broad proposition is insufficient to support a finding that the Decedents' rights under the FNHRA were clearly established with respect to public health regulations imposed by the state. *See Mullenix*, 577 U.S. at 12 (finding that inquiry into

whether law is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition.").

B. Constitutional Rights

Plaintiffs argue that the Decedents had clearly established rights to "[freedom] from cruel, unhuman, or degrading treatment," "safe conditions," "life," "bodily integrity," and "[freedom] from state-created danger," such that any reasonable official would have known that the issuance of the 2020 Advisories would violate these rights. (Pl.'s State Def.'s Opp'n at 17–22; SAC ¶ 181.) None of Plaintiffs arguments operate to defeat qualified immunity here.

Plaintiffs maintain that the Decedents' right to be free from cruel, unhuman, or degrading treatment, as a "universally accepted customary human rights norm" was clearly established at the time the State Defendants issued the 2020 Advisories. (Pls.' State Defs.' Opp'n at 17.) In support, Plaintiffs direct the Court to non-controlling case law pertaining to claims brought under the Foreign Sovereign Immunities Act ("FSIA"), the Torture Victim Protection Act ("TVPA"), and the Alien Tort Claims Act ("ATCA"). (*Id.*) Of course, none of these statutes are implicated by the claims in this case. Plaintiffs point to *Abebe-Jira v. Negredo*, where a plaintiff brought a claim under the ATCA against her captor and torturer, who was associated with the mid-1970s military dictatorship in Ethiopia, for torture and cruel, inhuman, and degrading treatment. 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519

U.S. 830, 117 S. Ct. 96, 136 L. Ed. 2d 51 (1996). Plaintiffs also cite *Najarro de Sanchez v. Banco Central de Nicaragua*, where an émigré from Nicaragua who fled the country to escape the Sandinista regime, brought a claim under the FSIA against the Nicaraguan Central Bank to cash a check that was issued to her prior to the demise of the former regime. 770 F.2d 1385 (5th Cir. 1985). Moreover, Plaintiffs cite to *Xuncax v. Gramajo*, where Guatemalan immigrants brought claims under the FSIA, TVPA, and ATCA against the former Guatemalan Minister of Defense for the execution and disappearance of plaintiffs' relatives, torture, arbitrary detention, and cruel, inhuman and degrading treatment. 886 F. Supp. 162 (D.Mass. 1995). Lastly, Plaintiffs cite to *Paul v. Avril*, where Haitian citizens brought claims under the ATCA against the ruler of a military regime in Haiti for torture and false imprisonment. 901 F. Supp. 330 (S.D.Fla. 1994).

These cases are patently distinguishable from the instant matter. In each case, one or more plaintiffs claimed to have been subjected to torture, murder, kidnapping and the like from Defendants. Here, the conduct at issue, while serious, is of a different sort. Plaintiffs in this case complain that Defendants issued public health advisories pertaining to the admission of COVID-19-recovered residents into nursing homes and adult care facilities, which, once adhered to, led to the untimely deaths of nursing home residents. (*See generally*, SAC.) Even if Plaintiffs were able to demonstrate a broad, general right to be free from cruel, unhuman, and degrading treatment, such readily distinguishable cases cannot serve as a basis to find that such right was clearly established as it relates to the conduct alleged here. *See Mullenix*, 577 U.S. at 12.

Moreover, to the extent that Plaintiffs allude to the constitutional right to be free from cruel and unusual punishment conferred by the Eighth Amendment to support their argument, it is unhelpful to them. (*See* Pl.'s State Defs.' Opp'n at 17.) It is well-settled that constitutional protections under the Eighth Amendment are only applicable to individuals who have been convicted of a crime. *See Ingraham v. Wright*, 430 U.S. 651, 668–69, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) (holding that the Eighth Amendment's prohibition of cruel and unusual punishments is limited to "criminal punishments" and is not applicable outside of that context). As such, because the nursing home residents were not under criminal punishment, they did not have a clearly established right under the Eighth Amendment.

Plaintiffs further argue that the issuance of the 2020 Advisories violated clearly established substantive due process rights under the Fifth and Fourteenth Amendments—specifically the right to safe conditions, life, bodily integrity, and freedom from state-created danger. (Pls.' State Defs.' Opp'n at 17–22.) Here, again, Plaintiffs fail to cite to any case similar in fact to the one at hand that would demonstrate, beyond debate, that these due process rights were clearly established in the context of public health policy decisions at the time of the issuance of the 2020 Advisories. Indeed, they could not have.

The Second Circuit has explicitly noted that "the Supreme Court has not addressed the limits imposed by due process on a [s]tate's power to manage infectious diseases." *Liberian Cmty.*, 970 F.3d at 190. State officials

were tasked with acting quickly in response to evolving and dynamic circumstances during the COVID-19 pandemic. As such, courts in this circuit and across the country have routinely granted state officials qualified immunity for policies implemented in response to the ongoing public health crisis. *See, e.g.*, *Mauro*, 2023 U.S. Dist. LEXIS 38964, 2023 WL 2403482, at *6 (collecting cases); *Liner v. Hochul*, No. 21-CV-11116, 2023 U.S. Dist. LEXIS 11386, 2023 WL 358826, at *5 (S.D.N.Y. Jan. 23, 2023). And as the Second Circuit has made clear, "the very purpose of qualified immunity is to protect officials when their jobs require them to make difficult on-the-job decisions . . . [t]his is especially true when officials are forced to act quickly, such as in the context of a public health emergency." *DiBlasio v. Novello*, 413 F. App'x 352, 356 (2d Cir. 2011) (citation and quotations omitted). Even the Supreme Court has weighed in to conclude that state officials must be given "especially broad" latitude to act "in areas fraught with medical and scientific uncertainties," and generally "should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14, 207 L. Ed. 2d 154 (2020) (Roberts, C.J., concurring in the judgment denying temporary injunction) (internal citations and quotations omitted). All of these considerations are at play in this case. In fact, the Court need look no further than the Plaintiffs' own complaint. According to the complaint, Defendants were motivated to issue the 2020 Advisories, at least in part, by the concern that New York State hospitals would become "swamped"

with COVID-19 patients and could not afford to house recovered nursing-home residents long-term. (*See* SAC ¶ 53.)

Plaintiffs' claims against the State Defendants are precluded by the doctrine of qualified immunity. Accordingly, Plaintiffs' Section 1983 and Section 1985 claims against the State Defendants must be dismissed.

III. WRONGFUL DEATH CLAIM

Having concluded that Plaintiffs failed to state any federal claims, it is within the Court's discretion not to exercise pendent jurisdiction over the state law claims. *See Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims."); *see also Jones v. Cnty. of Suffolk*, 236 F. Supp. 3d 688, 702 (E.D.N.Y. 2017); *Eubanks v. Hansell*, No. 22-CV-6277, 2024 U.S. Dist. LEXIS 54371, 2024 WL 1308672, at *12 (E.D.N.Y. Mar. 26, 2024) ("[B]ecause Plaintiffs have failed to allege a viable federal claim, it would 'exceed [the] allowable discretion' of the Court to assert supplemental jurisdiction."). As such, the Court declines to exercise jurisdiction over Plaintiffs' wrongful death claim and it must be dismissed for lack of subject matter jurisdiction.

Appendix B

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are GRANTED and Plaintiffs' complaint is DISMISSED.

SO ORDERED.

Dated: Brooklyn, New York
January 10, 2025

s/ LDH
LaShann DeARCY Hall

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED MAY 5, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

22-CV-2336 (LDH) (LB)

DANIEL N. ARBEENY, AS THE ADMINISTRATOR OF THE ESTATE OF NORMAN ARBEENY (DECEASED), INDIVIDUALLY AND ON BEHALF OF OTHERS,

Plaintiff,

-against-

ANDREW M. CUOMO; THE STATE OF NEW YORK; MELISSA DeROSA; HOWARD A. ZUCKER, M.D.,

Defendants.

Filed May 5, 2022

ORDER

LOIS BLOOM, United States Magistrate Judge:

The Honorable LaShann DeArcy Hall has assigned this case to me for all pretrial purposes. Although plaintiff paid the filing fee to bring this case, plaintiff is hereby put on notice that the complaint cannot proceed as currently filed for the following reasons.

Appendix C

Plaintiff's *pro se* complaint is filed individually and purportedly "on behalf of all others similarly situated." ECF No. 1 at 1, 2 (Estimating the number in the class as "fifteen thousand (15,000) residents of the State of New York who died of COVID-19 contracted in nursing homes.") However, as a non-attorney *pro se* litigant, plaintiff cannot bring claims on behalf of anyone but himself. *See* 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their cases personally or by counsel"); *Guest v. Hansen*, 603 F.3d 15, 20 (2d Cir. 2010) ("A person who has not been admitted to the practice of law may not represent anybody other than himself."); *Iannaccone v. Law*, 142 F.3d 553, 558 (2d Cir. 1998) ("[B]ecause *pro se* means to appear for one's self, a person may not appear on another person's behalf in the other's cause.").

Because plaintiff is unrepresented and is not a lawyer, he cannot represent a potential class, *Rodriguez v. Eastman Kodak Co.*, 88 Fed. App'x 470, 471 (2d Cir. 2004) (summary order) ("a *pro se* plaintiff may not seek to represent the interests of third-parties . . . [m]oreover, it is well established that a *pro se* class representative cannot adequately represent the interests of other class members."); *Vapne v. Perdue*, No. 17-CV-2838, 2017 WL 4350428, at *2 (E.D.N.Y. May 24, 2017) (citations omitted), or file under the False Claims Act. *United States ex. rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008) ("[b]ecause relators lack a personal interest in False Claims Act *qui tam* actions, . . . they are not entitled to proceed *pro se*." (quotation omitted). Thus, plaintiff cannot pursue this matter as a class action or a False Claims Act case unless he retains counsel.

Moreover, plaintiff cannot proceed on behalf of his father's estate. "Plaintiff, who is proceeding *pro se*, may only assert claims on behalf of [his father's] estate if: (1) []he is the duly-appointed administrator or 'personal representative' of the estate; (2) []he is the sole beneficiary of the estate; and (3) the estate has no creditors." *Noel v. American Airlines*, No. 22-CV-1696, 2022 WL 1294396, at *4 (S.D.N.Y. Apr. 29, 2022) (citing *Guest*, 603 F. 3d at 20).

Accordingly, in order to proceed on behalf of his father's estate, plaintiff must either obtain counsel or establish that: (1) he is the duly-appointed administrator of the estate; (2) he is the sole beneficiary of the estate; and (3) the estate has no creditors. Even if plaintiff demonstrates he can meet these requirements, the Court strongly encourages plaintiff to consult a lawyer, and to file an amended complaint.[1]

SO ORDERED.

LOIS BLOOM
United States Magistrate Judge

Dated: Brooklyn, New York
May 5, 2022

1. Although plaintiff would benefit by retaining counsel, plaintiff may contact the City Bar Justice Center's Federal Pro Se Legal Assistance Project, which provides free but limited representation to *pro se* parties in this Court. Plaintiff may schedule an appointment by calling (212) 382-4729 or by completing an intake form at https://www.citybarjusticecenter.org/fedpro/intake. A copy of the Federal Pro Se Legal Assistance Project's flyer is attached to this Order.