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

October 29, 2026

Farrell, J.

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

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PRELIMINARY STATEMENT

Respondent Kathy Hochul, Governor of the State of New York (Governor) and Respondent Letitia James, Attorney General of the State of New York (AG, and collectively with the Governor, Respondents), respectfully submit this memorandum of law in opposition to the Verified Petition, dated October 7, 2026, which seeks a writ of prohibition to: (1) void an executive order—Executive Order No. 64, dated October 1, 2026 (EO 64)—that appointed the AG as special prosecutor to investigate conduct arising out of allegations made in *Jane Doe v. Cornell University, et al.*, Index No. 161704/2026 (Sup. Ct. N.Y. Cnty.) (the *Jane Doe* Litigation); and (2) disqualify the AG from serving as special prosecutor in that investigation.

The Verified Petition must be denied. The Court of Appeals is clear that judicial review of the Governor's exercise of her superseder authority under Executive Law § 63(2) 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 Johnson v. Pataki*, 91 N.Y.2d 214, 223 (1997). Thus, Petitioner's claims necessarily fail.

First, Petitioner's claims are not justiciable. Petitioner's claims raise a political question that is not subject to judicial review and depend on so many levels of supposition and contingency about unknown future events that they are unripe and he lacks standing. Second, even if this matter were justiciable, it is procedurally defective and substantively meritless. Accordingly, for all the reasons detailed below and in the accompanying affirmation of Kaitlin Vigars, dated October 22, 2026 ("Vigars Aff."), the Verified Petition must be denied and this proceeding must be dismissed.

STATEMENT OF FACTS

On October 1, 2026, the Governor issued EO 64 appointing the AG as a special prosecutor for an investigation into allegations described in the *Jane Doe* Litigation. Executive Order No. 64,

Vigars Aff., Exh. A. The Governor issued EO 64 in an exercise of her superseder authority, derived from the executive powers conferred to the Governor in Article IV, § 3 of the New York State Constitution and the statutory powers granted to the Governor by the Legislature in Executive Law § 63(2). *See id*. EO 64 authorizes the AG to "investigate, and, if warranted, present evidence to a grand jury against and prosecute offenses arising out of the allegations of a sexual assault described in the [*Jane Doe* Litigation.]" *Id.* Further, EO 64 specifies that the AG "or her designee shall conduct a full, reasoned, and independent investigation . . . ." *Id.*

Petitioner is a defendant in the *Jane Doe* Litigation. Petition, ¶¶ 2–3, 6, 17, 22, 64, Dkt. No. 1. Petitioner anticipates that he will be targeted in the investigation authorized by EO 64 and that the investigation will not be properly conducted because, according to him, the AG allegedly unfairly prejudged the allegations made in the *Jane Doe* Litigation. Pet. ¶¶ 6–9, 31–34, 56, 64–66. In support of this claim, Petitioner points to a single, empathetic remark made by the AG on social media prior to her appointment as special prosecutor, which Petitioner characterizes as "communicat[ing] acceptance of Doe's account" and an "apparent credibility judgment . . . concerning the complainant . . . ." Pet. ¶¶ 44–45. According to Petitioner, these remarks indicate that the AG is unable to adequately evaluate the allegations made in the *Jane Doe* litigation and will not consider or pursue exculpatory evidence, which will taint the investigation and prejudice Petitioner in a possible future criminal proceeding. Pet. ¶¶ 46–48, 56–58.

Petitioner commenced this proceeding pursuant to CPLR article 78, seeking a writ of prohibition to void EO 64 and disqualify the AG from acting as special prosecutor. Pet. ¶¶ 36–51, 60–80. Alternatively, Petitioner requests that the determination by the Governor appointing the AG as special prosecutor be annulled because it is arbitrary and capricious and/or an abuse of

discretion. Pet. ¶¶ 52–55, 79.[1] By way of relief, Petitioner requests judgment pursuant to CPLR 7806 voiding EO 64 and requiring the Governor to instead appoint a special prosecutor free from actual or perceived conflicts of interest or bias, or, in the alternative, modifying EO 64 to limit the AG's participation in any investigation. Pet. ¶¶ 60–63, 80, Wherefore Clause. Respondents now answer in opposition.

STANDARD OF REVIEW

Executive Law § 63(2) authorizes the AG "[w]henever required by the governor" to "manag[e] and conduct[] in such court or before such [grand] jury criminal actions or proceedings as shall be specified in such requirement . . . ." It states that, when the AG is authorized by the Governor, the AG "shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform . . . ." Exec. Law § 63(2) Contemporaneous with this grant of authority, Executive Law § 63(2) limits the authority of the district attorney, so that when the AG is appointed by the Governor, "the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general . . . ." *Id.*

Courts interpreting this statutory grant of authority "have long held that article IV, § 3 of the Constitution and Executive Law § 63(2) together provide the Governor with discretionary authority to supersede the District Attorney in a matter." *Matter of Johnson*, 91 N.Y.2d at 223; *see Matter of Additional Jan. 1979 Grand Jury of Albany Superme Ct. v. Doe*, 50 N.Y.2d 14, 16

[1] The single cause of action pled in the Verified Petition is a claim pursuant to CPLR 7803(2). Pet. ¶¶ 69–81. CPLR 7803(2) permits a petitioner to raise the question of "whether the body or officer proceeded, is proceeding, or is about to proceed without or in excess of jurisdiction . . . ." Thus, based on Petitioner's narrow pleading, any claim that the Governor's actions are arbitrary and capricious or an abuse of discretion is not properly pleaded and not properly before this Court. *See Matter of Johnson Elec. Constr. Corp. v. New York State Dep't of Transp.*, 124 A.D.3d 1199, 1200 (3d Dep't 2015) (claims not properly before the court because they were not pleaded in the petition).

(1980) (Governor's superseder authority derives both from Article IV, § 3 of the New York State Constitution and from the Legislature as granted in in Executive Law § 63(2)); *Matter of Carey (Fischer)*, 68 A.D.2d 220, 224 (4th Dep't 1979) (same). The Governor's authority under Executive Law § 63(2) is broad as "[t]he statute neither limits the Governor's authority to supersede, nor requires the Governor to explain that choice." *Matter of Johnson*, 91 N.Y.2d at 224; *see Matter of Mulroy v. Carey*, 58 A.D.2d 213–14 (4th Dep't 1977) (ruling that the Governor is not required to explain rationale for exercising superseder authority because neither the Constitution, nor the statute include "a standard . . . as a guide for action by the governor"); *see also Matter of Rice*, 31 Misc. 3d 838, 844 (Sup. Ct. Nassau Cnty. 2011) (Governor's superseder authority is "left to his sound discretion; he is not, for example, required . . . to make any finding that a [d]istrict [a]ttorney is disqualified").

This statutory framework leaves "the authority to supersede within the Governor's sound discretion . . . and judicial review is limited to determining whether the Constitution or the Legislature has empowered the Governor to act." *Abelove v. Cuomo*, 57 Misc. 3d 668, 673 (Sup. Ct. Albany Cnty. 2017); *see Matter of Dondi v. Jones*, 40 N.Y.2d 8, 19–20 (1976) (considering whether specific prosecution pursued by the AG was within scope of authority tasked by Governor pursuant to Executive Law § 63(2) and corresponding executive order); *Matter of Alessi v. Pataki*, 21 A.D.3d 1141, 1143 (3d Dep't 2005) (affirming motion court determination that dismissed petition challenging Governor's exercise of discretionary authority because "petitioner has not demonstrated that the Governor lacked authority" to effectuate action). "For abuse of lawful discretionary authority, the remedy as a rule lies with the people at the polls, or with a constitutional amendment, or with corrective legislation." *Matter of Johnson*, 91 N.Y.2d at 223; *see Saxton v. Carey*, 44 N.Y.2d 545, 51 (1978) (action at issue was beyond scope of judicial review

because it was tasked to the executive and legislative branches of government, such that "the remedy lies not in the courtroom, but in the voting booth").

ARGUMENT

I. PETITIONER'S CLAIMS ARE NOT JUSTICIABLE.

"In order to warrant a determination of the merits of a cause of action, the party requesting relief must state a justiciable claim—one that is capable of review and redress by the courts at the time that it is brought for review." *Matter of Schulz v. Cuomo*, 133 A.D.3d 945, 947 (3d Dep't 2015); *see Matter of Vasquez v. Fischer*, 127 A.D.3d 1441, 1442 (3d Dep't 2015) ("generalized dissatisfaction with [governmental action] . . . does not present a justiciable controversy"). "The general principle of justiciability embraces several concepts . . . that are related by the fundamental tenet that, in our tripartite system of government, a court should limit itself to conflicts that are amenable to traditional judicial resolution and should 'not undertake tasks that other governmental branches are better suited to perform.'" *Matter of Brennan Ctr. for Justice at NYU Sch. of Law v. New York State Bd. of Elections*, 159 A.D.3d 1299, 1301 (3d Dep't 2018) (quoting *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984)). Threshold justiciability concepts that bar a determination on the merits include, among others, the political question doctrine, ripeness, and standing. *See Matter of Acevedo v. New York State Dep't of Motor Vehs.*, 29 N.Y.3d 202, 218 (2017) (recognizing standing as a threshold justiciability concept); *Matter of Ranco Sand & Stone Corp. v. Vecchio*, 27 N.Y.2d 92, 98 (2016) (recognizing ripeness as a threshold justiciability concept); *Jones v. Beame*, 45 N.Y.2d 402, 408 (1978) (recognizing political question doctrine as a threshold justiciability concept).

Here, Petitioner's claims are not justiciable, barring resolution on the merits. *See Matter of Percinthe v. Dep't of Corr. & Cmty. Supervision*, 227 A.D.3d 1347, 1348 (3d Dep't 2024) (controversy not justiciable because it involved "a future determination by respondent that is too

remote and speculative to be justiciable"); *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) (controversy not justiciable because petitioner "does no more than raise concerns over the potentially broad and arbitrary manner in which [respondent] could theoretically apply [the challenged action] and such concerns are wholly speculative"). Specifically, Petitioner's claims impermissibly raise a political question not suitable for judicial review, seek review of a determination that is not ripe for review, and Petitioner lacks standing. *See Matter of Morabito v. Martens*, 149 A.D.3d 1316, 1317 (3d Dep't 2017) (affirming motion court determination that dismissed petition because petitioner lacked standing to challenge government action at issue); *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 321, 324–26 (1st Dep't 2011) (reversing motion court determination that reached merits of claims because petitioner lacked standing and claims raised political question not suitable for judicial review); *Montano v. City of Watervliet*, 47 A.D.3d 1106, 1111 (3d Dep't 2008) (affirming motion court determination that awarded summary judgment dismissing claims that were not ripe for judicial review). Any single one of these justiciability defects mandates denial of the Verified Petition. *See American Ins. Assn. v. Chu*, 64 N.Y.2d 379, 385 (1985) (reversing appellate court decision that resolved claims on the merits because, even if party had standing, other justiciability issues required dismissal); *see also Matter of Town of Brunswick v. Cnty. of Rensselaer*, 152 A.D.3d 1106, 1107 (3d Dep't 2017) (finding claims not justiciable because petitioner lacked standing and lack of standing was dispositive); *Matter of New York Blue Line Council, Inc. v. Adirondack Park Agency*, 86 A.D.3d 756, 760 (3d Dep't 2011) (finding claims not justiciable because, even if party had standing, claims were not ripe for review).

A. Petitioner's claims raise a political question.

"[I]t is a fundamental principle of the organic law that each department of government should be free from interference, in the lawful discharge of duties expressly conferred, by either

of the other branches." *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 239 (1984). "Within our tripartite governmental framework, the Governor as chief executive officer, has the responsibility to manage the operation of the divisions of the executive branch . . . ." *Id.* Thus, "lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involves questions of judgment, allocation of resources, and ordering of priorities, which are generally not subject to judicial review." *Id.*; *see also Matter of BLDG 44 Devs. LLC v. State of New York*, ___ A.D.3d ___, 2026 N.Y. Slip Op. 02898 (3d Dep't May 7, 2026) ("under the separation of powers doctrine no one branch of government is allowed to arrogate unto itself powers residing entirely in another branch" (quotations marks, brackets, and citation omitted)). Likewise, "[t]he courts do not sit in review of the discretion of the legislature or determine the expediency, wisdom, or propriety of its actions on matters within its power." *Matter of Gonzalez v. Northeast Parent & Child Soc'y*, ___ N.Y.3d ___, 2026 N.Y. Slip Op. 01443 (Mar. 17, 2026); *Matter of Schulz v. State of New York*, 216 A.D.3d 21, 26 (3d Dep't 2023) (the court "may not substitute its judgment for that of the body which made the decision" and "[j]udges, however much they might disagree with the wisdom of the act under review, are not free to invalidate it on that ground"). "This judicial deference to a coordinate, coequal branch of government" presents a justiciability consideration that is "generally denominated as the political question doctrine . . . ." *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO*, 64 N.Y.2d at 239; *see Center for Independence of the Disabled v. Metropolitan Transp. Auth.*, 184 A.D.3d 197, 208 (1st Dep't 2020) (recognizing that justiciability concepts provide an important limitation on judicial power).

In contravention of these bedrock principles of judicial restraint, Petitioner asks this Court to impermissibly void a discretionary action by the Governor, limit the prosecutorial discretion of

the AG, and contravene a statutory framework that reflects explicit policy choices made by the Legislature. Pet. ¶¶ 36–55; *see Matter of Montano v. Cnty. Legislature of Cnty. of Suffolk*, 70 A.D.3d 203, 211–12 (2d Dep't 2009) (dismissing article 78 petition because petitioner's claim that legislature should have handled his bill differently raised a political question that was not justiciable); *Matter of Sgueglia v. Kelly*, 45 Misc. 3d 335, 342 (Sup. Ct. N.Y. Cnty. 2014) (denying article 78 petition because petitioner's claim that police department should have handled firearms license application differently raised a political question that was not justiciable).

1. Petitioner's claims invade the province of the executive branch.

The Governor's exercise of her superseder authority is an executive function, left entirely to her discretion. *See Matter of Johnson*, 91 N.Y.2d at 223–24; *People v. Leahy*, 72 N.Y.2d 510, 515 (1988). Petitioner concedes—and expressly does not challenge—that the Governor has broad, discretionary authority to appoint the AG as special prosecutor, but nevertheless questions the validity of the Governor's choice. Pet. ¶¶ 37–38, 44–48. Such claim is beyond the reach of this Court because it impermissibly requires the court to pass upon the soundness of a discretionary determination made by the Governor in exercise of her constitutional authority as executive and the statutory authority conferred on her by the Legislature. *See Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO*, 64 N.Y.2d at 239–40 (separation of powers barred judicial review of Governor's decision to close correctional facility because "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" and beyond the authority of the courts to review); *People ex rel. Saranac Land & Timber Co. v. Extraordinary Special & Trial Term of Supreme Court*, 220 N.Y. 487, 490–91 (1917) (discretionary action by Governor done in accordance with statutory authority conferred by the Legislature is not subject to judicial review); *Matter of Urban Justice Ctr. v. Pataki*, 38 A.D.3d 20, 32 (1st Dep't 2006)

(separation of powers barred judicial review of Governor's use of messages of necessity because Governor had authority to utilize messages of necessity and their use was left to the Governor's discretion).

Similarly, the AG's exercise of her special prosecutorial authority is an executive function involving considerable discretion. *See Leahy*, 72 N.Y.2d at 515 ("when an appointment is made under [Executive Law] section 63(2), the whole dynamic is played out within the executive branch"); *Matter of Carey*, 68 A.D.2d at 224 (appointment of AG to supersede district attorney is done as exercise of executive action, AG "steps into the shoes of the local [d]istrict [a]ttorney" and "is empowered to manage and conduct specified criminal actions and proceedings"); *see also Soares v. Carter*, 25 N.Y.3d 1011, 1013 (2015) (recognizing that the way a prosecution is conducted is exclusively an executive function). Exercise of prosecutorial discretion by any prosecutor is largely beyond the scope of judicial review because it necessarily implicates separation of powers concerns. *See, e.g.*, *Matter of Hassan v. Magistrates' Ct. of City of N.Y.*, 20 Misc. 2d 509, 511 (Sup. Ct. Queens Cnty. 1959) ("[a]s a basic incident of our form of government, with hits divided powers and responsibilities lodged in the executive, legislative, and judicial branches, *and as a self-imposed rule of judicial restraint*, the courts should not interfere with the discretion lodged in prosecuting officials such as the district attorney or the Attorney General to institute criminal proceedings" (emphasis in the original)); *see also Wayte v. United States*, 470 U.S. 598, 607 (1985) ("[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosector's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness").

Despite this traditional bar, Petitioner presumes to predict how the AG may exercise her prosecutorial discretion and, based on his assumptions, asks this Court to prohibit her from acting.

Pet. ¶¶ 36–55. This type of judicial interference would be inappropriate in any prosecution and should not be countenanced here. *See Matter of Staten Is. Branch of the Natl. 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, 412–13 (1st Dep't 2016) (separation of powers prohibited judicial review of actions of "duly elected prosecutor who acted within the discretion of his office"); *see also Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 55, 56 (1983) (finding that request to disqualify prosecutor was "not justiciable" and noting that the court's ability to intervene to disqualify a prosecutor was especially limited when it involved "a constitutional officer chosen by the electorate" because "removal by a court implicates separation of powers"); *People v. Bunge Corp.*, 25 N.Y.2d 91, 98 (1969) (ruling that when Attorney General is authorized by statute to act, "the discretion of the Attorney-General in maintaining or discontinuing an action may not be made the subject of injury by the courts").

Accordingly, Petitioner's claim is barred by the political question doctrine because it would require this Court to impermissibly invade the province of the executive branch, and the Court's review would undermine the constitutional and statutory authority of both the Governor and the AG, in violation of fundamental principles of the separation of powers. *See Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v. Cnty. of Erie*, 43 A.D.3d 1341, 1342 (4th Dep't 2007) (challenge to determination by County executive to reduce staffing appropriations was a political question not subject to judicial review because such determination involved the exercise of executive's discretionary authority regarding resource allocation); *Antonetty v. Cuomo*, 131 Misc. 2d 1041, 1045 (Sup. Ct. Bronx Cnty. 1986) (challenge to action by Governor regarding naming of certain property was a political question not subject to judicial review because such determination "was done in the performance of his executive powers and such acts performed in

his official capacity are outside the scope of judicial review"); *see also Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980) ("courts do not normally have overview of the lawful acts of appointive and elective officials involving questions of judgment, discretion, allocation of resources and priorities").

2. Petitioner's claims invade the province of the legislative branch.

"The Legislature, by enacting Executive Law § 63(2), statutorily gave the power to the Governor to call upon [the]AG to conduct investigations." *People v. Abelove*, 179 A.D.3d 39, 44 (3d Dep't 2019). "The statute neither limits the Governor's authority to supersede, nor requires the Governor to explain that choice." *Matter of Johnson*, 91 N.Y.2d at 224; *see Matter of Additional Jan. 1979 Grand Jury of Albany Supreme Ct.*, 50 N.Y.2d at 19 (only requirement of Executive Law § 63(2) is that the Governor identify the subject matter to be investigated); *see also Matter of Dondi*, 40 N.Y.2d at 19–20 (only limitation on AG's authority to act upon supersession of district attorney is "the scope of the order or requirement of the Governor"). Contemporaneous judicial review would contravene that explicit policy choice. *See Matter of Mulroy*, 58 A.D.2d at 214 ("imposition of a standard under which a governor may invoke his powers to supersede a district attorney" would contradict "a policy risk which the framers of the Constitution and the Legislature assumed in granting this authority to the governor"); *see also Xiang Fu He v. Troon Mgt., Inc.*, 34 N.Y.3d 167, 175 (2019) ("courts do not sit in review of the discretion of the Legislature or determine the expediency, wisdom, or propriety of its action on matters within its powers"); *Jiggetts v. Grinker*, 75 N.Y.2d 411, 415 (1990) ("[i]f the Legislature left the matter to the judgment of the [executive branch], then the issue is beyond review for the courts may not substitute judicial oversight for the discretionary management of the public's business by public officers").

Additionally, and as discussed further below, the Legislature created a specific process for addressing disqualification of the AG when acting as a special prosecutor that requires an

application by the AG to the superior criminal court where the criminal matter is triable. *See* County Law § 701(6). Permitting Petitioner to seek disqualification through an entirely different process not contemplated by this statute is in tension with the legislative policy choice that the statute reflects. *See Matter of Tripodi v. New York State Dep't of Corr. & Cmty. Supervision*, 251 A.D.3d 1708, 1709 (4th Dep't 2026) (motion court properly dismissed proceeding because proceeding was not authorized by underlying statutory scheme and court "may not second-guess the legislature's policy choices or rewrite statutes to reflect their preferred outcomes"); *see also Campaign for Fiscal Equity, Inc. v. State of New York*, 8 N.Y.3d 14, 28 (2006) (recognizing that courts must give deference to legislative policy choices because this deference is required by our structure of government).

Accordingly, Petitioner's claims are barred by the political question doctrine because resolution of such claims would improperly invade the province of the Legislature in violation of separation of powers. *See Matter of Schulz v. Silver*, 212 A.D.2d 293, 295 (3d Dep't 1995) (claims in article 78 petition challenging Legislature's failure to act were not justiciable because resolution of such claims would require review of legislative policy choices that "require the exercise of considerable judgment and discretion"); *Matter of Mohr v. Greenan*, 10 Misc. 3d 610, 614 (Sup. Ct. Erie Cnty. 2005) (claims in article 78 petition challenging budget appropriation decisions were not justiciable because resolution of such claims would require review of legislative policy choices).

B. Petitioner's claims are not ripe.

Whether a governmental action is ripe for review requires consideration of: (1) "whether the issues tendered are appropriate for judicial resolution and[;]" (2) an assessment of "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 2024); *see Grand S. Point, LLC v. Bassett*, 230 A.D.3d 49, 60 (3d

Dep't 2024). Appropriateness considers "whether the administrative action being reviewed is final and whether the controversy may be determined as a purely legal question." *Matter of New York Blue Line Council, Inc.*, 86 A.D.3d at 760 (quotation marks and citation omitted); *see Matter of Town of Riverhead v. Central Pine Barrens Joint Planning & Policy Commn*, 71 A.D.3d 679, 680–81 (2d Dep't 2010); *Matter of Hospital Assn. of N.Y. State v. Axelrod*, 164 A.D.2d 518, 525 (3d Dep't 1990). Hardship considers "the certainty and effect of the harm claimed to be caused by the administrative action: whether it is sufficiently direct and immediate and whether the action's effects have been felt in a concrete way." *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 520 (1986); *see Federation of Mental Health Ctrs. v. DeBuomo*, 275 A.D.2d 557, 562 (3d Dep't 2000). Harm that is insignificant, remote, or contingent is not sufficient to establish hardship. *See Hollandale Apts. & Health Club v. Bonesteel*, 173 A.D.3d 55, 59–60 (3d Dep't 2019); *Matter of LeGrand v. Goord*, 272 A.D.2d 650, 650 (3d Dep't 2000).

Here, Petitioner fails the hardship prong because the harms alleged—that the investigation will be improperly conducted and prejudice Petitioner in a possible future criminal proceeding—are uncertain. Pet. ¶¶ 56–58, 64–68; *see Matter of New York Blue Line Council, Inc.*, 86 A.D.3d at 760 (challenge to revision of Adirondack Park Agency regulations was not ripe for review based on alleged future harms that may never occur). The investigation authorized by EO 64 is only weeks old. *See* Executive Order No. 64. At this stage, the results of that investigation, whether there will be a presentation to the grand jury, or whether any grand jury will vote to indict Petitioner are not known. *See In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 245 (2d Cir. 1986) ("[b]efore disqualification can even be contemplated . . . the grand jury must indict; the government must go forward with the prosecution of the indictment"); *In re Grand Jury Proceedings*, 700 F.Supp. 626, 631 (Dist. P.R. 1988) ("whether a prosecutor who appears before

a grand jury labors under a conflict of interest or whether his conduct oversteps the bounds of propriety should be determined after indictment, not by mere conjecture or speculation"); *see also In re Grand Jury Investigation*, 696 F.2d 449, 451 (6th Cir. 1982) (expressing skepticism about whether disqualification of a special prosecutor is appropriate at the pre-indictment, investigatory stage and recognizing that early disqualification has been permitted in only a limited number of extreme circumstances with "serious abuses").

The myriad unknowns inherent in Petitioner's claim render any harm far too remote and contingent to sufficiently establish that he has suffered the requisite hardship for ripeness. *See Matter of Paychex, Inc. v. Dep't of Taxation & Fin.*, 251 A.D.3d 1369, 1372 (3d Dep't 2026) (petitioner's claim was not ripe for review because feared administrative action had not yet been initiated); *Matter of Buenos Hill, Inc. v. Saratoga Springs Planning Bd.*, 240 A.D.3d 990, 993 (3d Dep't 2025) (petitioner's claim was not ripe for review because harm alleged was "a future harm that may never come to pass"); *Matter of Acevedo v. New York State Dep't of Motor Vehs.*, 132 A.D.3d 112, 116–17 (3d Dep't 2016), *aff'd* 29 N.Y.3d 202 (2017) (petitioner's claim was not ripe for review because harms alleged were "contingent upon events which may not come to pass"). While Petitioner relies on the AG's remarks in a single social media post as proof that the various ills he fears will come to pass, such speculative and conclusory claims of harm—premised entirely on his own mischaracterization of the AG's statements—are insufficient for hardship. Pet. ¶ 66; *see Allard v. Allard*, 145 A.D.3d 1254, 1255–56 (3d Dep't 2016) (petitioner's speculative claims of future harms were insufficient to establish that matter was ripe for judicial review); *Matter of Wal-Mart Stores v. Campbell*, 238 A.D.2d 831, 832–33 (3d Dep't 1997) (same).

C. Petitioner lacks standing.

It is axiomatic that "a litigant must establish its standing in order to seek judicial review." *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769 (1991); *see Matter of 61*

Crown St., LLC v. New York State Off. of Parks, Recreation & Historic Preserv., 207 A.D.3d 837, 839 (3d Dep't 2022). "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfied the other justiciability criteria." *Matter of Assoc. for a Better Long Island, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014); *see Soc'y of Plastics Indus., Inc.*, 77 N.Y.2d at 769. The burden to prove standing is on the party seeking review. *See Matter of Curry v. New York State Educ. Dep't*, 13 A.D.3d 1327, 1329 (3d Dep't 2018); *Citizens for St. Patrick's v. City of Watervliet City Council*, 126 A.D.3d 1159, 1160 (3d Dep't 2015). 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 (2003) (quotation marks, brackets, and citation omitted); *see Matter of Long Is. Pure Water, Ltd. v. New York State Dep't of Health*, 209 A.D.3d 1128, 1129 (3d Dep't 2022).

Here, Petitioner fails to meet the burden to establish either requirement for standing. *See* Pet. ¶¶ 64–68; *see Matter of Whitfield v. New York State Off. of Professional Med. Conduct*, 237 A.D.3d 1393, 1394–95 (3d Dep't 2025) (affirming motion court determination that granted motion to dismiss article 78 petition challenging agency action related to its handling of investigation into petitioner's complaints of physician misconduct because petitioner failed to establish that his alleged injury was attributable to agency action); *Matter of Grigger v. Goord*, 27 A.D.3d 803, 803–04 (3d Dep't 2006) (affirming motion court determination that granted motion to dismiss article 78 petition challenging agency action related to denial of visitation privileges for petitioner's

mother because petitioner failed to establish that agency determination would impact his specific visitation privileges); *see also Matter of Parkland Ambulance Serv., Inc. v. New York State Dep't of Health*, 261 A.D.2d 770, 772 (3d Dep't 1999) (reversing motion court determination that denied motion to dismiss article 78 petition challenging agency action related to issuance of ambulance service certificates because petitioner's conclusory allegations of harm were insufficient to meet its burden to establish standing).

1. Petitioner did not suffer any injury-in-fact.

"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 Servs. v. Daniels*, 33 N.Y.3d 44, 50 (2019); *see Matter of Safety-Kleen Sys., Inc. v. New York State Dep't of Envtl. Conservation*, 206 A.D.3d. 1332, 1333–34 (3d Dep't 2022) (no injury-in-fact for standing because petitioner "failed to demonstrate how the absence of these exemptions . . . is causing or is reasonably likely to cause any harm to petitioner").

Petitioner here alleges that his conduct falls within the scope of the investigation authorized by EO 64 (Pet. ¶¶ 56, 64) and that there is a "substantial risk" that the investigation will be "influenced by prejudgment." Pet. ¶ 66. However, this is not an injury-in-fact because it is wholly speculative as it presumes presently unknown information about how the investigation will be conducted. *See Matter of Gronbach v. New York State Educ. Dep't*, 221 A.D.3d 1385, 1388 (3d Dep't 2023) (no injury-in-fact from administrative action that transferred certain hearings to a different administrative agency because alleged resultant diminution in hearing officer caseload assumed that, if hearings were spread to additional hearing officers, caseload of existing hearing officer would be diminished); *Matter of Brennan Ctr. for Justice at NYU Sch. of Law*, 159 A.D.3d

at 1301 (no injury-in-fact from administrative action refusing to rescind agency opinion because alleged resultant increase in election contributions away from legislators and candidates for political office assumed that, if opinion were rescinded, agency would adopt position advanced by legislators and candidates for political office); *Argyle Farm & Props., LLC v. Watershed Agric. Council of the N.Y. City Watersheds, Inc.*, 135 A.D.3d 1262, 1266 (3d Dep't 2016) (no injury-in-fact from administrative action adopting rules for siting septic systems in watershed because alleged limitation on landowner's ability to develop property assumed that, if landowner applied for land use approvals, application would be denied).

Though Petitioner points to a single post made by the AG on social media as proof of alleged harm, such statement does not establish the harms feared by Petitioner absent his own conclusory characterization. *See* Pet. ¶ 66; *see Matter of 292 Bedford, LLC v. New York*, 249 A.D.3d 874, 876 (2d Dep't 2026) (petitioner's conclusory claims of harm were insufficient to establish requisite injury for standing); *Matter of Cnty. of Orange v. City of New York*, 232 A.D.3d 785, 786–87 (2d Dep't 2024) (same); *Matter of Park v. Town of New Windsor Zoning Bd. of Appeals*, 137 A.D.3d 924, 926 (2d Dep't 2016) (same). Even if Petitioner's characterization of the AG's remarks were accurate, which it is not, the alleged harm flowing to Petitioner from such remarks—that he will be unfairly implicated in the investigation and prejudiced in a possible future criminal proceeding—rests on assumptions that are too speculative to establish injury-in-fact. Petitioner's alleged harm assumes that, despite all constitutional, statutory, and other guardrails on her authority, the AG will not properly discharge the obligations of her office or the task entrusted to her by the Governor. *See* Executive Order No. 64 (requiring a "full, reasoned, and independent investigation"). *See generally* Const. art. 13, § 1 (oath of office for all public officers requiring public officers to swear to "faithfully discharge the duties of the office"); Exec. Law § 63

(providing general duties of the attorney general); *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000) (acknowledging that prosecutors have "special responsibilities—constitutional, statutory, ethical, personal—to safeguard the integrity of criminal process"). And, Petitioner's alleged injury assumes that the results of the investigation will warrant presentation to a grand jury and that the grand jury will vote to indict Petitioner. Pet. ¶¶ 64–67.

Petitioner cannot rely on these speculative assumptions about the results of the investigation to establish an injury-in-fact because they are unknown future events that may never occur. *See Matter of New York State Bd. of Regents v. State Univ. of N.Y.*, 178 A.D.3d 11, 17 (3d Dep't 2019) (parents and teachers did not suffer injury-in-fact from promulgation of new regulations for teacher licensure because "whether teachers licensed under the regulations will ever teach in these petitioners' schools is a matter of conjecture and speculation" (quotation marks omitted)); *Matter of Schulz*, 133 A.D.3d at 947 (citizens did not suffer injury-in-fact from certain elected officials participating in a future constitutional convention because alleged conflict of interest arising from such participation "is predicated upon a series of events that may not come to pass"); *see also New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004) ("speculation about the future course [government action] might take cannot, under our precedents, supply the missing ingredient of in-fact injury").

Accordingly, Petitioner lacks standing because he has not suffered any non-speculative injury-in-fact. *Compare Matter of Seneca Lake Guardian v. New York State Dep't of Envtl. Conserv.*, 229 A.D.3d 987, 989–90 (3d Dep't 2024) (finding standing based on non-speculative claims that permitted activity would allow contaminants to enter waterbody since member obtained drinking water from waterbody and member's wells did not filter for contaminant), *with Matter of Animal Legal Defense Fund, Inc. v. Aubertine*, 119 A.D.3d 1202, 1203 (3d Dep't 2014)

(finding no standing based on speculative claims of increased health risks from consuming foie gras because there was no demonstrable link between feared health effects and consumption of foie gras).

2. Any injury-in-fact is not within the relevant zone of interests.

The zone of interests requirement mandates that "a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the zone of interests or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted." *Soc'y of Plastics Indus., Inc.*, 77 N.Y.2d at 773. This requirement ties the "in-fact injury asserted to the governmental act challenged" and "circumscribes the universe of persons who may challenge administrative action." *Id.* This requisite connection "assures that groups whose interests are only marginally related to, or even inconsistent with, the purpose of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Id.* at 774; *see Matter of Lawyers for Children v. New York State Off. of Children & Family Servs.*, ___ N.Y.3d ___, 2026 N.Y. Slip Op. 03218 (May 21, 2026) (legal services organizations that represent children in voluntary foster care proceedings had standing to challenge changes to voluntary foster care program because they were "best situated' to represent children's interests and children likely could not challenge action without counsel's involvement).

Here, the Governor acted to appoint the AG as special prosecutor pursuant to Executive Law § 63(2). Executive Order No. 64. This statutory subdivision serves a separation of powers function through which the Legislature delineates various law enforcement functions between the Governor, the AG, and local prosecutors. *Matter of Johnson*, 91 N.Y.2d at 223; *see People v. Viviani*, 36 N.Y.3d 564, 577 (2021) (noting that the New York State Constitution "does not assign prosecutorial authority to any constitutional officer, leaving that allocation as a matter for the Legislature"). Given its purpose and function, the zone of interests served by Executive Law §

63(2) is to preserve the structure of the executive branch and apportion law enforcement functions within that branch, which do not encompass the sort of individualized injury to a person that believes they may someday face criminal prosecution, like the injury alleged by Petitioner here. *See People v. Abelove*, 179 A.D.3d at 45 (Executive Law § 63(2) functions as a delegation of power from the Legislature to the Governor and how the Governor may utilize that statutory grant of authority to authorize the AG to conduct criminal prosecutions); *Matter of Donnaruma v. Carter*, 41 Misc. 3d 195, 214 (Sup. Ct. Albany Cnty. 2013) (Executive Law § 63(2) functions to make district attorneys accountable to the Governor); *see also Mulroy v. Carey*, 43 N.Y.2d 819, 820 (1977) (reserving possibility that, if exercise of Governor's superseder authority were subject to judicial review, it would be in action "brought or defended by the county or the elected District Attorney involved").

In the absence of any injury within the zone of interests of Executive Law § 63(2), Petitioner fails to establish standing. *See Matter of Park Manor Rehabilitation & Health Care Ctr., LLC v. Shah*, 129 A.D.3d 1276, 1278–79 (3d Dep't 2015) (affirming motion court determination that dismissed challenge to Medicaid reimbursement because petitioner failed to establish that alleged injury to former owner/operator was within zone of interests); *Lancaster Dev., Inc. v. McDonald*, 112 A.D.3d 1260, 1262 (3d Dep't 2013) (affirming motion court determination that dismissed challenge to bid determination for lack of standing because petitioner failed to establish that alleged injury was within zone of interests of competitive bidding statute).

II. PETITIONER'S CLAIMS ARE WITHOUT MERIT

A. Petitioner's claims are procedurally improper.

County Law § 701(6) sets forth a specific process that applies to disqualification of the AG "in any circumstance where the attorney general acts in place of a district attorney . . . ." County Law § 701(6)(a). Specifically, it states: "[w]henever the attorney general . . . is disqualified from

acting in a particular matter to discharge their duties at a term of any court, a superior criminal court in the county wherein the action is triable may upon articulable reasons set forth by the attorney general" appoint another attorney to act in her place. County Law § 701(6)(b). This process applies, "[n]otwithstanding any other provision of law to the contrary . . . ." County Law § 701(6)(b).

By its plain language, this statutory provision prescribes a specific process for disqualification of the AG that: (1) must be initiated by the AG; (2) done before a superior criminal court; and (3) in the county where the criminal action is triable. *See generally Matter of Town of Southampton v. New York State Dep't of Envtl. Conservation*, 39 N.Y. 3d 201, 209 (2023) ("[i]nasmuch as the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof"); *Matter of Amorosi v. South Colonie Ind. Cent. Sch. Dist.*, 9 N.Y.3d 367, 372–73 (2007) ("where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used"). The statute forecloses other statutory processes to disqualify the AG when she is acting in place of a district attorney. *See, e.g.*, *Eaton v. New York City Conciliation & Appeals Bd.*, 56 N.Y.2d 340, 345 ("[w]here as here, the statute describes the particular situations to which it is to apply an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (quotation marks and citation omitted)); *Matter of Lawrence Teachers' Assn., NYSUT, AFT, NEA, AFL-CIO v. New York State Pub. Empl. Relations Bd.*, 152 A.D.3d 171, 174 (3d Dep't 2017) ("notwithstanding any other provision of law . . . is a verbal formulation frequently employed for legislative directives intended to preempt any other potentially conflicting statute, wherever found in the state's laws").

In contravention of this statutorily enumerated process here, this proceeding was not initiated by the AG, but rather was initiated by an individual that presumes he may someday be a criminal defendant. Pet. ¶¶ 33–34, 56. Further, it is a proceeding pursuant to CPLR article 78 instead of an application made in the criminal court, if this investigation ever ripens into a prosecution. Pet. ¶¶ 1, 36–55, 60–63, 69–81. Additionally, this proceeding was commenced in Albany County, rather than the county where the criminal proceeding is triable, as is required by statute. Pet. ¶ 15; *see* Criminal Procedure Law § 20.40 (providing rules for where criminal proceeding must be tried). Thus, the process Petitioner attempts to utilize here is inconsistent with requirements of County Law § 701(6). *See Nitkewich v. Lincoln Life & Annuity Co. of N.Y.*, 40 N.Y.3d 349, 357–58 (2023) (rejecting statutory construction that was "inconsistent with its plain language"); *Matter of Central Hudson Gas & Elec. Corp. v. State Of N.Y. Pub. Serv. Commission*, 242 A.D.3d 33, 38 (3d Dep't 2025) (same); *Matter of Schwabler v. DiNapoli*, 194 A.D.3d 1235, 1237 (3d Dep't 2021) (same). Accordingly, the Verified Petition must be denied. *See Town of Colonie v. City of New York*, 237 A.D.3d 1398, 1401–02 (3d Dep't 2025) (motion court properly denied request to stay related proceeding because requested stay was for proceeding pending in a different court); *Matter of Mulhern v. Touro Coll.*, 226 A.D.3d 788, 789 (2d Dep't 2024) (motion court properly denied motion because it was not correct procedural vehicle for the relief sought).

B. The writ of prohibition does not lie.

Even if an article 78 proceeding were the proper procedural vehicle for Petitioner's claims, "[t]he extraordinary remedy of prohibition is available only where a judicial or quasi-judicial body acts or threatens to act 'without or in excess of its jurisdiction and then only when the clear legal right to relief appears and, in the court's discretion the remedy is warranted.'" *Matter of Allen B. v. Sproat*, 23 N.Y.3d 364, 375–76 (2014) (quoting *Matter of Schumer*, 60 N.Y.2d at 51). Here, Petitioner's request for a writ of prohibition to void EO 64 and disqualify the AG from serving as

special prosecutor must be denied because the writ of prohibition does not lie against these executive actions. *See Matter of Raiser & Kenniff, P.C. v. Nassau Cnty. Sheriff's Dep't*, 149 A.D.3d 1084, 1085 (2d Dep't 2017) (writ of prohibition did not lie to prohibit recording of phone calls made by individuals in custody in county jail because petitioners "failed to demonstrate that the conduct sought to be prohibited pertained solely to quasi-judicial action, as opposed to an investigative function performed in an executive capacity"); *New York State Police Investigators Assn., Local 4 IUPA, AFL-CIO v. State of New York*, 71 Misc. 3d 1007, 1022 (Sup. Ct. Albany Cnty. 2021) (writ of prohibition did not lie to prohibit issuance of administrative subpoenas because issuance of subpoenas was "purely investigative in nature and are not issued in a judicial or quasi-judicial capacity"). Petitioner's request must also be denied because he has not established any clear legal right to relief. *See Matter of New York State Health Facilities Assn., Inc. v. Sheehan*, 100 A.D.3d 1086, 1088 (3d Dep't 2012) (writ of prohibition did not lie because petitioner failed to establish "clear legal right to relief"); *Matter of Figgins v. Hendricks*, 28 A.D.3d 1178, 1179 (4th Dep't 2006) (same); *Matter of Smith v. Gribetz*, 211 A.D.2d 605, 605 (2d Dep't 1995) (same).

1. The writ of prohibition does not lie against executive action.

It is well settled that a writ of prohibition "may not issue against legislative, executive, or ministerial action . . . ." *Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 147 (1983); *see Matter of Cnty. of Suffolk v. Kennedy*, 211 A.D.3d 937, 938 (2d Dep't 2022). Here, the Governor's appointment of the AG as special prosecutor is an executive action, undertaken pursuant to the superseder authority conferred on the Governor by virtue of her constitutional executive powers enumerated in article IV, § 3 of the New York State Constitution, as well the powers conferred on her by the Legislature in Executive Law § 63(2). *See Leahy*, 72 N.Y.2d at 515 (when Governor exercises her superseder authority to appoint a special prosecutor under Executive Law § 63(2) this process is done "within the executive branch"); *Matter of Mulroy*, 58 A.D.2d at 210

(Governor's authority to supersede district attorney pursuant to Executive Law § 63(2) was a function of her executive powers); *see also Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978) ("executive power of the State, vested in the Governor, is broad"). Given the purely executive nature of this action, the writ of prohibition does not lie to prohibit the Governor from exercising her superseder authority to appoint the AG as a special prosecutor. *See Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1231 (3d Dep't 2022) ("writ of prohibition . . . is unavailable because respondent was not acting in a judicial or quasi-judicial capacity"); *see also Matter of Dondi v. Jones*, 40 N.Y.2d at 13 (writ of prohibition "must be directed at some inferior judicial tribunal or officer and lies to prevent or control judicial or quasi-judicial action only, as distinguished from . . . executive . . . action").

Likewise, the writ of prohibition also does not lie to prohibit the AG from exercising the authority granted to her by the Governor because the AG's exercise of her authority is similarly an executive action. *See Matter of McGinley v. Hynes*, 51 N.Y.2d 116, 123–25 (1980) (writ of prohibition did not lie to prohibit special prosecutor from presenting additional evidence to a grand jury because special prosecutor's actions were investigative activities done as part of prosecutor's executive functions); *State of New York v. Wolowitz*, 96 A.D.2d 47, 58 (2d Dep't 1983) (writ of prohibition did not lie to prohibit investigative actions undertaken by AG pursuant to her authority under the Executive Law). The authority granted to the AG by Executive Law § 63(2) is executive law enforcement authority. *See Matter of Johnson*, 91 N.Y.2d at 223, 225; *Matter of Additional Jan. 1979 Grand Jury of Albany Supreme Ct.*, 50 N.Y.2d at 18–19. Further, the authority granted to the AG by EO 64 is to "investigate . . . and, if warranted, to prosecute offenses"—which are executive functions not subject to the writ of prohibition. Executive Order No. 64; *see Matter of Doe v. Cuomo*, 71 A.D.3d 889, 889 (2d Dep't 2010) (writ of prohibition did not lie to prohibit AG

from pursuing investigation into alleged violation of immunity agreement because the AG "is performing a purely investigative function and, therefore, is acting in an executive rather than a quasi-judicial capacity"); *Abelove v. Cuomo*, 57 Misc. 3d at 677 (writ of prohibition did not lie to prevent AG from pursuing investigation as authorized by Governor in exercise of superseder authority "because the AG is performing a purely investigative function and, therefore, acting in an executive rather than a quasi-judicial capacity").

Although EO 64 contemplates a potential presentation to the grand jury, a grand jury serves an executive investigatory function that does not ripen into a judicial function until a specific prosecution is contemplated. *See Matter of McGinley*, 51 N.Y.2d at 123–25 (discussing distinction between executive, investigative functions of public prosecutor and quasi-judicial functions of public prosecutor); *see also Matter of Suffolk Cnty. Legislature v. Mullen*, 211 A.D.2d 736, 737 (2d Dep't 1995) ("functions of a public prosecutor . . . are to be regarded as executive in nature when, as here, a purely investigative function is involved, and consequently, such acts cannot legitimately be the object of a proceeding in the nature of a writ or prohibition")

Petitioner's reliance on *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 55 (1983), as establishing the availability of a writ of prohibition in the instant matter is misplaced. *See* Pet. ¶¶ 39, 42–43. In *Matter of Schumer*, the court invalidated a special prosecutorial appointment made by a district attorney that installed an unelected law school professor as special prosecutor and delegated to him "extensive discretionary power" to investigate and prosecute an elected federal official. 60 N.Y.2d at 52. The court found that the statute the district attorney acted under—County Law § 930, which authorizes the district attorney to appoint assistant district attorneys—did not authorize the appointment of special prosecutor because the accompanying delegation of responsibilities was so broad that it effectively and impermissibly "transferr[ed] the fundamental

responsibilities of the office" to an unelected official. *Id.* at 53. By contrast to Petitioner's claims here, which challenge the substantive merits of the special prosecutorial appointment and disclaim any challenge to the Governor's appointment authority, the specific issue resolved in *Matter of Schumer* was whether the district attorney had the authority to appoint the special prosecutor. *See id.* Although the court in *Matter of Schumer* also went on to opine as to whether the district attorney should be disqualified based on public statements she made regarding the identified target of the prosecution, the court ruled that the disqualification request was premature because, like here, information about how the investigation might play out was unknown. *See id*. at 55–56.

2. The writ of prohibition does not lie because Petitioner has no clear legal right to relief.

"Because of its extraordinary nature, prohibition is available only where there is a clear legal right . . . ." *Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988). The petitioner bears the burden to make such showing. *Pirro v. Angiolillo*, 89 N.Y.2d 351, 356 (1996) (in determining whether the writ of prohibition lies, "the question of whether petitioner has established a clear legal right to that relief is critical"); *see Matter of Town of Huntington v. New York State Div. of Human Rights*, 82 N.Y.2d 783, 785 (1993) (writ of prohibition did not lie because petitioner "failed to establish a clear legal right" to prevent state agency from considering individual compliant of racial discrimination). "To demonstrate a clear legal right to the extraordinary writ of prohibition, a petitioner is required to show that the challenged action was 'in reality so serious an excess of power incontrovertibly justifying and requiring summary correction.'" *Carter*, 25 N.Y.3d at 1013 (quoting *La Rocca v. Lane*, 37 N.Y.2d 575, 580 (1975)). Generally, this requires a showing that the prohibition sought and the error complained of "implicate the legality of the entire proceeding." *Doe v. Axelrod*, 71 N.Y.2d 484, 490 (1988); *see Matter of Hoovler v. Vazquez-Doles*, 237 A.D.3d 936, 937 (2d Dep't 2025) (writ of prohibition lied to prohibit judge from compelling disclosure of

grand jury minutes because judge lacked statutory authority to effectuate release of minutes); *Matter of Canning v. Revoir*, 220 A.D.3d 16, 19–20 (3d Dep't 2023) (writ of prohibition available to prohibit judge from enforcing subpoena requiring journalist to testify at criminal trial because journalist's testimony was privileged under civil rights law).

Here, Petitioner has no clear legal right to void EO 64 and disqualify the AG from serving as special prosecutor. *See Rush v. Mordue*, 68 N.Y.2d 348, 353 (1986) ("prohibition will not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power"). Though Petitioner seems to allege that he has a clear legal right to relief because the AG is biased against him, the AG's expressions of empathy on social media do not indicate bias or that she prejudged the investigation. *See People v. National Rifle Assn. of Am., Inc.*, 223 A.D.3d 84, 90–91 (1st Dep't 2023) (affirming dismissal of selective prosecution counterclaim alleging the AG "displayed animus" towards defendant organization based on comments made while campaigning); *Matter of People v. Trump Org., Inc.*, 205 A.D.3d 625, 626–27 (1st Dep't 2022) (affirming motion court determination denying motion to quash subpoena based on theory of selective prosecution where subject of subpoena challenged subpoena based on the AG's "political campaign and other public statements"); *People v. Walton*, 214 A.D.2d 805, 808 (3d Dep't 1995) (rejecting criminal defendant's claims that prosecutor's statements to the press amounted to prosecutorial misconduct or selective prosecution). Rather, the role of the prosecutor is as "advocate and public officer, charged with the duty not only to secure indictments but also to see that justice is done . . . ." *People v. Lancaster*, 69 N.Y.2d 20, 26 (1986); *see People v. Miller*, 110 A.D.3d 1150, 1151 (3d Dep't 2013); *People v. Tatro*, 53 A.D.3d 781, 783–84 (3d Dep't 2008). The AG's singular statement expressing empathy for a person who drew national

attention after reporting that she was the victim of a sexual assault falls squarely within that role. *See People v. Rivera*, 206 A.D.3d 1356, 1359–60 (3d Dep't 2022) (defendant not deprived of right to fair trial when, during trial, prosecutor referred to rape victim as a "victim" and a "survivor" and "express[ed] his personal opinion of the credibility of witnesses").

Thus, Petitioner fails to establish any clear legal right to the relief sought and, therefore, the writ of prohibition does not lie. *See Matter of Trump v. Merchan*, 230 A.D.3d 413, 414 (1st Dep't 2024); *Matter of Madison Sq. Garden Ent. Corp. v. New York State Liq. Auth.*, 221 A.D.3d 536, 537–38 (1st Dep't 2023); *Matter of Henry v. Fandrich*, 159 A.D.3d 1409, 1410 (4th Dep't 2018).

C. The writ of prohibition should not be issued as a matter of discretion.

1. Issuance of a writ of prohibition is not warranted.

When the writ of prohibition lies, "[t]he determination of whether to issue a writ of prohibition is committed to the sound discretion of the reviewing court." *Matter of Peterec-Tolino v. Schick*, 236 A.D.3d 1130, 1131 (3d Dep't 2025); *see Matter of HCI Distrib., Inc. v. New York State Police, Troop B Commander*, 110 A.D.3d 1297, 1298 (3d Dep't 2013) (where writ of prohibition lies, "the court has discretion to deny the issuance of a writ of prohibition"). A court exercising such discretion must consider: "the gravity of the harm caused by the excess of power, the availability or unavailability of an adequate remedy on appeal or at law or in equity and the remedial effectiveness of prohibition if such an adequate remedy does not exist." *Matter of Soares v. Herrick*, 20 N.Y.3d 139, 145 (2012); *see La Rocca*, 37 N.Y.2d at 579–80; *Matter of Clegg v. Rounds*, 222 A.D.3d 112, 119 (3d Dep't 2023). Petitioner fails to meaningfully address any of these factors and, in any event, they are not present here. Pet. ¶ 51; *see Matter of Raheem v. New York State Bd. of Parole*, 66 A.D.3d 1270, 1272–73 (3d Dep't 2009) (issuance of writ of prohibition was not warranted because respondent had authority to undertake action petitioner

sought to prohibit and petitioner otherwise had another adequate legal remedy); *Matter of Pryor v. Greenberg*, 247 A.D.2d 711, 712 (3d Dep't 1998) (same).

First, issuance of a writ of prohibition is not warranted because the gravity of any harm to Petitioner from the AG's statement is negligible. *See Matter of Trump v. Engoron*, 222 A.D.3d 505, 506 (1st Dep't 2023) (issuance of writ of prohibition not warranted because, among other things, "the gravity of potential harm is small"); *Matter of Schmitt v. Skovira*, 53 A.D.3d 918, 922 (3d Dep't 2008) (same). Although Petitioner claims that he will be gravely harmed if the AG does not properly discharge her obligations as special prosecutor, such claim is wholly speculative at this nascent stage of the investigation and implausible in light of the empathetic, but otherwise innocuous nature of the AG's social media remarks. *See Matter of Schumer*, 60 N.Y.2d at 56 (declining to reach the merits of claim alleging district attorney should be disqualified from prosecuting petitioner based on public comments made by district attorney because such claim was "premature" when made in anticipation of investigation and prosecution); *see also Matter of Columbia Cnty. Subpoena Duces Tecum Dated Mar. 20, 2013 (Czajka)*, 118 A.D.3d 1081, 1083 (3d Dep't 2014) (finding no appearance of impropriety to warrant disqualification of district attorney because claims "that the underlying investigation may have been vindictively provoked" were merely "speculative suggestions . . . unsupported by record evidence").

Second, issuance of a writ of prohibition is not warranted because there is an adequate remedy available to Petitioner where, if he is ever indicted by a grand jury, he can make pre-trial motions on the benefit of a full record and pursue his claims on direct appeal. *See Matter of Snyder v. Farrell*, 242 A.D.3d 1480, 1481–82 (3d Dep't 2025) (writ of prohibition would not issue to prohibit enforcement of prior court order authorizing prosecutor to re-present charges to a new grand jury because petitioner could raise issues with order on direct appeal); *Matter of Rodriguez*

v. Hobbs, 220 A.D.3d 1145, 1146–47 (3d Dep't 2023) (writ of prohibition would not issue to prevent prosecution based on alleged defects in search warrant because motion to suppress provided adequate remedy for petitioner to raise his claims); *Matter of Maluf v. Vance*, 116 A.D.3d 542, 542–43 (1st Dep't 2014) (writ of prohibition would not issue to prevent prosecution based on alleged conflict with principles of international comity because pre-trial motions and appeal provided adequate alternative remedy).

Indeed, under substantially similar circumstances, the court in *Abelove v. Cuomo*, dismissed a writ of prohibition that sought to disqualify the AG from acting as special prosecutor in an Executive Law § 63(2) appointment because there was "an alternative remedy by challenging the AG's qualification to act before the presiding court *in the event* criminal charges are levied." 57 Misc. 3d at 677 (emphasis added); *see also Wolowitz*, 96 A.D.2d at 58 (writ of prohibition did not lie to prevent investigation by attorney general and, even if it did, "[r]espondent's remedy . . . would be, and is, to simply defend on the merits and, if necessary, by way of appeal"). Resolution of Petitioner's claims in the proper procedural context of an actual criminal proceeding would allow for resolution of Petitioner's claims on a full record that would illuminate whether the various hypothetical ills he now fears ever actualize. *See Matter of Schumer*, 60 N.Y.2d at 56 (declining to rule on substantive merits of request to disqualify district attorney because request made at outset of investigation was "premature" and later resolution would allow for review based on a full record).

Notably, Petitioner does not dispute the adequacy or availability of these alternative remedies. Pet. ¶ 51. To the extent that Petitioner seems to take issue with the alternative remedies because they will delay resolution of his claims, this is insufficient to warrant use of such an extraordinary remedy as the writ of prohibition. *See Rush*, 68 N.Y.2d at 354 ("the ordeal of a

criminal trial and the possibility of conviction, by themselves, are insufficiently harmful to warrant use of the writ"); *La Rocca*, 37 N.Y.2d at 579 ("[t]he orderly administration of justice requires that correction of litigation errors merely be left to the ordinary channels of appeal or review").

2. Disqualification is not warranted.

Where writ of prohibition is sought to disqualify a judicial or quasi-judicial appointment of a special prosecutor, a reviewing court "should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." *Matter of Schumer*, 60 N.Y.2d at 55. Under such circumstances, "the appearance of impropriety, standing alone, might not be grounds for disqualification." *Id.* To establish disqualification under this standard, "[t]he objector should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored." *Id.*; *see People v. Hodgins*, 202 A.D.3d 1377, 1382–83 (3d Dep't 2022) (disqualification of prosecutor not warranted because there was no actual prejudice to defendant based on "prior acquaintance" between prosecutor and defendant); *People v. Sloley*, 179 A.D.3d 1308, 1312–13 (3d Dep't 2020) (disqualification of prosecutor not warranted because, even if there was a conflict of interest, criminal defendant failed to show any actual prejudice).

Though this standard is relied on heavily by Petitioner, it is inapplicable to disqualify a special prosecutor appointed by the Governor because it applies when the special prosecutorial appointment is a judicial or quasi-judicial appointment, rather than an executive one. Pet. ¶¶ 39–41, 59; *see, e.g., Matter of Working Families Party v. Fisher*, 23 N.Y.3d 539, 546 (2014) (applied to judicial appointment of a special prosecutor); *People v. Adams*, 20 N.Y.3d 608, 612 (2013) (applied to judicial appointment of a special prosecutor); *People v. Shinkle*, 51 N.Y.2d 417, 420 (1980) (applied to judicial appointment of a special prosecutor); *see also Matter of Schumer*, 60 N.Y.2d at 55 (articulating standard in the context of quasi-judicial appointment of a special

prosecutor but declining to consider disqualification at early stage of proceeding). Courts in this state have long recognized a distinction between special prosecutorial appointments that are executive in nature and those that are judicial or quasi-judicial. *See People v. Viviani*, 36 N.Y.3d 564, 579 (2021) (discussing distinctions between statutes that permit for special prosecutorial appointments and noting distinctions between those that permit for appointments by the court and those that permit for appointments by the Governor); *see also People v. Callara*, 44 N.Y.3d 623, 627 (2025) (recognizing a key difference between special prosecutorial appointments made under Executive Law § 63(2) and County Law § 701 is that the former is an appointment by the Governor and the latter is an appointment by the court); *Matter of Bd. of Supervisors of Montgomery Cnty. v. Aulisi*, 62 A.D.2d 644, 647–48 (3d Dep't 1978) (same); *Matter of Rice*, 31 Misc. 3d at 842 (same). Such distinction is dispositive here. *See Matter of Soares*, 20 N.Y.3d at 145 ("we have recognized that prohibition is an appropriate remedy to void the improper appointment of a special prosecutor *when made by the court*" (emphasis added)).

Even if the disqualification standard relied on by Petitioner applied, disqualification is not warranted based on a single, empathetic social media post made by the AG prior to her appointment. *See Matter of Soares*, 20 N.Y.3d at 146 ("[u]nder our precedent, the existence of a conflict of interest between the district attorney and a defendant, by itself, does not warrant the removal of the district attorney"); *see also Matter of Czajka v. Koweek*, 188 A.D.3d 1540, 1542 (3d Dep't 2020) (disqualification of district attorney not warranted because there was no actual prejudice to defendant where judge that presided over prior family court matters involving defendant now served as prosecutor). This is particularly so because the AG is otherwise obligated by her constitutional, statutory, professional, and ethical obligations as an attorney, an elected official, and constitutional officer to properly discharge the duties entrusted to her by the voters

when they elected her and by the Governor when she tasked her with this investigation. *See, e.g., People v. Zakrzewski*, 249 A.D.2d 1314, 1323 (3d Dep't 2023) (defendant failed to demonstrate actual prejudice requiring disqualification of prosecutor based on misinformation included in search warrant application because, among other things, district attorney was otherwise "an elected, constitutional officer" tasked to public duties concerning conduct of prosecution); *People v. Barba*, 60 Misc. 3d 1074, 1082 (Sup. Ct. Queens Cnty. 2018) (defendant failed to meet "high standard" to show prejudice requiring disqualification of prosecutor based on perceived conflict between defendant and district attorney stemming from defendant's prior negative dealings with district attorney and litigation against members of district attorney's office because district attorney was otherwise "an elected, constitutional officer" tasked to public duties concerning conduct of prosecution).

Though Petitioner alleges that disqualification is required because he will suffer prejudice from the AG's unfavorable investigatory choices (Pet. ¶¶ 46–48, 57–58) this claim is wildly speculative. *Morgenthau v. Crane*, 113 A.D.2d 20, 21–22 (1st Dep't 1985) ("[c]onjectural speculations, without any factual foundation . . . are not a sufficient predicate from which to conclude either the existence of prejudice or the reasonable potential for prejudice"). Such speculation about the different ways that various discretionary variables might turn in this investigation is simply insufficient to establish prejudice at this early stage. *Cf. People v. Mero*, 221 A.D.3d 1242, 1250, 51 (3d Dep't 2023) (finding no prejudice by joinder of charges in trial court because criminal defendant's claims were "purely speculative"); *People v. Ronk*, 159 A.D.3d 1129, 1130 (3d Dep't 2018) (finding no prejudice from failure to effectuate criminal defendant's appearance before grand jury because his claims were "only speculation"); *People v. Pottorff*, 145

A.D.3d 1095, 1097 (3d Dep't 2016) (finding no prejudice from counsel's failure to object when portion of voir dire was not transcribed because he "only speculates" how he was prejudiced).

Even if Petitioner's claims were not wholly conjectural, they misconstrue the AG's obligations stepping into the shoes of the district attorney. While a prosecutor has a duty of fair dealing to the accused and an obligation to see that justice is done, *see People v. Thompson*, 22 N.Y.3d 803, 809 (2014); *People v. Pelchat*, 62 N.Y.2d 97, 105 (1984), she has no obligation to present the evidence in the way "most favorable to the defense . . . ." *Thompson*, 22 N.Y.3d at 810; *People v. Mitchell*, 82 N.Y.2d 509, 515 (1993) ("the People maintain broad discretion in presenting their case to the Grand Jury and need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused"). Moreover, the credibility issues and factual inconsistencies that Petitioner is concerned with are more properly resolved before a petit jury, than in an investigation or presentation to the grand jury. *See People v. Douglas*, 226 A.D.3d 1162, 1163 (3d Dep't 2024) (integrity of grand jury proceeding was not impaired by prosecutors failure to present allegedly exculpatory eyewitness identification to grand jury because "a grand jury hearing is not intended to be a mini-trial at which competing evidence is weighed and questions of fact resolved . . . its purpose is simply to determine whether the evidence proffered by the People, if fully credited, would support a conviction"); *People v. Goldston*, 126 A.D.3d 1175, 1177 (3d Dep't 2015) (integrity of grand jury proceeding was not impaired by prosecutors failure to present allegedly exculpatory evidence to grand jury and such evidence bearing on victim's credibility "was more appropriately reserved for presentation to the petit jury than to the grand jury" (quotation marks and citation omitted)).

Accordingly, Petitioner fails to establish any actual prejudice that would require disqualification. *See Matter of Flynn v. DiTullio*, 228 A.D.3d 1323, 1232–24 (4th Dep't 2024)

(criminal defendant failed to establish appearance of impropriety and actual prejudice requiring disqualification from the fact that member of prosecutor's office was a victim in another unrelated case); *People v. Drago*, 207 A.D.3d 559, 560 (3d Dep't 2022) (criminal defendant failed to establish actual prejudice requiring disqualification from the fact of professional relationship between victim and prosecutor); *see also People v. Jenkins*, 186 A.D.3d 31, 36–37 (1st Dep't 2020) (finding that disqualification "is moored to an attorney-client relationship" and rejecting argument that would "extend the principle to instances where there is no relationship of any kind").

D. The Governor's actions are not subject to judicial review as arbitrary and capricious or an abuse of discretion.

"[W]hen the Governor acts by Executive Order pursuant to a valid grant of discretionary authority, [her] actions are largely beyond judicial review." *Matter of Johnson*, 91 N.Y.2d at 223; *see, e.g.*, *People ex rel. Saranac Land & Timber Co.*, 220 N.Y. at 490–91; *Gaynor v. Rockefeller*, 21 A.D.2d 92, 98 (1st Dep't 1964), *aff'd* 15 N.Y.2d 120 (1965) (recognizing that the Governor "is immune from interference by judicial process and free from judicial control in his performance of executive powers").

Here, it is undisputed that the Governor appointed the AG as special prosecutor pursuant to a valid grant of discretionary authority. Pet. ¶¶ 37–38; *see* Executive Order No. 64. Thus, Petitioner's alternative claims for relief—that the Governor's action was arbitrary and capricious and an abuse of discretion—are wholly without merit and must be denied as a matter of law. *See Maybee v. State of New York*, 4 N.Y.3d 415, 418 (2005) (discretionary action by Governor done in accordance with valid grant of authority "is not subject to judicial review"); *Matter of Brown v. New York State DOCCS Exec. Clemency Bur.*, 239 A.D.3d 1216, 1217 (3d Dep't 2025) (same); *Matter of Boyd v. Pataki*, 52 A.D.3d 1128, 1128–29 (3d Dep't 2008) (same).

CONCLUSION

Respondents respectfully request that the Verified Petition be denied and this proceeding be dismissed in its entirety and with prejudice.

Dated: Albany, New York
October 22, 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 11,956 words. The foregoing Memorandum of Law does not comply with the word count limit set forth in 22 NYCRR 202.8-b. However, this Court granted Respondents' request to submit a Memorandum of Law of up to 12,000 words and this Memorandum of Law complies with the permission granted by the court. 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