SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
GILLIO LOPES,

Petitioner,

FOR A JUDGMENT PURSUANT TO ARTICLE 78 AND SECTION 3001 OF THE CPLR

-against-

KATHY HOCHUL, in her official capacity as Governor of the State of New York, and LETITIA JAMES, in her official capacity as Attorney General of the State of New York,

Respondents.

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Index No.: 911974/2026

REPLY MEMORANDUM OF LAW IN RESPONSE TO RESPONDENTS' ANSWER AND OPPOSITION TO THE VERIFIED PETITION

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INTRODUCTION

While the Governor's superseder authority is broad, it is not unfettered. Executive Law § 63(2) does not authorize the Governor to disregard her legal obligations governing the prosecutor she appoints. Indeed, the Governor must "take care that the laws are *faithfully* executed." N.Y. Const. art. IV, § 3. (Emphasis added). That obligation cannot be satisfied by invoking executive power to excuse prosecutorial bias. Executive Order No. 64 ("EO 64" or the "Order") expressly requires an objective review and a "full, reasoned, and independent investigation." The Order invokes concerns about conflict, bias, and the public perception of bias as grounds for superseding the local District Attorney. Respondents cannot invoke those concerns to justify the appointment of a special prosecutor, while then dismissing evidence of the exact same harm and prejudgment by the new prosecutor selected by the Governor to conduct the investigation.

Before her appointment, Attorney General James publicly stated, on the Attorney General Office's official account: "What this young woman has been forced to endure is horrific and unacceptable. I'm holding her in my heart and in my prayers. To her, and to all survivors: you're not alone. We stand with you." Pet. ¶ 7. By declaring what Jane Doe "has been forced to endure" and characterizing her as a "survivor," the Attorney General treated the alleged assault as an established crime before conducting the proposed independent/unbiased investigation she was subsequently appointed to undertake. Her declaration that "[w]e stand with you" further aligned her and her office with Jane Doe's account. Respondents' classification of these words as mere empathy fails to confront their substance. The statement publicly declared as true, the underlying allegations that the Attorney General's independent/unbiased investigation was supposed to evaluate.

That prejudgment is particularly consequential because those same allegations support Doe's pending civil claims against Petitioner, a lawsuit prominently referenced in EO 64. A prosecutor's obligations run to the public, and competing private loyalties cannot compromise the duty to do justice. *See Matter of Sedore v. Epstein*, 56 A.D.3d 60, 66–68 (2d Dep't 2008). A prosecutor cannot wield the criminal power of the State while maintaining a competing commitment to vindicate a private civil litigant's allegations. Petitioner challenges the substantial risk that the Attorney General's public endorsement will influence the exercise of that power, turning an independent inquiry into a foregone conclusion to substantiate an account she has already embraced.

The Governor's power to appoint does not resolve the Attorney General's qualification to serve. Nor does the investigation's preliminary stage erase the prejudgment that preceded it. Petitioner has identified specific conduct undertaken by the appointed Attorney General, made before the appointment, bearing directly on the independence EO 64 requires. Respondents must answer that disqualification claim on its substance. Repeating that the Governor possesses superseder authority does not establish that the designated prosecutor can lawfully exercise it in these circumstances. The Court should reject Respondents' attempt to foreclose review and grant the relief requested in the Petition.

I. PETITIONER'S CLAIMS ARE JUSTICIABLE

Respondents' argument that Petitioner's claims are not justiciable fails to distinguish the Governor's authority to appoint a special prosecutor from the Attorney General's qualification to serve in this particular matter. Indeed, Petitioner challenges the Attorney General's qualification to exercise that authority in this matter after publicly prejudging the allegations she was appointed to independently investigate. Courts may enforce legal obligations without assuming the

executive's policymaking role. *See Center for Independence of the Disabled v. Metropolitan Transp. Auth.*, 184 A.D.3d 197, 208–09 (1st Dep't 2020); *People v. Adams*, 20 N.Y.3d 608, 612–13 (2013).

Petitioner challenges the Attorney General's existing appointment based on her prior public endorsement of Doe's allegations. Before her appointment, Attorney General James publicly described what Doe "has been forced to endure," addressed her as a "survivor," and declared, "[w]e stand with you." Pet. ¶ 7. The Governor then appointed her to investigate those same allegations, which underlie the civil action where Petitioner is one of the named defendants. Respondents expressly admit that Petitioner's conduct "may fall within the scope of the investigation authorized by EO 64." Answer ¶¶ 59, 69. They further admit paragraph 65 of the Petition, which alleges that Attorney General James's authority encompasses witness-credibility assessments, the pursuit of evidence, grand jury presentations, and charging decisions concerning Petitioner. Answer ¶ 70; Pet. ¶ 65. These admissions establish Petitioner's specific connection to the investigation and the consequential decisions entrusted to Attorney General James. Although Respondents have not admitted that Petitioner will be charged or prejudiced, his concern relates directly to prosecutorial authority they acknowledge extends to allegations involving him. As such, Petitioner's concern is concrete: the official entrusted with an independent investigation has already publicly made a determination of the facts by accepting Doe's version of events before undertaking that investigation, in accordance with principles of due process. Respondents cannot dispose of that concern by relying on the Governor's appointment power or describing the investigation as merely preliminary. Neither addressed the central issue i.e., whether the Attorney General's public commitment to Doe's account creates a substantial risk of prejudice to Petitioner.

Moreover, the authorities on which Respondents rely concern materially different circumstances. In *Schulz*, the alleged injury depended on voter approval of a future constitutional convention, the election of particular delegates, and their subsequent actions. *Schulz v. Cuomo*, 133 A.D.3d 945, 947–48 (3d Dep't 2015). In *Percinthe*, the challenge to expired parole conditions was moot, while the request to prevent their reimposition upon a future release depended on a determination that might never occur. *Matter of Percinthe v. Department of Corr. & Community Supervision*, 227 A.D.3d 1347, 1348 (3d Dep't 2024). *Police Benevolent Association* involved a facial challenge to potential arbitrary applications of a policy; although the policy had been applied to individual plaintiffs, they did not pursue claims challenging its application to their particular circumstances. *Police Benevolent Assn. of N.Y. State Troopers, Inc. v. New York State Div. of State Police*, 40 A.D.3d 1350, 1352–53 (3d Dep't 2007). The foregoing decisions do not resolve whether the Governor's appointment creates a present and substantial risk of prejudice to Petitioner. Here, Petitioner challenges a specific appointment based on the designated prosecutor's previously voiced public endorsement of the allegations she is charged with investigating. As explained below, the circumstances of this appointment satisfy the requirements for judicial review.

A. Petitioner's challenge to the Attorney General's qualification presents a legal question appropriate for judicial resolution.

Respondents contend that judicial review would impermissibly interfere with the Governor's superseder authority, the Attorney General's prosecutorial discretion, and the Legislature's allocation of prosecutorial power. (Resp. Br. at 6–12.) Indeed, Respondents conflate the authority to designate a prosecutor with the designated prosecutor's legal qualification to serve *in a particular matter*. Petitioner acknowledges the Governor's broad authority under Executive Law § 63(2). The question presented is whether Attorney General James's prior public

endorsement of the allegations she was subsequently appointed to investigate creates a disqualification under established law.

1. The Governor's superseder authority does not resolve the separate question of disqualification.

Respondents principally rely on *Matter of Johnson v. Pataki*, 91 N.Y.2d 214, 223–24 (1997), which recognizes the Governor's broad discretion to supersede a district attorney and generally confines judicial review to whether constitutional or statutory authority exists for that action. Petitioner does not ask this Court to depart from that rule. He does not contend that the Governor was required to establish the necessity of supersession, explain her decision to the Court's satisfaction, or leave the investigation with the Tompkins County District Attorney. Rather, Petitioner challenges Attorney General James's personal qualification to exercise the authority conferred upon her. *Johnson* did not decide whether a designated prosecutor could proceed notwithstanding an independently established disqualification. Its protection of the Governor's discretionary superseder decision therefore does not resolve the distinct issue presented here.

The distinction matters because the presence of executive discretion does not, by itself, foreclose judicial enforcement of an existing legal obligation. Courts must refrain from assuming the policy choices reserved to the political branches, but that limitation does not render every claim affecting executive action nonjusticiable. *Center for Independence of the Disabled v. Metropolitan Transp. Auth.*, 184 A.D.3d 197, 208–09 (1st Dep't 2020). Here, the asserted restriction is the law governing prosecutorial disqualification. Petitioner seeks application of that restriction to the official entrusted with investigating the allegations against him, not judicial supervision of how a qualified prosecutor should conduct the investigation.

Ordinarily, disqualification requires prejudice attributable to an established conflict or a substantial danger that an attorney will misuse confidential information. The objector must

demonstrate actual prejudice or a sufficiently serious risk of prejudice to warrant intervention. *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 55 (1983). Separately, *People v. Adams*, recognizes a narrow category of cases in which an exceptionally serious appearance of impropriety warrants disqualification. 20 N.Y.3d 608, 612–13 (2013). That inquiry considers whether the record objectively calls into question the prosecutor's exercise of discretion according to the merits and legitimate prosecutorial considerations.

Before receiving the designation as special prosecutor, Attorney General James publicly described what Doe "has been forced to endure," addressed her together with "all survivors," and declared, "We stand with you." Pet. ¶ 7. Petitioner contends that these statements communicated acceptance of Doe's account before Attorney General James was assigned to assess its credibility and determine whether criminal charges were warranted. The concern is therefore specific to the allegations under investigation, specific to EO 64, and to the official now responsible for evaluating them. Whether that public commitment establishes the exceptional risk of prejudice required for disqualification is a legal question that Respondents cannot answer merely by stating that the Governor possesses *superseder* authority.

In *Schumer*, the Court declined to adjudicate the district attorney's personal disqualification because the asserted political antagonism and potential involvement of former employees did not establish a sufficiently developed basis for intervention. 60 N.Y.2d at 55–56. In this case, Petitioner relies on a very specific and very public statement addressing the complainant and allegations entrusted to Attorney General James. Following Attorney General James' tweet, the Governor issued EO 64 which specifically references the concerns raised by Doe and the public, and now in this Petition, "that this incident cannot be fully and thoroughly investigated or prosecuted without conflict or bias, or the public perception of conflict or bias", noting that the public interest requires

an "objective review." The next day, on September 29, 2026, the Governor referred to the allegations as "nothing short of horrifying" and expressed support for the district attorney's decision to reopen the criminal investigation. Pet. Ex. 4. Notwithstanding her stated support of the local District Attorney, the Governor appointed Attorney General James, despite her expressed prejudgment , which mirrors the reason the Governor inserted herself in this matter in the first place. Unlike *Schumer*, this matter does not depend upon whether a potential witness later becomes implicated.

Furthermore, *Adams* does not support Respondents' contention that disqualification principles apply only to judicial appointments. Resp. Br. at 31–32. *Adams* concerned the refusal to disqualify an existing district attorney's office and appoint a replacement. The Court reversed, finding an objectively serious appearance that prosecutorial discretion had been influenced by the complainant's position rather than legitimate prosecutorial considerations. 20 N.Y.3d at 610–14. Its reasoning therefore concerns the prosecutor's qualification to continue, not simply the validity of a judicial appointment. Although *Adams* arose after charges were filed and does not independently establish the availability of pre-prosecution review here, its substantive disqualification standard directly informs Petitioner's claim.

2. Review of a demonstrated disqualification is consistent with the Legislature's allocation of prosecutorial authority.

Respondents also argue that judicial review would override the Legislature's decision to allocate superseder authority to the Governor. (Resp. Br. at 11–12.) Executive Law § 63(2) assigns the Attorney General both the prosecutorial powers and the corresponding duties otherwise exercised by the district attorney. The statute supplies authority to act; it does not expressly exempt the designated prosecutor from otherwise applicable disqualification principles. Applying those

principles would address a claimed legal restriction on the exercise of authority, rather than create an additional policy prerequisite to the Governor's decision to supersede.

County Law § 701(6) does not establish otherwise. That subdivision expressly addresses circumstances in which the Attorney General acts in place of a district attorney and is disqualified. It provides a mechanism for a superior criminal court in the appropriate county to appoint a replacement upon articulable reasons supplied by the Attorney General. The requirements governing replacement do not establish that the underlying question of qualification is a political question beyond judicial determination. The statute itself contemplates that the Attorney General may be disqualified while exercising substituted prosecutorial authority.

Whether Section 701(6) limits the procedural route or relief available here must be addressed on the merits, as discussed further below. The statute is inapplicable here as it does not resolve whether Attorney General James's prior public statements satisfy the substantive standard for disqualification.

As such, the Court should reject Respondents' argument that the political question doctrine forecloses consideration of Petitioner's claim merely because the challenged authority originated in an exercise of executive power.

B. The claims concern an existing appointment and an allegedly existing disqualification.

Respondents argue that Petitioner's claims are premature because the investigation may never lead to an indictment or prosecution. (Resp. Br. at 12–14.) Petitioner challenges Attorney General James' qualification to direct the investigation itself. EO No. 64 has already designated her to investigate allegations involving Petitioner, and the statement underlying his disqualification claim predates that designation. The question is whether Attorney General James's prior

endorsement of the allegations made against Petitioner creates a sufficiently substantial risk of prejudice to warrant review now.

It is well settled "that courts do not give advisory opinions—that is, determinations that purport to resolve issues that depend on events that may never occur and are outside the control of the parties." *Hollandale Apartments & Health Club, LLC v. Bonesteel*, 173 A.D.3d 55, 59, 100 N.Y.S.3d 711 (2019); *Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 (1988). Where "anticipated harm is insignificant, remote or contingent, the controversy is not ripe." *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 519-20 (1986) (internal brackets omitted). Thus, to determine whether a governmental action is ripe for review, the court must consider "whether the issues tendered are appropriate for judicial resolution" and assess "the hardship to the parties if judicial relief is denied." *Sullivan v. New York State Joint Commn. on Pub. Ethics*, 207 A.D.3d 117, 130 (3d Dep't 2022); *see Grand S. Point, LLC v. Bassett*, 230 A.D.3d 49, 60 (3d Dep't 2024).

The alleged harm here is substantial and directly concerns Petitioner. He is a named defendant in the civil action containing allegations Attorney General James has been appointed to investigate. Pet. ¶¶ 28–30, 56. Her assessment of witnesses and decisions about which evidence to pursue will shape the case against him before any charges are filed. Pet. ¶¶ 57–58. The basis for the claimed disqualification also already exists: she publicly endorsed Doe's account before receiving authority to investigate it.

Because the statement establishes disqualifying prejudgment, the problem arises when she directs the investigation, not only if she later obtains an indictment. The Court can evaluate her statement, the authority she now holds, and the resulting risk of prejudice on the existing record. Whether the investigation ultimately produces criminal charges does not answer whether she is

qualified to lead it or whether she is inherently biased due to her public endorsement of Doe's allegations.

The alleged prejudice likewise concerns decisions made before indictment. Attorney General James's authority encompasses the assessment of witnesses, selection of evidence, and direction of the investigation. Pet. ¶¶ 56–58. If her prior statement establishes a disqualifying prejudgment, waiting until those decisions have shaped the record would render a later review futile. The purported uncertainty of a future prosecution does not fully answer the injury alleged by Petitioner. "It is not in the public interest to allow a prosecutor to carry out a lengthy investigation when there is doubt that his or her appointment is valid, and to run the risk that the process will have to start over again with a different prosecutor." *Fisher*, 23 N.Y.3d at 544. *Schumer*'s holding was expressly tied to the record presented. The Court invalidated an unauthorized delegation of prosecutorial authority while finding the separate disqualification claim premature because the asserted political antagonism and potential conflicts did not establish grounds for intervention. *Schumer*, 60 N.Y.2d at 53–56 ("the application for disqualification was premature and not justiciable *on the present record*") (Emphasis added). Here, Petitioner relies on an official statement addressing the very allegations Attorney General James was subsequently assigned to investigate. Given that the statement and designation establish a sufficiently immediate risk of prejudice, the absence of an indictment does not resolve that inquiry by itself.[1]

C. Petitioner has a personal stake in the challenged exercise of prosecutorial authority.

[1] The authorities Respondents rely on do not establish that preindictment review is barred. *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 245 (2d Cir. 1986) (en banc), concerned potential disqualification of defense counsel whose testimony might require withdrawal, not a prosecutor's qualification. In *In re Grand Jury Proceedings*, 700 F. Supp. 626, 630–31 (D.P.R. 1988), the individual prosecutor had already recused himself, and the court rejected speculative grounds for disqualifying the entire office. Likewise, *In re Grand Jury Investigation*, 696 F.2d 449, 451 (6th Cir. 1982), rejected conclusory conflict allegations while leaving the general scope of preindictment supervisory authority unresolved. Petitioner relies on the designated prosecutor's own public statement concerning the allegations she was assigned to investigate and asks the Court to assess that existing record under the demanding standard for intervention.

To establish standing, "[a] petitioner challenging government agency action pursuant to an article 78 petition has the burden of demonstrating an injury in fact and that the alleged injury falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the government has acted." *Matter of Stevens v. New York State Div. of Criminal Justice Servs.*, 40 N.Y.3d 505, 515 (2023) (cleaned up).

Petitioner has a personal stake in this challenge because Attorney General James has been assigned to investigate allegations against him after publicly endorsing the complainant's account, creating the specific risk of prejudice he seeks to prevent.

1. Petitioner alleges an individualized injury.

"The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention." *Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 NY3d 44, 50 (2019) (cleaned up). *See also Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 7 (2014). However, standing rules should not be applied "in an overly restrictive manner where the result would be to completely shield a particular action from judicial review." *Matter of Sierra Club v. Village of Painted Post*, 26 NY3d 301, 311 (2015); *Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 N.Y.3d 1, 6–7 (2014) ("standing rules should not be heavy-handed").

Respondents attempt to portray the alleged injury as speculative with respect to how the investigation might proceed. (Resp. Br. at 16–18.) However, Petitioner's claim rests on identified facts: he is a named defendant in the related civil case, the allegations concerning him fall within EO No. 64, and Attorney General James publicly endorsed Doe's account before receiving authority to investigate it. Pet. ¶¶ 7, 16–17, 28–33, 56.

Petitioner is faced with the situation where the prosecutor evaluating the allegations against him has already prejudged the allegations in Doe's favor. Moreover, the pending risk reaches investigative decisions preceding any prosecution. It is attributable to EO No. 64, which placed those decisions under Attorney General James's control, and the requested limitation on her participation would address its asserted source. Pet. ¶¶ 57–58, 60–63. It is painfully clear that Attorney General James has already violated her oath and obligation to conduct an independent investigation when making her very public statement of accepting as true Doe's allegations. The Attorney General's own words warrant disqualification in this matter.

2. The asserted injury implicates the protections Petitioner seeks to enforce.

Respondents separately argue that Executive Law § 63(2) protects only institutional interests in allocating prosecutorial authority. (Resp. Br. at 19–20.) The zone of interests inquiry requires a connection between the injury alleged and the purposes of the governing law. *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 773–74 (1991). That connection exists here because Section 63(2) transfers prosecutorial duties along with prosecutorial powers.

A prosecutor's duties include protecting fairness and the integrity of the criminal process. *See People v. Santorelli*, 95 N.Y.2d 412, 420–21 (2000). "Prosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities--constitutional, statutory, ethical, personal--to safeguard the integrity of criminal proceedings and fairness in the criminal process." *Id.*

The disqualification rules protect affected individuals against prosecutorial prejudice and, in exceptional circumstances, an objectively intolerable appearance of impropriety. *Adams*, 20 N.Y.3d at 612–13. Petitioner seeks enforcement of those restrictions as they apply to authority over allegations involving him.

Furthermore, despite Respondents' contention, the statute's allocation of executive power does not eliminate that personal interest. Indeed, *Schumer* permitted an investigation's prospective subject to challenge an unlawful delegation of prosecutorial authority, although finding the separate personal disqualification claim was premature. 60 N.Y.2d at 53–56. Respondents cannot defeat standing merely by describing the underlying grant of authority as institutional. Whether Petitioner established the prerequisites for relief here is a separate inquiry for the Court to consider.

II. RESPONDENTS HAVE NOT ESTABLISHED THAT THE PETITION IS PROCEDURALLY BARRED OR SUBSTANTIVELY WITHOUT MERIT

A. County Law § 701(6) does not expressly make an application by the Attorney General the exclusive means of obtaining judicial review of disqualification.

Respondents argue that County Law § 701(6) forecloses this proceeding because only the Attorney General may initiate disqualification proceedings, and any application must be brought in the superior criminal court where the matter is triable. (Resp. Br. at 20–22.) Their argument conflates the statutory procedure for appointing a replacement as necessarily controlling whether an adverse party may obtain review of the Attorney General's qualification to proceed.

Section 701(6)(b) addresses circumstances in which the Attorney General and her assistants are disqualified and authorizes a superior criminal court to appoint a replacement upon articulable reasons supplied by the Attorney General. Those requirements govern the appointment authorized by that subdivision. The text of the statute does not expressly state that the Attorney General alone may raise a disqualification issue or that an adverse party is barred from seeking otherwise available judicial review. County Law § 701(6). Petitioner's proposed distinction gives effect to the statutory requirements without making the challenged prosecutor's willingness to seek replacement a prerequisite to every judicial inquiry into her qualification.

The subdivision's broad applicability and "notwithstanding" clause must also be given effect. Petitioner does not ask this Court to disregard those provisions or appoint a replacement

through a procedure inconsistent with the statute. He seeks a determination concerning Attorney General James's personal participation and relief limited to the legal defect established. Pet. ¶¶ 60–63. Whether Article 78 supplies that remedy must be determined under the authorities governing Article 78; the existence of a replacement procedure does not itself answer that question.

Respondents' venue objection likewise depends on which proceeding is properly before the Court. If this Article 78 proceeding is available, CPLR 506(b) permits commencement where the challenged determination was made or the respondent's principal office is located. The Petition alleges those connections to Albany County. Pet. ¶ 15. That does not dispense with Section 701(6)'s requirements for an appointment under that provision, but Respondents cannot resolve the availability of Article 78 simply by applying the venue requirement governing a different application.

B. Petitioner has established that prohibition reaches the challenged conduct and that a clear legal right to relief exists.

1. The challenge concerns the prosecutor's legal authority to proceed, not an individual investigative decision.

Respondents argue that prohibition cannot reach either the Governor's designation or the Attorney General's investigation because both involve executive action. (Resp. Br. at 22–26.) Prohibition is available only to restrain judicial or quasi-judicial action taken without or in excess of authority, upon a clear legal right to relief. It cannot correct ordinary legal errors or restrain purely executive investigative activity. *Matter of Soares v. Herrick*, 20 N.Y.3d 139, 145 (2012).

Petitioner's claim concerns whether Attorney General James may personally exercise prosecutorial authority in this matter after publicly endorsing the allegations entrusted to her. He does not ask the Court to decide which witnesses should be interviewed or how particular evidence should be presented. For example, *Matter of Working Families Party v. Fisher*, 23 N.Y.3d 539, 544–45 (2014), distinguishes a challenge to a prosecutor's appointment from an attempt to control

investigative decisions by a validly appointed prosecutor. The Court permitted review of a judicial appointment during an investigation, emphasizing the value of resolving the prosecutor's authority promptly. *Id.* Although *Working Families Party* involved a court appointed prosecutor, it establishes that the investigative stage alone does not bar review of a challenge to the validity of a prosecutor's appointment. Petitioner relies on that distinction because he challenges Attorney General James's qualification to proceed, not her individual investigative decisions. The case does not independently resolve whether this personal disqualification challenge to a prosecutor designated by the Governor satisfies the requirements for prohibition. Respondents' reliance on *Matter of Abelove v. Cuomo*, 57 Misc. 3d 668, 676–77 (Sup. Ct. Albany County 2017), is misplaced. *Abelove* involved an attempt to disqualify the Attorney General's entire office because an assistant might be a necessary witness; the Attorney General had already excluded that assistant from prosecuting the matter. 57 Misc. 3d at 676–77. Here, Petitioner attributes the prejudgment to Attorney General James herself, the official designated to direct the investigation. His claim therefore concerns her personal qualification to proceed, rather than imputing a subordinate's potential conflict to the entire office. Although *Abelove s*eparately held that prohibition does not reach purely investigative conduct, Petitioner relies on the distinction discussed above between controlling investigative decisions and challenging the prosecutor's legal authority to proceed. *Id.* at 668. The assistant's exclusion in *Abelove* did not require the court to resolve the personal disqualification claim presented here.

2. The Attorney General's statement must be assessed under the governing disqualification standard.

Respondents claim the September 28 statement was an expression of empathy that cannot establish a clear legal right to relief. (Resp. Br. at 26–28, 31–35.) A conflict alone does not require removal; the record must establish actual prejudice or a sufficiently substantial risk of prejudice.

Soares, 20 N.Y.3d at 146; *Schumer*, 60 N.Y.2d at 55. *Adams*, 20 N.Y.3d at 612–13 (recognizing exceptional circumstances in which an objectively serious appearance of impropriety warrants disqualification).

The wording of the statement matters. Attorney General James described what Doe "has been forced to endure," addressed her together with "all survivors," and declared, "We stand with you." Pet. ¶ 7. Petitioner contends that these words communicated acceptance of Doe's account before Attorney General James received responsibility for evaluating it. The concern is the relationship between that expressed credibility judgment and her subsequent authority to assess the same complainant, weigh contradictory evidence, and determine whether charges are warranted. Her later assurance of a fair investigation must be considered alongside the earlier statement, not treated as resolving its significance. Pet. ¶¶ 44–48. The Governor's stated reasons for supersession reinforce this concern. EO 64 identifies the need for an objective review and expressly addresses the public perception of conflict or bias. Pet. Ex. 5. Yet the official selected to restore that confidence had already publicly endorsed the complainant's account. Pet. ¶ 7; Ex. 6. Petitioner submits that placing the investigation under her control carries forward the very concern about prejudgment that an independent review was intended to address. A later promise of fairness does not, by itself, dispel that concern.

Petitioner does not equate a prosecutor's role with that of an impartial judge. Nor does he claim a right to have the evidence presented in the manner most favorable to the defense. Respondents' discussion of prosecutorial discretion therefore does not answer whether a prior public endorsement creates a legally disqualifying risk in this particular matter.

The civil enforcement cases Respondents cite also involve different claims. For example, *People v. National Rifle Assn. of Am., Inc.*, 223 A.D.3d 84, 89–91 (1st Dep't 2023), addressed

retaliation and selective enforcement, including probable cause and differential treatment. *Matter of People v. Trump Org., Inc.*, 205 A.D.3d 625, 626–27 (1st Dep't 2022), rejected challenges to civil investigative subpoenas, including a selective prosecution theory. Neither supplies a categorical exemption from prosecutorial disqualification principles. Petitioner's claim must be assessed under *Schumer* and *Adams*, while recognizing that public criticism or support, without the required showing of prejudice or exceptional impropriety, is insufficient.

C. The Court should exercise its discretion to grant appropriately limited relief.

1. The governing discretionary factors support relief.

Even where prohibition is available, issuance remains discretionary. The relevant considerations include the seriousness of the harm, the adequacy of ordinary remedies, and whether prohibition would effectively address the identified excess of authority. *Soares*, 20 N.Y.3d at 145. Respondents argue that the alleged harm is negligible and that motions after indictment and direct appeal provide adequate remedies. (Resp. Br. at 28–31.) This argument is flawed.

Petitioner's asserted harm concerns the development of the investigation, including assessments of credibility and decisions about what evidence to pursue. Pet. ¶¶ 57–58. If the Court finds a disqualifying prejudgment, the practical question is whether later review would adequately address investigative decisions already made under that influence. Petitioner does not rely merely on the hardship of facing trial and a possible conviction, which alone would not justify prohibition. *See Rush v. Mordue*, 68 N.Y.2d 348, 354 (1986). Instead, Petitioner seeks relief before the alleged prejudgment shapes the investigative record. If the Court finds a disqualifying risk, limiting Attorney General James's participation now would address its source while allowing a lawful investigation to proceed, without relying solely on later review of decisions already made.

2. Respondents overstate the categorical inapplicability of ordinary disqualification principles.

Respondents argue that the standards discussed in *Schumer* and *Adams* apply only to judicial appointments and therefore cannot reach a prosecutor designated by the Governor. Resp. Br. at 31–32. That argument confuses the source of authority with the legal restrictions governing its exercise. *Adams* concerned a request to disqualify an existing district attorney's office and appoint a replacement; it did not merely review the validity of a judicial appointment. 20 N.Y.3d at 610–13.

Moreover, *Abelove* considered ordinary prosecutorial conflict principles in evaluating a disqualification claim against the Attorney General acting under gubernatorial superseder authority. 57 Misc. 3d at 676–77. Although its denial of prohibition remains relevant to the procedural question, its analysis does not support Respondents' proposed categorical exemption. Petitioner must still satisfy the substantive standard and establish an available procedural remedy. But the executive origin of Attorney General James' designation does not itself establish that an otherwise demonstrated disqualification may be disregarded.

3. Respondents' reliance on Rivera does not establish that personal credibility endorsements are proper.

Respondents cite *People v. Rivera*, 206 A.D.3d 1356, 1359–60 (3d Dep't 2022), to support their account of Attorney General James' statement. Resp. Br. at 28. *Rivera* distinguished limited references to the complainant as a "victim" and "survivor" from the prosecutor's expression of a personal opinion about witness credibility, which it expressly found improper. *Id.* at 1359-60. The court declined to reverse because curative instructions were given and the record did not establish misconduct depriving the defendant of a fair trial. *Id.*

The timing and context also distinguish *Rivera*. There, the court evaluated comments made during a trial, where the evidence was presented to a jury and the judge gave curative instructions addressing the prosecutor's improper credibility opinion. 206 A.D.3d at 1359–60. Here, Attorney

General James endorsed Doe's account before she was assigned to investigate it. The concern is therefore whether that prior commitment compromises the investigative judgment entrusted to her, before the evidence reaches a jury. *Rivera's* conclusion that corrective instructions preserved a fair trial does not resolve whether James is qualified to direct this investigation.

D. Any alternative challenge to the Governor's determination rests on a preserved, reviewable legal theory.

Respondents state that the Petition pleads only a claim under CPLR 7803(2), notwithstanding its alternative request for relief. Resp. Br. at 3 n.1. The Petition expressly invokes CPLR 7803(3) in paragraphs 52–55 and alleges arbitrary and capricious action or abuse of discretion in paragraphs 71 and 79. Its request for alternative relief is therefore presented in the pleading, rather than raised for the first time in reply.

Respondents separately argue that the Governor's exercise of lawful superseder discretion is not subject to ordinary arbitrary and capricious review. Resp. Br. at 35. *Matter of Johnson v. Pataki,* substantially limits review of that discretion. 91 N.Y.2d at 223–24. The alternative claim instead depends on whether the asserted disqualification establishes an independently reviewable legal defect in Attorney General James' personal participation. If that threshold is satisfied, Petitioner requests relief confined to that defect. CPLR 7806 permits annulment or modification of a reviewable determination and directions concerning specified action.

CONCLUSION

Broad executive authority does not excuse prosecutorial bias or eliminate the obligation to exercise independent judgment. The Attorney General's public endorsement of Doe's account undermines the independent investigation that EO 64 expressly requires, and the Governor's appointment cannot cure that prejudgment.

For the foregoing reasons, the Court should grant the Petition, annul EO 64, and disqualify the Attorney General from serving as special prosecutor in this matter. Alternatively, the Court should grant narrower relief prohibiting Attorney General James from personally participating in, directing, or supervising the investigation or any resulting prosecution, together with appropriate safeguards to ensure independent prosecutorial judgment. If the Court determines that the challenge is premature, any dismissal should be expressly without prejudice to Petitioner's right to seek disqualification in the appropriate proceeding upon a developed record, without adjudicating the merits of that claim.

Dated: New York, New York
October 27, 2026

Respectfully Submitted,

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STATEMENT PURSUANT TO 22 NYCRR 202.8-b

I, Andrew T. Miltenberg, affirm under penalty of perjury pursuant to CPLR 2106 that the total number of words in the foregoing Reply Memorandum of Law, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is 5,788 words. The foregoing Reply Memorandum of Law does not comply with the word count limit set forth in 22 NYCRR 202.8-b. However, this Court granted Petitioner's request to submit a Reply Memorandum of Law of up to 6,500 words and this Reply Memorandum of Law complies with the permission granted by the Court. In determining the number of words in the foregoing Reply Memorandum of Law, I relied upon the word count of the word-processing system used to prepare the document.

/s/ *Andrew T. Miltenberg*
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