Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the matter of the application of
GILLIO LOPES,

Petitioner,

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

-against- Index No.
911974-26

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

Respondents.

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ARTICLE 78 Hearing

Lawrence H. Cooke
Sullivan Supreme & County Court
414 Broadway
Monticello, New York 12701
October 29, 2026

B E F O R E: HONORABLE JAMES FARRELL
Acting Justice of the Supreme Court

A P P E A R A N C E S:

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JOHN MOORE, ESQ.

NICOLE DUBATOWKA
Court Reporter

THE COURT CLERK: Case one on the calendar Gillio Lopes vs. Kathleen Hochul and Letitia James. Index number 911974-26 on for hearing. Appearances for the record please.

MR. BERNSTEIN: Stuart Bernstein for Mr. Lopes.

MR. MILTENBERG: Andrew Miltenberg, Nesenoff and Miltenberg with Mr. Bernstein, Judge.

MS. VIGARS: Assistant Attorney General Kaitlin Vigars here with my colleague, Assistant Attorney General John Moore from the Office of the New York State Attorney General for Respondents Kathy Hochul, Governor of the State of New York and Letitia James, New York State Attorney General.

THE COURT: Thank you, welcome counsel. I'll hear from the Petitioner. 30 minutes.

MR. BERNSTEIN: Stand, sit?

THE COURT: Stand please.

MR. BERNSTEIN: Thank you. Good afternoon, Your Honor, counsel. My name is Stuart Bernstein, my partner Andrew Miltenberg, we represent the Petitioner, Gillio Lopes in this case. I am in my 37th year of practicing law, Your Honor and the first eight as an assistant district attorney in New York County under the Honorable Robert M. Morgenthau and the office of special narcotics prosecutor. There was no greater honor than to be to standing before a jury and

doing opening statements and saying I represent the People of the State of New York. That statement meant, all of the people. Criminal defense attorneys, they have one client but as I know, Your Honor is aware, district attorneys and assistant district attorneys represent all of the citizens of their counties that they represent and in this case Attorney General James, represents all of the citizens of New York State. She is supposed to represent all of them and as we will discuss throughout the afternoon, unfortunately she has failed that obligation from the get-go.

As the Court of Appeals explained in People v. Santorelli, prosecutors have special responsibilities to safeguard the integrity of the criminal proceedings and fairness of the criminal process. Those responsibilities require a prosecutor to test competing accounts, consider conjure evidence and change course when the evidence warrants.

That obligation is the backbone and foundation of our petition. The standard we ask this Court to apply would be the same regardless of who the prosecutor was, the political affiliations, the identity. It would have absolutely nothing to do with that. The only party that respectfully brought political issue into this case, is the State. The State keeps answering questions challenging that

we are not asking. We are not challenging the Governor's authority to supersede the Tompkins County District Attorney. I will say that now Your Honor, and I will say it probably a lot of times throughout this afternoon. We are not asking this Court to supervise an investigation. We are simply asking Your Honor, based on the facts of this case, that whether the official chosen by the Governor to carry out the Governor's vision to restore confidence in a objective independent investigation is and was qualified to do so.

It is our opinion and what our papers support, is that Attorney General James is not that person and is not qualified in this specific case, again I want to be very clear, Your Honor, we are talking about this specific case. And based on Attorney General James' statement on September 28th that we will get into where she publicly aligned herself with a complainant in a civil and criminal manner that, that appointed is no longer a viable appointment.

Respectfully, Your Honor, that is the question before you. We submit that this case appears to be a case of first impression. There's a lot of cases cited by both sides, maybe six to ten important cases. None of them bear on these cases. It's more like a jigsaw puzzle, your Honor where we take rationals and holdings from different cases and come to here, and come to this case. What happened in

this case, Your Honor is a perfect storm and I will go through that very shortly.

The Petitioner is seeking only again, we are not looking for a wide sweeping referendum here, Your Honor. This is a very specific request, that Your Honor disqualify and invalidate Executive Order 64 appointing Attorney General James as a special prosecutor in this case and send it back to the Governor. Not asking you to step in and to run the investigation, not asking you step in and pick someone. Again, we are not saying and we are not asking you to say that the Governor, it's really important, we are not asking you to say, the Governor does not have the right to supersede. We are just saying that the qualifications of the person she selected are not legally sufficient and we believe the case law allows you, Your Honor, to make that determination.

Turning to the facts of this case. On Monday September 28th at approximately 6:13 p.m. Attorney General James on the official Attorney General X account issued a post and Your Honor that is exhibit six in our moving papers and I believe, exhibit A in the States-- the State didn't include it. It's exhibit six in our papers.

THE COURT: The State did not include it.

MR. BERNSTEIN: I don't believe the State included AG James' post as an exhibit. The only exhibit I believe

they have is Exhibit A, Executive Order 64, which is exhibit six in our papers.

Attorney General James at 6:15 on September 28th writes, "what this young woman has been forced to endure is horrific and unacceptable. I'm holding her in my heart and in my prayers. To her and to all survivors: You're not alone. We stand with you."

Your Honor, that and we'll talk about it and I'm sure the State will talk about it. That is not a empathetic statement. They claim that Attorney General James made an empathetic statement. That is not an empathetic statement, Your Honor. This is a very specific statement and if you look at three specific parts here, what this young woman has forced to endure. So that Your Honor, Attorney General James, has now accepted what has allegedly happened, has happened. That is a foregone conclusion. What this young woman has been forced to endure is horrific. I'm holding her, so now Attorney General James is now making it personal. It's not a generalization that all crime is bad or sexual assault is bad and that would potentially be an empathetic statement that someone would make, this is not. This is a very, very specific, I'm holding her in my heart and in my prayers. To her, again the next line, to her, a very specific not a generalized statement. To her and to all survivors. Respectfully, Your Honor if you look in the

dictionary, the word survivor means something has happened to someone. So the Attorney General has clearly made a decision that something horrific has happened to this young woman.

She's the Attorney General of the State of New York. The highest ranking law enforcement official in this state. She should not be making those statements. Respectfully, I think it violates several mechanics of ethics. As the sitting Attorney General for the State, she has made a decision, she has made a determination. Your Honor, also absent from the State's papers is a declaration from Attorney General James explaining it. It wasn't important enough or she couldn't explain it. All their papers say, it was an empathy statement, that is written by counsel but nothing from Attorney General James herself or the Governor explaining their actions. I guess they don't think they have to, that is up to them, Your Honor. I'm just saying, there is no declaration from Attorney General James explaining this statement.

I think what is lost in this media coverage, Your Honor, obviously it's covered. I think what gets lost a little is what happens the next day. September 29th, Your Honor, Governor Hochul issued a press release and that is exhibit four in our papers.

And the second paragraph of Governor Hochul's press

release on September 29th states, "I support the district attorney's decision to reopen the criminal investigation."

THE COURT: That was before the appointment of the Attorney General?

MR. BERNSTEIN: Exactly. So on the 28th AG James makes that statement. On the 29th, Governor Hochul is supporting District Attorney Van Houten for him reopening the investigation and then on October 1st comes the superseding appointment of Attorney General James. We don't have anything that happened in between. We have a public statement from the governor supporting District Attorney Van Houten.

THE COURT: He made a statement that he was going to reopen it, yes?

MR. BERNSTEIN: Correct and the Governor supported it on the 29th. Now we go to the 1st, where we have Executive Order 64 which is exhibit five in our papers and I believe exhibit A in the State's papers. Your Honor, we look at it, there are one, two, three, there are five whereas causes. And the first whereas cause states, Article four section three of the Constitution of the State of New York obligates the Governor to take care that the laws are faithfully executed.

We'll come back to the word faithfully shortly. But that is the first wherefore clause. Wherefore clause

number four, "whereas concerns have been raised both by Jane Doe and the public that this incident cannot be fully and thoroughly investigated or prosecuted without conflict or bias or that the public perception of conflict of bias." The public conception--perception of conflict of bias. The last whereas clause, "whereas the criminal justice process must be guided by the facts of the law and the public interest requires an objective review."

Your Honor, I'm not trying be funny, I'm not trying to be flippant or sarcastic. When you look at the Governor's Executive Order and you look at Attorney General James' post, it really looks, it could be argued that the Governor is writing about the post of Letitia James. She has shown that she is not objective, she has shown she is bias and the Governor's specific Executive Order writes, "the public interest requires, so she talks about the public but more importantly above it writes, "Jane Doe in the public that the incident cannot be fully and thoroughly investigated, prosecuted without conflict of bias." Your Honor, if you look at exhibit six our copy of AG James' post and it just jumped out at me, there are posts after people, you I guess how that works, you can like something and not like something. If you look at the first two post that are on this page and we just submitted the first two posts here.

There is a gentleman Ryan he says, "so much for the

presumption of innocence, LOL." The next one by a person named Lori says, "you should be removed from service." Now, that's the public, that's the public's initial reaction to AG James' post. When I said I wasn't joking, Your Honor that specifically is what Governor Hochul was looking to change. There was apparently some perception having to do with the Tompkins County DA's office and the society and public lost faith in him.

Respectfully, the public has lost faith immediately with Attorney General James on the 28th. She has shown no presumption of innocence, she has shown that she has picked sides. So, the question before Your Honor, respectfully is, is she qualified as the special prosecutor in this case. Not does Governor Hochul have the right to supersede and that is an important distinction because the government, the State, in their papers continue to argue executive privilege, they continue to argue the Governor has the power to supersede. Again, for the umpteenth time, we are not arguing that. And it is clear from the post that Attorney General James has accepted the facts as she had heard them. Whether she heard them on the news or however she had heard them on September 28th she accepted them.

By saying, clearly and unambiguously, what this young woman has been forced to endure is horrific. She has accepted that what she said happened, has happened. How

does that play into the this case, Your Honor.

Our papers, the State put in papers, we put in lots of moving, and then our reply which addresses all their arguments. I will answer any and all your questions, Your Honor and I will try to address all of them.

Those statements make this a ripe case right now. We can discuss that and I will discuss that in a little bit. But, right now going back to the Governor's discretion of authority. Again, we are not here saying, we want DA Van Houten back that is not why we are here. DA Van Houten is not here saying I want to be back on. That would be challenging Governor Hochul's authority. Just like we saw with regards to Johnson V. Pataki where the Court of Appeals would not step in and say Governor Pataki didn't have the right to replace DA Johnson when he basically came out and said, long before that I will never seek the death penalty and Governor Pataki took all potential death penalty case away from him. The Court of Appeals said you can't-- we are not going to substitute the Governor's mindset, thinking and that is what the State says here, you can't do what we are asking you to do because we are looking to supersede the Governor's mindset. We're not. We're not saying the Governor can't, and in the State of New York, Your Honor, I find it hard to believe that there is not a single unbiased former federal prosecutor, former attorney that can step in

and be a special prosecutor. In fact, we invite that. Mr. Lopes--

THE COURT: Let me ask you a question about that.

MR. BERNSTEIN: Sure.

THE COURT: I got to hone in a little bit on your venue. I'm a little bit concerned number one, about joinder. So, let me ask you this question. Tompkins County is the Third Judicial District. I'm sorry, is not in the third, it's in the fourth. Is this case number one, properly venued? That is my first question and number two, are there other litigants, are they joined. The alligation here is of a multi-potential suspect case. Is it not just your client, right? There is six other people. They're not part of this litigation, why?

MR. BERNSTEIN: So --

THE COURT: And if I agree with you, say I agree with you for the moment and she should be removed. Does she get removed for your client's case and the other six have her as special prosecutor, how does that work? Multiple prosecutors for different defendants?

MR. BERNSTEIN: Your Honor in regards to venue--

THE COURT: Answer that question first.

MR. BERNSTEIN: Sure. Your Honor, why the other six have not joined I just don't know that answer. I don't believe it is materially necessarily here they can joinder.

They could always be brought in. The State didn't bring them in their papers.

THE COURT: Why didn't you bring them. I know the State didn't but the Court has to be mindful of piecemeal litigation and they may want the Attorney General to stay on the case, I don't know they haven't appeared. Although, on page ten of your affirmation you indicate that they would also be prejudice but they are not saying that.

MR. BERNSTEIN: Your Honor, I think that they would reap the benefits of our work and we came-- they at no point as much as I hear you saying is that if they want the Attorney General they never moved to join. They never moved--

THE COURT: You never also served them. You never joined them yourself.

MR. BERNSTEIN: Honestly Your Honor, I don't know who they are. I don't know their attorneys, I don't know anything. We do know there is another proceeding in the In re grand jury in Tompkins County.

THE COURT: I'll ask about that. What about that, what is the status of that?

MR. BERNSTEIN: Your Honor, I have no idea. There is no public filing on that in criminal court.

THE COURT: What if I agree with you and that judge over there disagrees with me and now we have two different

decisions or I disagree with you and they agree with your position. What happens then?

MR. BERNSTEIN: Your Honor, what happens then is I believe that your Article 78 --

THE COURT: I'm not the Appellate Court.

MR. BERNSTEIN: Your decision on the Article 78 Petition Your Honor, is the one that would be control.

THE COURT: I'm a court of court of jurisdiction with a superior court Judge of Tompkins County over the grand jury. We are equal.

MR. BERNSTEIN: Judge, I have no knowledge of the grand jury being impanelled in Tompkins County.

THE COURT: You just said that there is litigation there In re Tomkins County grand Jury. I assume that goes to the grand jury judge.

MR. BERNSTEIN: I saw a filing. I see no papers by anyone opposing it by the state, there has been no filing, there is no nothing, there is no caption, no index number. There is no mechanism for that to even have a case to be viable. I don't know what counsel has done in that case, Mr. Lee's counsel, I know it is Mr. Lee. In terms of here, joinder Your Honor, going back to the argument here. No one has put in that they oppose it. No one has come in, the State hasn't opposed it.

THE COURT: I don't even know--you said you don't

even know who these folks are. I don't know if they know about it. Maybe they don't know about it, is that possible?

MR. BERNSTEIN: Respectfully, Your Honor, anything is possible. I know there is a civil matter. In terms of this process is it possible they don't know about it, I would find it hard to believe with the amount of press that this is covered. I'd be very, very shocked if they didn't know about it. In terms of the joinder statute itself, Your Honor, I believe Your Honor can order us to serve, to attempt to serve, if we brought them in. I don't believe that is a linchpin for potential denial of this case. Your Honor, is it possible Mr. Miltenberg address something as well.

THE COURT: He may. I need an answer to that. You can't have one court ruling in one direction and another court ruling in another direction and there be uncertainty. That is not fair, that is not fair to anyone.

MR. MILTENBERG: I would submit to you that this question of whether the Attorney General in this case has made a predetermination or predisposition is not particularly litigable by any single defendant in the civil case. It's is a question sort of, it's a foundation question as to this litigation. It's a determination that I think has to be made whether it affects one person, five of the seven, three of seven, seven of the seven, whatever the

case may be.

Either this Court determines that the statements made by Attorney General James take her out of contention to be a neutral party objectively reviewing this case or the Court determines that it's okay for her to continue.

It's not particularly owned, this issued isn't owned by any one defendant. This is, as far as we are concerned how we see it, a statewide issue. This is an original sin if you will, for this particular case and there is no, as far as we are concerned, other competing pending litigation on this particular issue but this --

THE COURT: There is what your co-counsel indicated was application before the grand jury Judge in Tompkins County.

MR. MILTENBERG: There is but I don't think that specifically addresses this foundational issue.

THE COURT: Couldn't you bring this up if your client was eventually charged? Could you ask for her to be removed?

MR. MILTENBERG: I think at that point, considering the fact that the role of special investigator/ prosecutor is to commence the review with a clean slate.

THE COURT: But the facts don't change, do they?

MR. MILTENBERG: Well, exactly that is part of the concern here. Is not only did the facts not change but the

acceptance by the Attorney General of facts central, facts that are foundation to Jane Doe's claims is not going to change. We need, the State needs, the people need. I want to think about how we got here. We got here today because people were not satisfied with the investigation done by Cornell and the results of that. We are here because people were not satisfied with the Tompkins County District Attorney's approach with this.

Why do we need to put the People of the State in the position of again, lacking confidence in result because of an apparent predetermination of appearance whether or not Attorney General James is bias, in this particular case we argue that she is, the appearance of an impropriety, a predetermination we believe is enough.

This is a question that has to be answered regardless of who brings it up and we submit that should be the focus of what this Court looks at.

MR. BERNSTEIN: Your Honor, if I can piggyback on the question regarding is it premature and can it wait until after. I think the Court of Appeals in Fisher addresses that, it says, "it's not in the publics interest to allow a prosecutor to carry out a lengthy investigation when there is doubt." Which respectfully Your Honor, we have submitted a lot of doubt that keeping her appointed is valid. "And to run the risk that the process will have to start over again

with a different prosecutor." It just makes no sense and the Court of Appeals allowed for an inquiry as to appointment of the prosecutor at the early stages not having to wait to it. Along that same line Your Honor, our client is identified, the Governor has basically identified him in terms of being in the scope of the investigation. It's not speculative, Your Honor. The Governor in her Executive Order, in the second wherefore clause identifies the specific lawsuit, the State in their answer admitted that Mr. Lopes falls within the scope of Attorney General's potential investigation, that he is an identified person.

So, he clearly, it's not speculative, Your Honor he's named in the Attorney General investigation which includes what Mr. Miltenberg was saying Your Honor, the investigation begins with and you know this better than anyone, a prosecutor with the set ideas in their head of where this investigation is going to go. A creditability assessment, what witnesses, all of these are pre-investigated decisions. Respectfully, Attorney General James has already made, has already made in a favor of Jane Doe and against the alleged potential perpetrators. How, and Your Honor, again, she, Attorney General James, is suppose to represent all of the people having read that statement, how is Mr. Lopes and the other potential people that could face criminal prosecution, how are they supposed

to feel as a citizen. How are they suppose to feel that the person that is in charge of this investigation has already predetermined it.

They are entitled to a right of a fair and unbiased investigation which Attorney General James through her statement made clear will not happen. The Court of Appeals in Fisher says, we don't have to wait until the end. Respectfully, that is where we are. Your Honor, I think there was a unanswered question with regards to venue.

THE COURT: I understand why the venue is in Albany County, I understand that. She is the Attorney General of the State of New York. You could have venued it to Tompkins couldn't you?

MR. BERNSTEIN: Respectfully, if we move a Article 78, I don't think we can Your Honor. Article 78, according to my understanding of the CPLR and the law has to be where the action took place and Governor Hochul's Executive Order 64 took place in Albany. That is where the seal and everything is, it took place in Albany. The action of the Executive 64 which we are contesting, we are not contesting the statement of Attorney General James, we are contesting the appointment of Attorney General James and that occurred in Albany County. Could venue come in different places, Your Honor, I think that is also possible you could have venue in different statutes. I think clearly and

respectfully that venue is appropriate here in Albany County based on Executive Order 64.

THE COURT: Okay, anything further? You have one minute left.

MR. MILTENBERG: I submit, Your Honor this is too important of a question to exalt formal resubstance reviewing with --

THE COURT: It's not formal resubstance if you have multiple courts coming down with different decisions. You have chaos.

MR. MILTENBERG: I agree with you. Nonetheless, this is the original question that must be answered.

THE COURT: And the court system should not engender or support any fashion chaos, we should be the antithesis of that.

MR. MILTENBERG: Certainly.

THE COURT: Thank you.

MR. BERNSTEIN: Lastly again, I think joinder is permissible. If you are inclined to decline the petition I ask Your Honor, that it be done without prejudice.

THE COURT: Thank you. Who is arguing on behalf of the attorney general and the government?

MS. VIGARS: Yes, Assistant Attorney General Kaitlin Vigars. Good afternoon, Your Honor. Just initially on the procedural question you just raised with Petitioner's

counsel. I do want to stress that, County Law Section 701 subdivision 6 does provide for a specific process for handing disqualification of the Attorney General that would require to Your Honor's point, the matter to be venued in the county where the criminal matter is triable.

To Your Honor's point and this is addressed in our papers, we do think that process attempts to elevate some of the organizational concerns that you just raised.

THE COURT: You didn't raise that specific issue though.

MS. VIGARS: Well we raised --

THE COURT: You didn't raise the issue of multiple courts hearing multiple applications. Nor the fact that the six others were not joined or ought to be joined or should be joined or could affect something that involved their rights. I know what the Petitioner's argued but you didn't argue that in your papers, did you?

MS. VIGARS: We did not. But we did argue about County Law Section 701 subdivision 6 in our papers. I pointed out here, just because I do think it answers your questions about concerns about chaos and organizing and marshalling the process. I do also want to highlight a number of other procedural concerns that are dispositive here.

As indicated in our papers, there are several

justiciability issues that prevent this Court from reaching the merits of Petitioner's claim here. Justiciability is important threshold consideration that goes to the very power of the court to adjudicate the dispute. It encompasses a number of concepts as relevant here, ripeness, standing and a political question doctrine.

First with respect to ripeness, the Petitioner must establish that judicial review is both appropriate and that he would suffer hardship if relief is denied. Petitioner here fails that second prong, the issue of the hardship. Specifically, with respect to hardship to constitute hardship for purposes of ripeness, the harm alleged must be sufficiently direct immediate and felt in a concrete way. The harm can't be remote or contingent. The harm alleged here is essentially that the investigation will be improperly conducted and that would potentially prejudice Petitioner in a future criminal proceeding but that harm relies on several unknown future events, which we don't know if they are going to occur.

For Petitioner to experience that harm, first he would need to, the result of the investigation would need to implicate him, the results of the investigation would need to implicate him in such a way that it supports presentation to the grand jury and ultimately the grand jury would need to vote to indict the petition.

So, even if as Petitioner has claimed it's true that the statement by the Attorney General, the very brief statement on social media by the Attorney General, were to establish that she was going to somehow act improperly here it wouldn't necessarily solve that third piece of whether or not this ever will ripen into a criminal prosecution, whether the grand jury will vote to indict.

I also want to note that Petitioner in his papers has claimed a separate harm of prejudice in a separate civil proceeding. That is raised improperly for the first time in his reply. Even it were properly before the Court again, it rests on number of assumptions about how the investigation would be conducted and ultimately what the result of that investigation will be.

Turning to the second justiciability issue addressed in our papers, is the issue of standing. To establish standing it is the Petitioner's burden to show that he has suffered an injury-in-fact and that, that injury is within the zone of interest of the statute under which the government has acted. So for many, for actually all of the same reasons that Petitioner's claim is not ripe his injury-in-fact, is all not sufficiently concrete. So to be an injury-in-fact the harm alleged by Petitioner has to be concrete. It can't be speculative or contingent or depend on unknown future events and for the same reason his claim

isn't ripe, it's not an injury in fact.

Even if this were a sufficient injury it's not an injury within the zone of interest of Executive Law Section 63 subdivision 2. Executive Law Section 63 subdivision 2 exists as a statutory mechanism for the legislator to apportion power throughout the executive branch.

So, under the New York State Constitution, there are constitutional officers that have law enforcement authority. That's the Governor, the Attorney General and the District Attorney. The constitution doesn't spell out who possesses what authority or prosecutorial responsibilities. That is traditionally left to the legislator to decide who is going to do what and Executive Law Section 63 subdivision 2, is how the legislator has chosen to exercise it's authority to apportion law enforcement authority throughout the executive branch.

The structural and functional interest served by Executive Law Section 63 subdivision 2 don't bear any relationship to the sort of individualized injury to someone that presumes they might be eventually subject to a criminal prosecution. It's really a power sharing statute that doesn't necessarily or that does not have any relationship to the rights of an accused.

To the extent that the Petitioner is for the first time in his reply, claiming that he is also asserting some

sort of interest in fairness in the criminal process. I do want to stress again, there is no criminal proceedings at this stage. We are in a very early stages of an investigation. If this does ripen into a criminal proceeding, the character of the government action would necessarily change, which would change the standing calculus. Potentially if there were an indictment, now the government is acting under the criminal procedure law which changes the standing calculus in a material way.

Third, the political question doctrine is the third justiciability principle that bars Petitioner's claims here. The political question doctrine is a separation of powers principle. It prohibits courts from reviewing the discretionary determinations of actions that are properly tasked to the executive and the legislative branch. Here, the Petitioner claims violates the political question doctrine in three main ways.

First, with respect to the executive branch, Petitioner essentially is asking this Court to review how the Governor has exercised her discretionary authority to supersede the district attorney. Though Petitioner here, is attempting to distinguish their claim. Ultimately, I think a lot of the argument that you heard and a lot of argument that's in their papers goes ultimately at bottom to a disagreement with her choice. Ultimately, that is exactly

the sort of claim that is not reviewable by courts.

Additionally, with respect to the executive branch essentially Petitioner is asking this Court based on his fears of how the Attorney General may exercise her prosecutorial discretion to restrain her from acting. Generally speaking, courts are prohibited from weighing in on how a prosecutor exercises their prosecutorial discretion.

Third, the Petitioner here, the claim here, also asks this Court to improperly invade the province of the legislative branch. The legislative branch here has enacted Executive Law Section 63 subdivision 2 to give the Governor authority task the Attorney General to conduct investigations. It doesn't include any standard for the Governor to act and it doesn't require her to explain her choice. The only requirement is that she identify the subject matter of the investigation and there is numerous case law cited in our papers that all supports this point.

Petitioner's argument here today, is essentially asking this Court to graft on to Executive Law Section 63 subdivision 2 an external qualification requirement. That external qualification requirement, it doesn't exist in the statutory language, it doesn't exist in the constitutional provision under which the governor has acted. It would contravene the legislator's specific policy choice to

countenance that argument here.

I think this point is nicely illustrated in matter of Mulroy vs. Carey. In that case, very much like Petitioners are asking this Court to do here, the Petitioners in that case, which included the District Attorney who had been displaced were essentially arguing that the Governor's decision wasn't reasonable and that there should be some sort of standard of review.

The fourth Department, in matter of Mulroy vs. Carey, which was eventually affirmed by the Court of Appeals specifically held that this was a separation of power issues. The legislator has very obviously made this choice and it's not for the courts to second guess or to graft on these additional standards.

Finally too, I just want to again point to County Law Section 701 Subdivision 6. As I indicated at the beginning of my remarks, the legislator has enumerated a specific and exclusive process for handing disqualification of the Attorney General allowing Petitioner to utilize an alternative process again contravenes that legislative choice.

Finally, just on the justiciability piece. I do just want to note that matter of Schumer v. Holtzman I think nicely illustrates the justiciability issues that prevent the court from acting here. In that case the parties had

specifically waived justiciability.

THE COURT: Can we go back for a moment to the case you cited Mulroy.

MS. VIGARS: Yes.

THE COURT: Didn't the Court of Appeals say no view is expressed whether in any or all circumstance the exercise of executive power supersede an elected DA would be beyond judicial review. We are not talking about an elected DA here. Didn't it also say that?

MS. VIGARS: Yes. They did leave open that there was a possibility of potentially a way for litigant to bring this sort of claim. Yes, I acknowledge that--

THE COURT: Didn't they in Johnson V. Pataki address the merits of the claim that the Governor had appointed the Attorney General in an abusive discretion. Did they in one paragraph and then submit it descends, Detone in their descend say, the majority address the merits. Why did they address the merits if it's unreviewable?

MS. VIGARS: Your Honor, the reason they addressed the merits. This is not just specific to Johnson v. Pataki there are a number of cases that indicate this. Not withstanding the fact that Executive Law Section 63 Subdivision 2 doesn't require a standard and it doesn't require the Governor to explain their choice.

THE COURT: But she did.

MS. VIGARS: Some governors have done so affirmatively.

THE COURT: But she did explain her choice, right. Or why she was doing it, right to avoid conflict, to avoid bias, to get an objective review. These were words that were used in the executive order.

MS. VIGARS: Yes those are the words that in the executive order. Sorry, to your specific point, with respect to Johnson, I believe the reason that the Court addressed the discretionary issue there is because in that case Governor Pataki had specifically held himself out as making some sort of statement of necessity or explaining his choice. I think here the language of the executive order to your point, though it does provide some explanation, is it not the sort of explanation that was discussed and at issue in matter of Johnson v. Pataki.

THE COURT: Why then would the Court, Judge Kaye wrote that opinion. Very, very smart Judge. Why would she had weighed it into that issue. Maybe she got voted into by Smith or Detone. I don't know because their descends were pretty strong. The majority in that particular case, did address the merits, they did. If it's non-reviewable then why would the Court even go through the trouble of even addressing it.

MS. VIGARS: Again, I think the Court of Appeals explains that in the decision that they were addressing it because some governors have affirmatively gone beyond what the statute requires and so they were addressing it there. Ultimately, Johnson v. Pataki it stands for the proposition that the Governor's determination is incredibility broad here and it's just not reviewable at the level of detail that Petitioner, his claims indicate.

THE COURT: Can I ask a couple of questions regarding the facts of this particular situation. Did the Governor know when she appointed the Attorney General, that the Attorney General had made the social media post that is attached the Petitioner's papers, exhibit 4?

MS. VIGARS: Yes, presumably giving the timing that the statement was before the appointment, the Governor was aware of the statement and notwithstanding the statement she nevertheless chose to exercise her discretion to appoint the Attorney General to this position.

THE COURT: So she was aware of it and appointed the Attorney General notwithstanding the contents of it, yes?

MS. VIGARS: Yes.

THE COURT: I have another question, it was raised sort of but not really. I see here in exhibit four, which is a statement from the Governor and it was pointed out by

Petitioner just a few moments ago. That she supported the decision to reopen the criminal investigation and that is the statement that she put out on the 29th of September.

Then there is another document here it says, Governor Kathy Hochul says video, audio, photos and rush transcript. Governor Hochul and Attorney General James to provide an update on Cornell sexual assault investigation. I have a question about that because it appears there was a joint press conference and this is a copy of the Governor's statement and then she turned it over to the Attorney General. Did she stand next to the Governor, did the Attorney General stand next to the governor at this particular October 2nd press situation when the Governor repeated similar statements that the Attorney General had made in the tweet?

MS. VIGARS: Your Honor, I believe it was a joint press conference. But ultimately--

THE COURT: And she'd had been appointed at that point, no?

MS. VIGARS: I'm sorry. I'm having trouble following the question.

THE COURT: The Attorney General had been appointed as the special prosecutor at that point; correct?

MS. VIGARS: I'm not aware.

THE COURT: It was October 2nd.

MS. VIGARS: Then yes, the Attorney General was appointed on October 1st and if you are telling me the date --

THE COURT: The night before. This is what it says. It says, this is the Governor, "Good morning last night I signed an executive ordered appointing Attorney General Letitia James as special prosecutor et cetera et cetera. Then she said "this women, this young woman had already endured something that is utterly unspeakable and that at every turn she was failed by the people and institutions with obligation to protect her." She concluded by saying "but at the heart of all this is one young women and what she deserved from the beginning. Every parent who sends their child off to college expects them to be safe and if something terrible happens the student deserves to know that the people they turn to will listen to them, protect them and fight for them. That is the bear minimum. This brave young woman deserved that in 2024 and she deserves it now. And I'm going to use every part of my power to do everything I possibly can to make sure she finally gets it." Then she says, "with that I turn over to Attorney General Letitia James." So was she standing next to the Governor when the Governor made those remarks?

MS. VIGARS: If that is what you are reading from, it was a joint press conference then, yes. But, ultimately

I think what we are getting into here is an ultimate disagreement with the Governor's choice.

THE COURT: I just want to know if she was standing next to her when the Governor made those statements and then introduced her as special prosecutor.

MS. VIGARS: I mean it was a joint press conference so to answer Your Honor's question, yes.

THE COURT: Thank you.

MS. VIGARS: With respect to the merits of Petitioner's claim --

THE COURT: Does that run a foul of the professional rule of conduct?

MS. VIGARS: Ultimately, I think we are getting a little bit far field but.

THE COURT: I'm just wondering if it might.

MS. VIGARS: I think at this point, there is nothing about the Attorney General's statement on social media, there is nothing here that would indicate that theres anything that is going to happen, there is no reason to believe that the investigation is not going to follow where the facts lead it. Ultimately the special prosecutor as a constitutional officer, as a elected officer, she has-- there are all sorts of obligations that she has that would require her to follow the facts --

THE COURT: Wasn't her statement purpose of

appointing the Attorney General to avoid conflicts, to avoid bias to have objective and now you got this situation where your appointed attorney who has made statements that where, I guess from what I can see, viewed by almost 700,000 people. 626,000 people, based on exhibit four. Is that a problem?

MS. VIGARS: Well, Your Honor, in order to warrant disqualification there has to be actual prejudice.

THE COURT: Are there any cases, can either side cite me any cases where a prosecutor has made a public statement either through social media or otherwise that has engendered this type of response?

MS. VIGARS: There are multiple cases cited in or brief. The NRA case for example, the Trump case. All of which involve public statements by a prosecutor which in those cases did not present an impediment to prosecution.

THE COURT: You agree with me, it's probably not a good idea for a prosecutor to engage in that type of conduct?

MS. VIGARS: Well that is not the question that needs to be resolved by this Court.

THE COURT: You wouldn't agree with me?

MS. VIGARS: It's not proper for this Court to decide whether or not they agree with this statement. The question before the Court is ultimately if notwithstanding

all the procedural barriers it requires disqualification--

THE COURT: I'm asking whether a prosecutor should make those types of statements.

MS. VIGARS: I'm hearing Your Honor's disagreement with the sentiment of the statement that is coming across.

THE COURT: No, I'm asking you whether you think it's appropriate for a prosecutor to make that statement.

MS. VIGARS: Ultimately I don't think public statements by a prosecutor are an impediment to prosecution. At the end of the day, the obligation that the prosecutor has is as duty of fair dealing to the accused. There is nothing that prevents a prosecutor from making public statements. There are numerous cases--

THE COURT: There is a ethical rule.

MS. VIGARS: --there are a number of cases cited in our brief that go to public statements made by a prosecutor. Where those public statements were not an impediment to prosecution. Even in matter of Schumer, those were public statements that were made by the prosecutor and even there the Court of Appeals found it was not proper to reach the disqualification issue.

THE COURT: What were the statements at issue with Schumer?

MS. VIGARS: Concerns about the propriety, about the propriety of engaging in the investigation, about their

political differences. There had been a contentious election and there was some back and forth I believe in the media and in the press about it and even then, the court found that disqualification was not appropriate and actually in that case rested on the disqualification issue turned on justiciability considerations.

So ultimately to Your Honor, we reached the disqualification issue but before you reach the disqualification issue, you also have to resolve a few other procedural hurdles such as whether the writ of prohibition lies and whether it's discretion, it's issuance is warranted. Ultimately the writ of prohibition here does not lie because these are executive actions. The writ of prohibition exists to constrain judicial and quasi-judicial actions.

The Governor's appointment of the Attorney General here was done in exercise of her constitutional authority as the executive. It's purely an executive action. The writ of prohibition would not lie against that executive action.

Additionally, the Attorney General's exercise of the authority given to her by the Governor is likewise an executive action. The writ of prohibition does not lie to constrain either of those actions.

THE COURT: Do you think if any of these individuals are prosecuted and ultimately convicted of any

offenses involving this, this potentially could be an Appellate issue?

MS. VIGARS: Yes and that gets into the point of the discretionary factors that this Court would have to consider. If the writ of prohibition lies, whether or not it should issue, is a matter left to your discretion. One of the factors, as to one of the discretionary factors, is that adequacy of alternative remedies. So, here ultimately if this ripens into a criminal prosecution, criminal defendant would have the opportunity to make a post-- excuse me, a pretrial motion where they can raise these claims, they can raise them again on direct appeal, they can raise them post-conviction motions, they can raise them in other collateral proceedings which is writ of habeas corpus. There are a number of other mechanisms for the Petitioner to raise these claims. Additionally the unique--

THE COURT: Couldn't they raise the claim before the judge if there is an indictment and the court will issue an indictment --

MS. VIGARS: Correct they can move to dismiss the indictment. What is unique and I think important about these alternative remedies that makes them particularly adequate is that at that point they'd be made on a full record. At this point, we are speculating based on these statements, what might happen. But ultimately if there is

an indictment and if this does move forward we have a full record. We see how the investigation has born out, we see how the thing that Petitioner fears here materialized and the Judge at that point, could review to say whether or not Petitioner is prejudice, whether the things he's concerned about, he or other criminal defendants, whether the things they are concerned about actually materialized to undermine the right to a fair trial, to be an inappropriate indictment. Any of those things. Matter of Abelove which is cited in our papers, that is exactly what I think what the Court found there is, there is plenty of adequate alternative remedies here and that would be a discretionary reason why the writ of prohibition should not issue. I do want to be mindful of my time. I think I am over the 30 minutes.

THE COURT: No, you have four more minutes.

MS. VIGARS: Okay. I think finally, Your Honor. I do just want to say there is an alternative claim for relief in the petition which asks whether the Governor's actions, which asks this Court to review the Governor's actions as arbitrary, capricious and were in an abusive discretion. That standard doesn't apply to the Governor's discretionary action. That is a black-letter law those cases are cited in our brief. That would require denial of that alternative grounds for relief. So for all those reasons--

THE COURT: Do any of those cases address a criminal proceeding or are they different?

MS. VIGARS: I believe they all are administrative and civil matters.

THE COURT: Isn't this because of the potential criminal nature it's very, very serious constitutional due process issue that are involved here, were not at issue in those other cases?

MS. VIGARS: Just to touch on the conversation we just had. Those sort of constitutional and other affirmative rights of an accused those are things, one that are not necessarily implicated here where there is no criminal proceeding and two, they are more properly raised in a context of a criminal proceeding where they can be resolved on a full record and through those other more appropriate channels.

So, for all those reason as detailed in our answer, we would respectfully requested the relief requested in the verified petition be denied and that the verified petition of this proceeding be dismissed in entirety and with prejudice.

THE COURT: Thank you.

MR. BERNSTEIN: Any chance of two to three minutes?

THE COURT: One minute.

MR. BERNSTEIN: One minute okay. If Your Honor

respectfully will allow us a week, three days to maybe submit supplemental briefing on joinder. I think it's permissive, if Your Honor will permit that. I would ask for that.

THE COURT: I think it can be dismissed under 30--1001A if I find they are not properly joined.

MR. BERNSTEIN: Right, I'm asking if we can submit supplemental why it should not be dismissed.

THE COURT: I have a problem with this joinder issue because I don't understand, if your argument is there all going to be substantial prejudice why they haven't all either appeared and why you didn't serve them and put them together. Otherwise it's not a one defendant potential case. It's a potential for seven. You can't have seven different proceedings and if it's acting together in concert theory, it's one indictment.

MR. BERNSTEIN: I think it's Mr. Lopes right to do this as well without --

THE COURT: It's also my right to say you didn't join the proper parties and therefore it's dismissed.

MR. BERNSTEIN: And that is why I'm asking for three days to put in supplement briefing why we believe it's proper. When we filed this Petition it is certainly something that was discussed and we believed it was proper under the law. Again, the State didn't raise it we didn't

address --

THE COURT: I have to look at all the law when I look at something. I don't just look at what the State responds I look at everything. And 7802 (d) tells me that there is a joinder issue here. 1001-A tells me it can be dismissed on a issue of failure to join. There is no dispute, you allege in page ten, at the bottom, you allege that not only will your client be prejudice but so will the others, that is what you say. Well where are the others? You make a statement but I don't know if that is accurate. I don't know that, they haven't joined, you didn't join them.

By the way, if we would assume that they probably should join based on your argument and they don't want to, then you serve them as a defendant. That is what the law states.

MR. BERNSTEIN: Your Honor, I understand 1001 says it can be but I'm saying I think it's permissive and why we think it's not. That's why I'm asking supplemental on the issue whether you can proceed which we believe you can without them.

THE COURT: What is the Attorney General's position on any additional briefing on the joinder issue. You didn't raise it but I can raise it.

MS. VIGARS: Yes, we agree the Court can raise it

at any point. To your point Your Honor, CPLR 1001-A permits the Court to raise the issue of necessary parties. Ultimately we would oppose.

THE COURT: It also gives me the authority to grant them leave to serve.

MS. VIGARS: Yes, it does. The option is yours especially now here where the statute of limitations has not run. We would oppose that, Your Honor. As this has been placed on expedited schedule as indicated in my correspondence to the Court. We have prepared our papers with that expedited schedule in mind. We would oppose any requests that would further prolong this proceeding.

THE COURT: I'll give you one week to get a joinder application in. That's it.

MR. BERNSTEIN: A joinder application.

THE COURT: Yes or submission on the issue of joinder. I think you have real issues with the joinder. It wasn't raised by the Attorney General. I'll give you time to submit it to me, One week.

MR. BERNSTEIN: Thank you, Your Honor.

THE COURT: By November 5th submission on that.

MS. VIGARS: Are you going to give the Respondents any time to respond?

THE COURT: I have to see what they are going to say about it. If they continue to say there is no issue of

joinder, I'll consider that. You didn't raise it but I'll consider that. If they wish to join, I'll give you a chance to respond.

MS. VIGARS: Thank you.

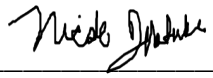
MR. BERNSTEIN: Thank you.

THE COURT: Thank you, counsel. Have a good day.

(Whereupon, the proceedings were concluded.

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Certified to be a true and accurate transcript of my stenographic notes.



NICOLE DUBATOWKA

Court Reporter