SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
GILLIO LOPES,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

KATHLEEN ("KATHY") M. 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.

Index No. 911974-26

Farrell, J.

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO AMEND

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PRELIMINARY STATEMENT

Respondent Kathy Hochul, Governor of the State of New York (Governor) and Respondent Letitia James, New York State Attorney General (AG, and collectively with the Governor, Respondents), respectfully submit this memorandum of law in opposition to Petitioner's motion for leave to amend, dated November 5, 2026, which seeks leave to file an amended petition adding six new parties who, like Petitioner, are defendants in *Jane Doe v. Cornell University, et al.*, Index No. 161704/2026 (Sup. Ct. N.Y. Cnty.) (the *Jane Doe* Litigation). As detailed below, amendment is not warranted because the proposed amendment is palpably insufficient and patently devoid of merit. Accordingly, Petitioner's motion for leave to amend should be denied, the relief requested in the Verified Petition should be denied, and the Verified Petition and this proceeding should be dismissed in their entirety and with prejudice.

STATEMENT OF FACTS

For a complete Statement of Facts, Respondents respectfully refer this Court to the Statement of Facts provided in their prior filing. Dkt. No. 21 at pp. 1–3.

As relevant to this motion, Petitioner commenced this action by order to show cause on October 7, 2026, seeking to: (1) annul Executive Order No. 64 (EO 64), which was issued by the Governor in exercise of her superseder authority pursuant to Executive Law § 63(2), requiring the AG to investigate the conduct of, and, if warranted, present evidence to a grand jury arising out of the allegations in the *Jane Doe* Litigation; and (2) disqualify the AG from serving as special prosecutor in the investigation and prosecution contemplated by EO 64. Dkt. Nos. 1–12. Respondents answered, asserting objections in point of law and opposing the relief requested. Dkt. Nos. 18–21. The Verified Petition was fully submitted on October 27, 2026. *See* Dkt. No. 24. The parties then appeared before this Court for oral argument. *See* Dkt. Nos. 13, 27.

At oral argument, this Court raised the issue of joinder, expressing concern about its ability to effectuate complete relief in the absence of others who may face prosecution as authorized by EO 64.[1] Dkt. No. 27 at pp. 12–13. Additionally, the Court expressed concerns about the potential for inconsistent results amongst courts of coordinate jurisdiction. Dkt. No. 27 at pp. 12–16. The Court also raised related questions about venue. Dkt. No. 27 at pp. 12–13, 19–20. At the conclusion of oral argument, the Court granted Petitioner's request to provide a further submission. Dkt. No. 27 at p. 42. Petitioner subsequently moved by order to show cause for leave to amend the Verified Petition to add six new parties—four new petitioners and two new respondents, who, like Petitioner, are defendants in the *Jane Doe* Litigation. Dkt. Nos. 26–31. Respondents oppose.

STANDARD OF REVIEW

CPLR 401 provides applicable rules for joining new parties in special proceedings, including proceedings pursuant to CPLR Article 78. It states that, "[a]fter a proceeding is commenced, no party shall be joined or interpleaded . . . except by leave of court." CPLR 401. As relevant to any application for leave to amend made in this context, CPLR 3025(b) instructs that leave to amend "shall be freely given upon such terms as may be just . . . ." This is a liberal standard that permits leave "unless the proposed amendment is palpably insufficient or patently devoid of merit." *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 156 A.D.3d 99, 102

[1] As the Court noted at oral argument, Respondents did not raise any nonjoinder issue in their answering papers. Dkt. No. 27 at p. 21. However, any such defect is only one of many other dispositive defects requiring dismissal. *See* Dkt. No. 21 at pp. 5–36. Even without an objection from Respondents, this Court may "raise the absence of a necessary party at any stage of the proceedings upon its own motion." *Matter of Schenectady Cnty. Dep't of Social Servs. v. Noah DD.*, 200 A.D.3d 1509, 1511 (3d Dep't 2021). Once raised, this Court may summon any necessary party subject to this Court's jurisdiction or, if a necessary party cannot be summoned, the court must consider whether to proceed in the absence of that necessary party. *Id.*; *see Matter of Velez v. New York State Dep't of Corr. & Cmty. Supervision*, 163 A.D.3d 1210, 1211–12 (3d Dep't 2018).

(3d Dep't 2017); *see Backus v. Lyme Adirondack Timberlands II, LLC*, 96 A.D.3d 1248, 1250 (3d Dep't 2012); *Dever v. DeVito*, 84 A.D.3d 1539, 1541 (3d Dep't 2011).

ARGUMENT

THE PROPOSED AMENDMENT IS PALPABLY INSUFFICIENT AND PATENTLY DEVOID OF MERIT.

A. The proposed amendment does not cure the defects identified by this Court.

Initially, Petitioner's application for leave to amend should be denied because the proposed amendment does not resolve the nonjoinder and venue defects identified by this Court. Dkt No. 27 at pp. 12–16; *see Doe v. Tobin & Dempf, LLP*, 247 A.D.3d 1320, 1323 (3d Dep't 2026) (motion court did not abuse its discretion in denying motion to amend complaint because proposed amendment did not cure pleading deficiency); *Stone v. Gordon*, 211 A.D.3d 881, 882 (3d Dep't 1995) (same); *see also Ahmed v. Choudhry*, ___ A.D.3d ___ (1st Dep't 2026), 2026 N.Y. Slip. Op. 06518 (Nov. 5, 2026) (denying plaintiff's request to amend its complaint because "amendment would be futile since plaintiff cannot cure the defects").

1. The proposed amendment does not resolve any nonjoinder defect.

CPLR 1001 mandates that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiff or defendants." CPLR 1001(a). "When a person who should be joined . . . has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned." CPLR 1001(b). "If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party." *Id.* "Nonjoinder of a party who should be joined under [CPLR 1001] is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party . . . ." CPLR 1003; *see* CPLR 3211(a)(10) (identifying

failure to name a necessary party as grounds for dismissal); *JMMJ Dev., LLC v. Woodvale Holdings, LLC*, 207 A.D.3d 830, 831 (3d Dep't 2022) (resolving motion to dismiss or, in the alternative, for joinder based on absence of necessary party).

As set forth in CPLR 1001(b), the determination as to whether a court may proceed without a necessary party requires an evaluation of five discretionary factors:

> (1) whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; (2) the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined; (3) whether and by whom prejudice might have been avoided or may in the future be avoided; (4) the feasibility of a protective provision by order of the court or in the judgment; and (5) whether an effective judgment may be rendered in the absence of the person who is not joined.

CPLR 1001(b).

In analyzing these five factors, "[n]o single one is determinative; and while the court need not separately set forth its reasoning as to each factor, the statute directs it to consider all five." *Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals*, 5 N.Y.3d 452, 459 (2005); *see Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 N.Y.3d 543, 551 (2012). "The overall statutory design is intended to (1) guarantee that absent parties at risk of prejudice will not be embarrassed by judgment purporting to bind their rights or interests where they have had no opportunity to be heard and (2) protect against multiple lawsuits and inconsistent judgments." *Comm'r of the N.Y. State Dep't of Transp. v. Polite*, 236 A.D.3d 82, 109 (2d Dep't 2024) (quotation marks and citation omitted); *see Saratoga Cnty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 820 (2003).

Here, in the proposed amendment, Petitioner attempts to obviate the Court's nonjoinder concerns by adding six new parties, who are some of Petitioner's co-defendants in the *Jane Doe* Litigation. Dkt. No. 29 at ¶¶ 12–15, 18–19; *see* Dkt. No. 4. However, in addition to the six parties

identified in the proposed amendment, there are multiple other defendants in the *Jane Doe* Litigation that are alleged to have engaged in various misconduct that could provide a basis for criminal liability. *See* Dkt. No. 4; *see also* Penal Law § 20.25 (proscribing when an individual may be criminally liable for corporate conduct). Further, there are potentially innumerable unknown others who are not named as defendants in the *Jane Doe* Litigation, but whose conduct falls within the scope of the investigation authorized by EO 64 and who could be subject to future prosecution by the AG. *See, e.g.,* Penal Law § 120.20 (making it unlawful to engage in conduct which creates a substantial risk of serious physical injury to another person); Penal Law §§ 220.00–220.55 (controlled substances offenses); Penal Law § 260.20(2) (making it unlawful to sell any alcoholic beverage to a person under twenty-one years old).[2]

Thus, if the necessary parties to this proceeding are the individuals whose conduct falls within the scope of the investigation authorized by EO 64 and may eventually be prosecuted, the proposed amendment does not obviate this Court's nonjoinder concerns because it fails to join all such parties. *See Matter of Iglhaut v. City of New York*, 247 A.D.3d 569, 569 (1st Dep't 2026) (motion court properly dismissed article 78 proceeding for failure to join necessary parties where petitioner failed to identify all necessary parties "rendering it impossible to bring the parties before the court"); *see also Matter of Furnia*, 232 A.D.3d 1080, 1083 (3d Dep't 2024) (motion court's

[2] Although CPLR 1024 permits a litigant to proceed against unknown parties in certain circumstances, this provision does not permit unknown petitioners in proceedings pursuant to CPLR Article 78. *See Matter of Westchester Cnty. Correction Officers Benevolent Assn., Inc. v. Cnty. of Westchester*, 29 Misc. 3d 1219(A) (Sup. Ct. Westchester Cnty. 2008) ("CPLR 1024, which provides for the naming of unknown parties as defendants in an action, does not provide for the naming of unidentified Petitioners in an Article 78 proceeding"). Regardless, Petitioner has not named any unknown parties in the proposed amendment and otherwise has not met the prerequisites for use of this procedural tool. Dkt No. 29; *see Walker v. Glaxosmithkline, LLC*, 161 A.D.3d 1419, 1420–21 (3d Dep't 2017) ("[i]n the absence of evidence that a plaintiff made the requisite timely and diligent efforts to identify an unknown defendant, he or she may not take advantage of the procedural mechanism provided by CPLR 1024").

finding that children of beneficiary of estate were necessary party to estate proceeding required remittal to motion court to consider whether there were other unknown children that could be identified and joined or, if they could not be joined, whether court could proceed in their absence). At this stage of investigation, any nonjoinder of necessary parties only highlights that Petitioner's claim is wildly premature. *Compare Matter of Soares v. Herrick*, 20 N.Y.3d 139, 143, 146–47 (2012) (reaching merits of application to disqualify prosecutor after indictment was dismissed and re-presented five times and criminal defendant commenced civil action for malicious prosecution against prosecutor, but still denying such motion because criminal defendant failed to show any actual prejudice), *with Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 56 (1983) (refusing to reach merits of application to disqualify prosecutor at outset of investigation because "the application for disqualification was premature").

More pointedly, even if the six new parties identified in the proposed amendment were the only other parties that might eventually be prosecuted, two of those parties—Matthew Ingalls (Ingalls) and Johnathan Newell (Newell)—cannot be joined because they are beyond the jurisdiction of the Court. CPLR 1001(b); *see Windy Ridge Farm v. Assessor of Town of Shandaken*, 11 N.Y.3d 725, 727 (2008). Although the proposed amendment purports to join Newell and Ingalls as respondents, Petitioner concedes they are not residents of this state. Dkt. No. 29 at ¶¶ 18–19. Since neither reside in this state, Ingalls and Newell are not subject to the jurisdiction of this Court and cannot be joined unless they consent or appear. *See Doe v. Roe*, ___ A.D.3d ___ (3d Dep't 2026), 2026 N.Y. Slip Op. 06502 (Nov. 5, 2026) (court lacked general and specific jurisdiction over defendant-undergraduate student at Cornell University because student maintained domicile at her parents' residence while attending college and her participation in a university disciplinary investigation did not provide basis for exercise of long-arm jurisdiction);

Porcello v. Brackett, 85 A.D.2d 917, 917–18 (4th Dep't 1981) (court lacked general and specific jurisdiction over defendant-undergraduate student at Cornell University because student maintained domicile at his parents' residence while attending college and "social agreement among students to share the expenses of a pleasure trip" did not provide basis for exercise of long-arm jurisdiction); *see also Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829–30 (1988) (court lacked general and specific jurisdiction over defendant-alumna of St. Lawrence University because alumna resided in California and previous enrollment and attendance at university in New York did not provide basis for exercise of long-arm jurisdiction). Petitioner admits that Ingalls and Newell will not consent or appear. Dkt. No. 26 at ¶¶ 26–27. In the admitted absence of other jurisdictional bases over these parties, they cannot be joined. *See* CPLR 1001(b) (a court can only order a party to be joined if that party "is subject to the jurisdiction of the court"); *Matter of Schenectady Cnty. Dep't of Social Servs. v. Noah DD.*, 200 A.D.3d 1509, 1511 (3d Dep't 2021) (court "plainly did not have authority to make [person] a named party to this proceeding" because the court had no jurisdiction over person and, in the absence of jurisdiction, "the court is limited to directing that reasonable efforts be made to join him as a party or considering whether this matter should proceed in his absence").

In the absence of any party this Court deems necessary, this Court must consider the CPLR 1001(b) balancing factors to determine whether it can proceed or whether it must dismiss. *See* CPLR 3211(a)(10) (failure to name a necessary party as grounds for dismissal); *Swezey*, 19 N.Y.3d at 554–55 (dismissing action because balance of CPLR 1001(b) factors led court to "conclude that this case cannot be decided without the presence of the [necessary party]"). Notably, Petitioner makes no attempt to address the CPLR 1001(b) balancing factors or otherwise request that this Court proceed in the absence of any necessary parties. *See* Dkt. Nos. 26–29. Instead, Petitioner

asks this Court to effectuate joinder by giving notice to "the remaining individuals" pursuant to CPLR 7802(d), so that these parties may intervene.[3] Dkt. No. 26 at ¶ 30. This request conflicts with Petitioner's proposed amendment, which purports to add Ingalls and Newell as respondents, rather than as proposed intervenors. *See* Dkt. No. 29 at ¶¶ 18–19. Even so, Petitioner's request that this Court effectuate joinder by inviting intervention is procedurally improper because "[w]hen a necessary party can be joined only by consent or appearance, a court must engage in the CPLR 1001(b) analysis to determine whether to allow the case to proceed without that party." *Matter of Red Hook/Gowanus Chamber of Commerce*, 5 N.Y.3d at 459.

Analyzing the requisite statutory factors here, the availability of alternative remedies cuts strongly against proceeding in the absence of necessary parties because Petitioner—and any other person who might eventually be indicted and prosecuted—can challenge any indictment in numerous ways and through various procedural vehicles on a complete record that speaks to actual and specific, rather than hypothetical and generalized, claims of prejudice. *See Milmar Food Group II, LLC v. Applied Underwriters, Inc.*, 61 Misc. 3d 812, 833 (Sup.Ct. Orange Cnty. 2018) (granting motion to dismiss for failure to name a necessary party because plaintiff had an effective remedy available in another state); *Saxon Assoc. v. Barton*, 143 Misc.2d 602, 603 (Sup. Ct. N.Y. Cnty. 1989) (denying motion to amend judgment to add necessary party because plaintiff had another effective remedy available in new plenary action or by moving for relief in separate

[3] Even if joinder could be accomplished in this unorthodox manner, issuing notice to invite intervention would unnecessarily delay this proceeding. *See Matter of Connectivity Sys., LLC v. Zoning Bd. of Appeals of the Town of Ramapo*, 227 A.D.3d 984, 986 (2d Dep't 2024); *Matter of Citizens Organized to Protect the Envt. v. Planning Bd. of Town of Irondequuoit*, 50 A.D.3d 1460, 1461–62 (4th Dep't 2008); *Matter of Hospital Assn. of N.Y. State v. Axelrod*, 164 A.D.3d 518, 527 (3d Dep't 1990). Further, the claim of any intervenor similarly situated to Petitioner would fail for all the same reasons that Petitioner's claim fails. *See Town of Southhampton v. New York State Dep't of Envtl. Conserv.*, 194 A.D.3d 1310, 1313 (3d Dep't 2021) (motion to intervene in Article 78 proceeding properly denied where underlying claim was defective).

bankruptcy proceeding); *see also L-3 Communications Corp. v. SafeNet, Inc.*, 45 A.D.3d 1, 11 (1st Dep't 2007) ("dismissal should be a last resort where plaintiff will be deprived of *any remedy*" (emphasis added)).

Although the availability of alternative remedies alone is not dispositive, the remaining factors likewise weigh against proceeding because the absence of necessary parties would only sow confusion and chaos in this, a related proceeding, and in any potential future criminal prosecutions that would prejudice all parties and undermine this Court's ability to render an effective judgment. *See Matter of Green v. Bellini*, 12 A.D.3d 1148, 1149 (4th Dep't 2004) (proceeding for writ of prohibition that sought to reinstate criminal prosecution could not continue in the absence of party that was subject of the criminal prosecution because of "the prejudice that might accrue to [the criminal defendant] as a result of petitioner's failure to join him"); *see also Amazing Home Care Servs., LLC v. Applied Underwriters Captive Risk Assur. Co., Inc.*, 191 A.D.3d 516, 519 (1st Dep't 2021) (dismissal of necessary party from action required dismissal of entire action because court could not proceed in absence of necessary party where alternative remedy was available to plaintiffs, absence of necessary party raised "[t]he possibility of multiple conflicting judgments[,]" and no effective judgment could be rendered without necessary party).

Moreover, permitting amendment to add new parties without any excuse for nonjoinder and at this late stage, after Respondents answered and after the parties were heard at oral argument, would prejudice Respondents by unduly delaying this proceeding. *See Place v. Preferred Mut. Ins. Co.*, 190 A.D.3d 1208, 1212 (3d Dep't 2021) (motion court did not abuse its discretion in denying motion for leave to amend complaint where application for leave to amend was made after joinder of issue and plaintiff offered no excuse for delay); *Hennessy v. G.S. Mink Steamer & T. Claxton Hose Co. No. 2, Auxiliary Inc.*, 182 A.D.3d 830, 834 (3d Dep't 2020) (same); *Bailey v.*

Vill. of Saranac Lake, Inc., 100 A.D.3d 1089, 1091 (3d Dep't 2012) (same). Although delay of a few weeks, like the delay already incurred here, is normally not unduly prejudicial, there is a substantial risk that this delay will be interminably prolonged by the proposed amendment because it contemplates adding new parties to this proceeding who apparently cannot be located. *See* Dkt. No. 29 at ¶¶ 18–19, 30. As a practical matter, adding new respondents whose whereabouts are unknown would result in protracted delay while Petitioner continues his efforts to first locate and then serve these new respondents. *See* CPLR 308; *Oglesby v. Barragan*, 135 A.D.3d 1215, 1216 (3d Dep't 2016) (evaluating sufficiency of plaintiff's efforts to locate out-of-state defendants for purposes of service).

Accordingly, the proposed amendment does not, and cannot at this time, resolve the nonjoinder issue identified by this Court such that amendment should not be permitted. *See Cisco v. Verizon, N.Y., Inc.*, 244 A.D.3d 809, 812 (3d Dep't 2025) (amendment not warranted because proposed amendment "did not cure the defects in the complaint that led to its dismissal"); *Carr v. Haas*, 163 A.D.3d 1212, 1215 (3d Dep't 2018) (amendment not warranted because proposed amendment did not cure justiciability and pleading defects); *see also Gansett One, LLC v. Husch Blackwell, LLP*, 168 A.D.3d 579, 580 (3d Dep't 2019) (finding that granting leave to amend is unnecessary when "amendment cannot cure the fundamental deficiencies in these claims").

2. The proposed amendment does not resolve any venue defect.

Although not squarely addressed in the proposed amendment, this Court, at oral argument, also questioned whether Albany County is a proper venue for this proceeding. Dkt. No. 27 at pp. 12–13, 19–20. That question necessarily implicates a broader defect previously identified by Respondents—i.e., that a proceeding pursuant to CPLR article 78 is not the proper procedural vehicle to request disqualification of the AG. Dkt. No. 21 at pp. 20–22. As detailed in Respondents' answering papers, County Law § 701(6) otherwise establishes requirements for

making an application to disqualify the AG that apply any time she is serving as special prosecutor and mandate any application for disqualification be made to a superior criminal court in the county where the criminal matter is triable. Dkt. No. 21 at pp. 20–22; *see* County Law § 701(6); *see also People v. Viviani*, 36 N.Y.3d 564, 578–79 (2021) (disqualification processes in County Law § serve separation of powers functions that are implicated when a court is asked to undertake "the exceptional function of displacing an elected constitutional officer").

The statutory requirements set forth in County Law § 701(6) serve the important comity goals animating the Court's questions. *See* County Law § 701(6). The process proscribed by County Law § 701(6) martials the disqualification process before a single court where any criminal matter impacted by the disqualification is triable, limiting the risk of duplicative litigation and inconsistent results. *See Matter of Dondi v. Jones*, 40 N.Y.2d 8, 15 (1976) (considering principles of comity in connection with application for a writ of prohibition to disqualify the AG from serving as special prosecutor and finding that, because petitioner had twice moved to dismiss the indictment on the same grounds raised in his application for writ of prohibition to disqualify the AG, his failure to make a third application to dismiss the indictment did not bar prohibition since a court ruling on the third application could not overrule the prior two decisions); *see also Matter of Schneider v. Aulisi*. 307 N.Y. 376, 382 (1954) (proceedings in multiple counties before courts of coordinate jurisdiction is disfavored because, even if not technically improper, as a matter of practice this "would tend to bring the administration of justice into disrepute, and would seriously interfere with the orderly administration of judicial work").

B. The proposed amendment raises new claims that lack merit.

To the extent that Petitioner's motion for leave to amend can be read as requesting leave to assert new factual allegations regarding the recent appointment of outside counsel to assist the AG with the investigation authorized by EO 64, any request to so amend must be denied because

any claims directed at the appointment of outside counsel are wholly without merit. *See Gaul v. Cool Insuring Agency, Inc.*, 250 A.D.3d 1162, 1165 (3d Dep't 2026) (motion for leave to amend was "appropriately denied" because proposed amendment failed to state clam with requisite particularity and allegations were otherwise insufficient to state a claim); *Loch Sheldrake Beach & Tennis, Inc. v. Akulich*, 141 A.D.3d 809, 811 (3d Dep't 2016) (motion for leave to amend was improperly granted because claims in proposed amendment failed as a matter of law).

Petitioner's new factual allegations and contentions about the appointment of outside counsel reflect a fundamental misunderstanding of the constitutional predicate for criminal investigations and prosecutions. *See Viviani*, 36 N.Y.3d at 577–579 (explaining constitutional grant of prosecutorial authority to the AG and district attorney, how they share prosecutorial powers, and constitutional basis for those officers to act); *People v. Gilmour*, 98 N.Y.2d 126, 129–31 (2002) (explaining evolution of AG's prosecutorial authority and basis for same as provided in the New York State Constitutional and Executive Law § 63). Contrary to Petitioner's contentions that the investigation must proceed without the AG's involvement, in fact, it cannot. *See Viviani*, 36 N.Y.3d at 577 (finding it unconstitutional to create a special prosecutor other than AG or district attorney because this would "take[] an essential function from a constitutional officer and give[] it to a different officer chosen in a different manner"); *see also People ex rel. Wogan v. Rafferty*, 208 N.Y. 451, 462 (1913) (finding it unconstitutional to take constitutional authority from constitutional officer and vest that authority outside of the constitutional officer without any involvement by the constitutional officer because it would deprive the constitutional officer of powers vested by the constitution and "interfere with the free exercise" of the officer's duties and responsibilities).

The Legislature, apportioning prosecutorial authority between duly-elected constitutional law enforcement officers, vests: (1) district attorneys with generalized prosecutorial authority in the county where they are elected; and (2) the AG with specific state-wide prosecutorial authority that she may exercise only when authorized by statute. *See* County Law § 700 (statutory delegation of general prosecutorial authority to district attorneys); Executive Law § 63 (statutory delegation of specific prosecutorial authority to the AG); *see also People v. Romero*, 91 N.Y.2d 750, 754 (1998) ("District Attorneys have plenary prosecutorial power in the counties where they are elected" and "the Attorney-General has no such general authority . . . except when specifically authorized by statute"); *Della Pietra v. State of New York*, 71 N.Y.2d 792, 796 (1988) (district attorneys have "general prosecutorial authority for all crimes occurring in the county where elected" and the AG has "no general prosecutorial authority . . . except when specifically permitted by statute"). Beyond these two officers, no other person holds prosecutorial authority, nor may such authority be delegated away to an unelected person. *See Viviani*, 36 N.Y.3d at 577 (finding it unconstitutional to create a special prosecutor other than AG or district attorney because this would "take[] an essential function from a constitutional officer and give[] it to a different officer chosen in a different manner"); *Matter of Haggerty v. Himelein*, 89 N.Y.2d 431, 436 (1997) ("the constitutional, statutory, and common-law prosecutorial authority[,]" including "the discretionary power to determine whom, whether and how to prosecute a criminal matter" and "the responsibility and accountability" for those actions is "not freely transferable to anyone else").

Executive Law § 63(2) is a statutory delegation of prosecutorial authority that empowers the AG to exercise her prosecutorial authority whenever required by the Governor. Exec. Law § 63(2). The Governor exercising her superseder authority under Executive Law § 63(2) has a single prosecutorial alternative to the district attorney—the AG. Exec. Law § 63(2); *see Viviani*, 36

N.Y.3d at 579; *see also Wogan*, 208 N.Y. at 462 (finding it unconstitutional to take constitutional authority from constitutional officer and vest that authority outside of the constitutional officer without any involvement by the constitutional officer because it would deprive the constitutional officer of powers vested by the constitution and "interfere with the free exercise" of the officer's duties and responsibilities). The AG acting in a superseder capacity wholly displaces the district attorney and strips all prosecutorial authority from the district attorney. *See Matter of Haggerty*, 89 N.Y.2d at 436 (when the Governor requires the AG to act, the AG supersedes the local district attorney "to assume the prosecutorial function" and "acquires all the powers and performs all the duties in respect of such actions or proceedings before a court or Grand Jury, which the district attorney would otherwise be authorized or required to exercise or perform."); *Matter of Carey (Fischer)*, 68 A.D.2d 220, 224–25 (4th Dep't 1978) ("[a]n Attorney-General who supersedes a local [d]istrict [a]ttorney exercises all powers and performs all duties with respect thereto that the local [d]istrict [a]ttorney would otherwise perform"); *Matter of Rice*, 31 Misc.3d 838, 842 (Sup. Ct. Nassau Cnty. 2011) (recognizing that when Governor exercises her superseder authority under Executive Law § 63(2), she is removing power from the district attorney).

Thus here, where the Governor has exercised her superseder authority to task the AG with the investigation authorized by EO 64, the district attorney is divested of any prosecutorial authority over that investigation and the only person with any prosecutorial authority to investigate this matter is the AG. *See Matter of Carey*, 68 A.D.2d at 225; *see also Matter of Haggerty*, 89 N.Y.2d at 436 (recognizing distinction between when AG is acting under superseder authority under Executive Law § 63(2) and fully displacing district attorney versus when AG and district attorney are working cooperatively together). That ultimate prosecutorial authority cannot be further divested from the AG and installed in an unelected person. *See Matter of Schumer*, 60

N.Y.2d at 52 (prosecutor cannot delegate away ultimate prosecutorial responsibility and authority); *see also Wogan*, 36 N.Y.3d at 455–56 (constitutional authority cannot be taken away from a constitutional officer and given to a non-elected, non-constitutional officer); *see also Matter of Working Families Party v. Fisher*, 23 N.Y.3d 539, 546 (2014) (recognizing a strong "public interest in having prosecutorial duties preformed, where possible, by the constitutional officer chosen by the electorate"). Rather, the AG, as the sole constitutional officer currently vested with the constitutional and statutory prosecutorial powers and responsibilities, must retain ultimate authority and control. *See People v. Soddano*, 86 N.Y.2d 727, 728 (1995) (prosecutor "may allow appearances by public officers or private attorneys so long as they are kept aware" because prosecutors "retain the ultimate, nondelegable responsibility for prosecuting").

Though the AG may be assisted by an unelected person, as she will be here by the outside counsel, ultimate responsibility and accountability for the prosecution must remain with the AG and her complete exclusion from the investigation is constitutionally impermissible. *See Matter of Schumer*, 60 N.Y.2d at 52 (district attorney could not transfer fundamental responsibilities of her office to unelected official); *see also People v. Soddano*, 86 N.Y.2d 727, 728 (1995) (prosecutor "may allow appearances by public officers or private attorneys so long as they are kept aware" because prosecutors "retain the ultimate, nondelegable responsibility for prosecuting"); *Wogan*, 208 N.Y. at 462 (constitutional authority vested in constitutional officer could not be vested outside of that constitutional officer). In certain limited circumstances, County Law § 701(6) permits further divestiture of the AG's prosecutorial authority, but this further divestiture can only be done on application of the AG and in a superior criminal court in the county where the criminal matter is triable and permits transfer only to very specific alternatives. County Law § 701(6). These statutory limitations are strictly construed because "a very important purpose is

served by adhering to the plain language of the statute and to its exceptional function of displacing an elected constitutional officer." *People v. Leahy*, 72 N.Y.2d 510, 514 (1988); *see People v. Callara*, 44 N.Y.3d 623, 626 (2025) (requiring strict adherence to statutory process for transferring power from a prosecutor because of "the separation of powers concerns at play").

Furthermore, the writ of prohibition does not lie to compel this relief because the AG's decision to appoint outside counsel, staffing decisions about who will work with the outside counsel, and ultimately how the investigation is conducted through outside counsel are all executive or administrative actions against which the writ of prohibition does not lie. *See Matter of Doe v. Cuomo*, 71 A.D.3d 889, 889 (2d Dep't 2010) (writ of prohibition did not lie against investigation into alleged violation of immunity agreement because such action is executive in nature); *McGraw v. Shapiro*, 56 A.D.2d 624 (2d Dep't 1977) (writ of prohibition did not lie against employment decisions because such actions are administrative in nature); *see also Matter of Soares v. Carter*, 25 N.Y.3d 1013 (2015) (recognizing the "broad authority and discretion . . . to conduct all phases of criminal prosecution" as an "executive power"). Further, Petitioner has no clear legal right to any relief because neither he, nor this Court, may dictate how any prosecutor, including the AG or any designee, perform their job responsibilities or exercise their prosecutorial discretion. *See Matter of Staten Is. Branch of the Nat's Assn. for the Advancement of Colored People v. State of N.Y. Grievance Comm. for the Second, Eleventh & Thirteenth Jud. Dists.*, 144 A.D.3d 412, 413 (1st Dep't 2016); *Matter of Columbia Cnty. Subpoena Duces Tecum Dated Mar. 20, 2013 (Czajka)*, 118 A.D.3d 1081, 1083 (3d Dep't 2014); *Matter of Donnaruma v. Carter*, 41 Misc. 3d 195, 210–11 (Sup. Ct. Albany Cnty. 2013).

Likewise, a writ of prohibition should not issue as a matter of discretion given the availability of other adequate remedies available to Petitioner if he is eventually indicted and

prosecuted. *See Matter of Whitehurst v. Kavanagh*, 218 A.D.2d 366, 368–69 (3d Dep't 1996) (affirming denial of writ of prohibition seeking to prohibit district attorney from proceeding with prosecution of indictment because petitioner could raise his claims "by moving against the indictment" and "the ordeal of a criminal trial with the possibility of conviction, standing along is not sufficiently harmful to warrant the use of prohibition even if the harm sought to be redressed implicates a constitutional right"); *see also People v. Riccio*, 91 A.D.2d 693, 694 (3d Dep't 1982) (direct appeal from criminal conviction considering criminal defendant's claim that prosecution by AG acting pursuant to Executive Order made in exercise of Governor's superseder authority was improper or beyond scope of AG's authority).

Accordingly, Petitioner's request for leave to amend to add new factual allegations regarding the appointment of outside counsel should be denied because these new factual allegations are wholly without merit. *See Capicotto v. Western N.Y. Med. Mgt., LLC*, 247 A.D.3d 1492, 1494 (4th Dep't 2026) (motion court properly denied motion for leave to amend because proposed amendment was patently devoid of merit "where it fails to cure any of the defects that warranted dismissal"); *Singh v. T-Mobile*. 232 A.D.3d 662, 667 (2d Dep't 2024) (motion court properly denied motion for leave to amend because proposed amendment "was palpably insufficient and patently devoid of merit, as it failed to cure any of the defects that warranted dismissal"); *Spada v. Aspen Univ., Inc.*, 202 A.D.3d 494, 495 (1st Dep't 2022) (motion court properly denied motion for leave to amend because proposed amendment "would not cure the deficiency" in the original pleading).

C. The proposed amendment does not cure the procedural and substantive defects that mandate dismissal of the Verified Petition.

Finally, leave to amend must also be denied because the proposed amendment does not cure the numerous other procedural and substantive defects that require dismissal of the Verified

Petition and preclude this Court from granting relief. *See Matter of Town of Verona v. Cuomo*, 136 A.D.3d 36, 45 (3d Dep't 2015) (motion court did not abuse its discretion in denying cross-motion to amend because proposed amendment was "plainly lacking in merit" where petitioners lacked standing and court lacked jurisdiction over dispute); *Swergold v. Cuomo*, 70 A.D.3d 1290, 1294 (3d Dep't 2010) (motion court did not abuse its discretion in denying motion for leave to amend because proposed amendment "suffer[ed] from the same jurisdictional deficiencies" and "also would have been dismissed in its entirety"); *Matter of Senior Care Servs., Inc. v. New York State Dep't of Health*, 46 A.D.3d 962, 964 (3d Dep't 2007) (affirming motion court determination that denied motion for leave to amend because claims in proposed amendment were substantively meritless).

As detailed in Respondents' answering papers, Petitioner's claim fails three important justiciability criteria—ripeness, standing, and presentation of a political question. Dkt. No. 21 at pp. 5–20. These threshold considerations are dispositive and not cured by the proposed amendment. *See Matter of Shelter Is. Assn. v. Zoning Bd. of Appeals of Town of Shelter Is.*, 57 A.D.3d 907, 908–10 (2d Dep't 2008) (finding "Supreme Court did not err in denying . . . petitioner's cross motion which was for leave to amend the petition . . . as none of the petitioners, including the four additional petitioners that the original petitioners sought to add had standing"); *see also Matter of Johnson v. Pataki*, 91 N.Y.2d 214, 223 (1997) (judicial review of the Governor's exercise of her superseder authority "is generally limited to determining whether the State Constitution or the Legislature has empowered the Governor to act and does not include the manner in which the Governor chooses to discharge that authority"); *Matter of Schumer*, 60 N.Y.2d at 55–56 (request to disqualify prosecutor raised separation of powers concerns and "was

premature and not justiciable" because it was made before information about how prosecution might play out was known).

Similarly, as also discussed in Respondents' answering papers, Petitioner's claim is procedurally improper because the writ of prohibition does not lie against executive action or in the absence of a clear legal right to relief. Dkt. No. 21 at pp. 22–28. Neither defect is remedied by the proposed amendment as the claim in the proposed amendment is identical to the claim alleged in the original petition, both of which impermissibly seek a writ of prohibition against executive action and do not identify any clear entitlement to relief. *See Matter of Wechsler v. New York State Adirondack Park Agency*, 85 A.D.3d 1378, 1379 (3d Dep't 2011); *see also Matter of McGinley v. Hynes*, 51 N.Y.2d 116, 123–25 (1980) (writ of prohibition did not lie against investigative activities of special prosecutor because investigation "had not yet progressed to a stage where individual wrongdoers had been identified or discrete charges of criminality raised").

These procedural defects notwithstanding, and as also discussed in Respondents' answering papers, issuance of the writ of prohibition is also not warranted as a matter of this Court's discretion. Dkt. No. 21 at pp. 28–31. Further, Petitioner fails to establish any actual prejudice that would require disqualification of the AG. Dkt. No. 21 at pp. 31–35. Nothing in the proposed amendment addresses these defects. *See People v. Zinkhen*, 89 A.D.3d 1319, 1320 (3d Dep't 2011) (criminal court did not err in denying motion to dismiss indictment that alleged the prosecutor should be disqualified because did not provide proof of any actual prejudice and only asserted "an inference of impropriety, which is not enough on its own to require [the c]ourt to dismiss the indictment or disqualify the District Attorney's office"); *People v. Walton*, 214 A.D.2d 805, 808–09 (3d Dep't 1995) (denying CPL 440 motion "[a]lleging that statements made by the prosecutor to the press constituted prosecutorial misconduct and that he was the victim of selective

prosecution" because defendant failed to show that he was prejudiced or that this resulted in selective application of the law and defendant otherwise had ability to protect his rights through other means at trial and in pre-trial motions); *see also People v. National Rifle Assn. of Am., Inc.*, 223 A.D.3d 84, 90–91 (1st Dep't 2023) (AG's public statements that "displayed animus" towards defendant organization did not amount to selective prosecution); *Matter of People v. Trump Org., Inc.*, 205 A.D.3d 625, 626–27 (1st Dep't 2022) (AG's public statements about subject of subpoenas did not did not amount to selective prosecution).

Accordingly, the proposed amendment is devoid of merit such that Petitioner's motion for leave to amend must be denied. *See Matter of Bolofsky v. City of New York*, 205 A.D.3d 515, 515-16 (1st Dep't 2022) (finding "Supreme Court providently exercised its discretion to deny leave to amend to add additional parties after respondents challenged the standing of petitioner" because "petitioners cannot show that they will actually be harmed by the challenged administrative action as the harm is entirely conjectural"); *Matter of Perkins v. Town of Dryden Planning Bd.*, 172 A.D.3d 1695, 1697–98 (3d Dep't 2019) (finding "no abuse of discretion by Supreme Court in denying the motion for leave to amend the petition" because the proposed amendment "is devoid of merit"); *Ferguson v. Hart*, 151 A.D.3d 1242, 1243–45 (3d Dep't 2017) (reversing motion court determination that granted motion for leave to amend because proposed amendment was "palpably insufficient on its face" since claims were inconsistent with applicable law).

CONCLUSION

Respondents respectfully request that Petitioner's motion for leave to amend be denied in its entirety and with prejudice.

Dated: Albany, New York
November 16, 2026

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TO: All counsel of record (via NYSCEF)

STATEMENT PURSUANT TO 22 NYCRR 202.8-b

I, Kaitlin Vigars, affirm under penalty of perjury pursuant to CPLR 2106 that the total number of words in the foregoing 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 6,776 words. The foregoing Memorandum of Law complies with the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing Memorandum of Law, I relied upon the word count of the word-processing system used to prepare the document.

/s/ Kaitlin Vigars
Kaitlin Vigars