MIRZA M. BULUR, in his official capacity as the ACTING PUBLIC SAFETY DIRECTOR for the CITY OF PATERSON and APPROPRIATE AUTHORITY, CITY OF PATERSON POLICE DEPARTMENT, and ENGELBERT RIBEIRO in his official capacity as the POLICE CHIEF of the CITY OF PATERSON POLICE DEPARTMENT, Plaintiffs, V. THE NEW JERSEY OFFICE OF THE ATTORNEY GENERAL, MATTHEW J. PLATKIN in his official capacity as ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, JOHN DOES 1-10, MARY DOES 1-10, and XYZ CORPORATIONS 1-10, Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 090126 (CONSOLIDATED) <u>CIVIL ACTION</u> ON PETITION FOR CERTIFICATION OF THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NOS.: A-0629-23 AND A-1209-23 ENTERED: DECEMBER 18,2024 SAT BELOW: Honorable Morris G. Smith, J.A.D. Honorable Mark K. Chase, J.A.D. Honorable Christine M. Vanek, J.A.D.
ANDRE SAYEGH, MAYOR OF THE CITY OF PATERSON and ENGELBERT RIBEIRO, Plaintiffs, V. ISA M. ABBASSI, in his official capacity as the Officer-in-Charge of the Paterson Police Department, THE NEW JERSEY OFFICE OF	

THE ATTORNEY GENERAL, and MATTHEW J. PLATKIN, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, Defendants.	

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE ASSOCIATION OF CHIEFS OF POLICE IN OPPOSITION TO PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

On March 27, 2023, the Office of the Attorney General ("OAG") assumed total operational control of the day-to-day operations and internal affairs of the Paterson Police Department. The OAG exercised this authority pursuant to its statutory supersession powers, which permit the Attorney General, as the State's chief law enforcement officer, to supersede "a county prosecutor" in any "investigation, criminal action or proceeding," and to "participate in" or "initiate" any investigation, criminal action, or proceeding. The plain statutory language does not, however, expressly authorize the OAG to supersede a municipal police department's day-to-day operations.

The OAG has instead granted that authority to itself through its Internal Affairs Policies and Procedures ("IAPP"), which it recently revised to permit the supersession of any local law enforcement agency, despite the lack of any equivalent language in the relevant statutes. The Appellate Division here held that the OAG does not possess the statutory authority to supersede the Paterson Police Department without the City's consent, and that issue presents the sole question presented in the OAG's petition for certification.

The Appellate Division's decision should stand for two primary reasons. First, the panel correctly determined that the OAG does not have the inherent statutory power to supersede a local police department. Second, and perhaps

more important, even assuming the OAG does possess the power to supersede a municipal police department, it must exercise that authority pursuant to established and articulated rules and standards. Administrative agencies need to define and articulate the standards and principles that govern their discretionary decisions in as much detail as possible to afford the regulated community sufficient procedural due process. Pursuant to those principles, the OAG must promulgate rules, guidelines, or other standards outlining the events or circumstances which trigger its supersession powers, the procedures for invoking and instituting its supersession authority, the events or circumstances which trigger relinquishment of the supersession authority, and the procedures for returning control of a superseded law enforcement agency to its traditional leaders. Without such standards, it will be impossible for any court to undertake effective judicial review to determine whether the supersession decision at issue is arbitrary, capricious, or unreasonable.

In its petition for certification, the OAG resorts both to its interpretation of the relevant statutes and its extensive prior practice of superseding local law enforcement agencies. As to the former, the statutory language is neither as definite nor broad as the OAG suggests. The OAG resorts to a patchwork of various statutory provisions concerning its powers and amalgamates them to present a broad scope of authority, but none of those provisions provide it with

the express right to supersede any entity other than a county prosecutor's office. Given the lack of an express right to supersede a local police department, the OAG must exercise that authority only pursuant to established standards. It has not. Instead, it has taken a power not expressly granted to it and wielded it with unfettered discretion unbound by any established standards or criteria. Subsequent judicial review therefore is unfeasible, if not impossible.

As to its prior supersession actions, the OAG appears eager to boast that it has superseded local law enforcement agencies many times in the past without incident. In fact, this history only further underscores the need for clear supersession criteria, as apparently supersession is neither extraordinary nor unusual.

Finally, for similar reasons, the OAG should not be granted a stay. For the reasons explained above, the OAG cannot show a likelihood of success on the merits because its actions here are beyond the scope of its authority. More importantly, this Court has held that public bodies cannot be irreparably harmed where they are prevented from taking unlawful action. Accordingly, because the OAG cannot show irreparable harm or a likelihood of success on the merits, this Court neither should disturb the Appellate Division's decision nor grant a stay.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus Curiae New Jersey State Association of Chiefs of Police ("NJSACOP") relies on the statement of facts and procedural history set forth in the Appellate Division's published decision.

LEGAL ARGUMENT

I. THE APPELLATE DIVISION PROPERLY HELD THAT THE OAG EXCEEDED ITS STATUTORY AUTHORITY.

The Legislature has not granted the OAG the express authority to supersede a local law enforcement agency. Indeed, no statute or judicial decision grants the OAG the authority to supersede a municipal police department any time it chooses, with or without notice, for any reason or no reason, for as long as it chooses. The OAG has granted to itself these extraordinary administrative powers and exercises them as it sees fit. Thus, for years, the OAG has exercised with unfettered discretion a power it does not expressly have. No principle of administrative law permits such an unbound exercise of what is, at best, an implied authority. If the Legislature has not seen fit to authorize expressly, let alone delineate the powers of, the supersession of a local law enforcement agency, and if the OAG similarly has declined to establish rules and regulations regarding the invocation of that power, then judicial review essentially is

impossible. If a court cannot effectively review administrative action, then that action is arbitrary and capricious as a matter of law and must be set aside.

A. The OAG Cannot Rely Upon Any Express Statutory Grant Of Authority To Supersede A Municipal Police Department.

No statute provides the OAG the express right to supersede a municipal police department. Instead, the OAG asserts its right to do so through its interpretation of an amalgam of statutes that provide it with various supervisory powers. The Attorney General is New Jersey's "chief law enforcement officer" and head of the Department of Law and Public Safety. *See N.J.S.A.* 52:17B-98; *N.J.S.A.* 52:17B-2. The Legislature has granted to him responsibility for "the general supervision of criminal justice" in order to "secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State." *N.J.S.A.* 52:17B-98. Pursuant to that authority, the Attorney General has the power "to adopt guidelines, directives, and policies that bind police departments statewide." *Paff v. Ocean Cty. Prosecutor's Off.*, 235 N.J. 1, 19 (2018).

Pursuant to those powers and responsibilities, the Attorney General established the first IAPP in 1991, which set forth standards, policies, and procedures for the internal affairs function of New Jersey's law enforcement agencies, including the establishment of a viable process for the receipt and

investigation of citizen complaints concerning police conduct. *See Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75, 100-01 (2020) (providing a history of the IAPP). In 1996, the Legislature required all police departments to adopt and implement guidelines consistent with the IAPP. *Id.* at 101. *See also N.J.S.A.* 40A:14-181. At that time, the IAPP **did not** contain language granting the OAG the right to supersede a municipal police department.

In November 2022, the OAG issued a revised IAPP. *See Attorney General Law Enforcement Directive No. 2022-14* (Nov. 15, 2022). The revised IAPP states that "*N.J.S.A.* 52:17B-107 grants the Attorney General broad authority to supersede in any investigation, criminal action or proceeding, which includes internal affairs investigations and disciplinary proceedings." *Id.* at 10. Based on this broad understanding of the statutory language, the revised IAPP interprets *N.J.S.A.* 52:17B-107 (the Criminal Justice Act of 1970) to allow the Attorney General to "supersede a county prosecutor **or other law enforcement agency** in any investigation, criminal action or proceeding." *Id.* (emphasis added). Of course, the Criminal Justice Act of 1970 provides very limited suppression powers to the OAG, covering only county prosecutors' offices and only in certain limited circumstances. *N.J.S.A.* 52:17B-106-107. The IAPP then goes on to state that this self-invented authority essentially is unlimited:

> This statutory authority applies fully to any and all aspects of the internal affairs process, and nothing in the IAPP is intended to limit or circumscribe the Attorney General's statutory authority. The Attorney General may supersede and take control of an entire law enforcement agency, may supersede in a more limited capacity and take control of the internal affairs function of an agency, or may supersede and take control of a specific case or investigation. Whenever the Attorney General determines that supersession is appropriate, the Attorney General may assume any or all of the duties, responsibilities and authority normally reserved to the chief law enforcement executive and the agency.
>
> [*Id.* at 10-11.]

The OAG thus has granted to itself broad and unfettered powers to wield the supersession authority against local law enforcement agencies. At best, the OAG's unilateral expansion of its supersession authority is a policy change and an alteration to the status quo that requires the OAG to adhere to the formal administrative rulemaking process, including by providing notice to the regulated community and an opportunity for interested persons to provide their perspective. At worst, it is an ultra vires expansion of the OAG's authority beyond the express statutory terms. *See Zimmerman v. Diviney*, 477 N.J. Super. 1, 19 (App. Div. 2023) (noting that agencies cannot exceed statutory powers).

Even assuming the OAG has the power to expand the supersession authority beyond the express statutory allotment of authority, this Court has stated that an agency's expansion of its own power is subject to additional procedural requirements, including notice to the regulated community, formal

rulemaking, and "implementing regulations" to delineate the express authority at issue. *Metromedia, Inc. v. Dir., Div. of Tax'n*, 97 N.J. 313, 330 (1984) ("When an agency's determination alters the status quo, persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination.") This is especially so where, as here, the agency's new policy "prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization." *Id.* at 331. Where an agency exceeds its express statutory grant of authority, then it must engage in "additional implementing regulations" to clarify its authority and set the standards for wielding that authority. *See id.* at 332-33 (stating that "additional implementing regulations" are required to effectuate agency policy unless the policy is "at the very least sufficiently specifically authorized by the Act"). *See also Equitable Life Mortg. & Realty Investors v. Div. of Tax'n*, 151 N.J. Super. 232, 240 App. Div. (1977) (explaining similar principles).

The OAG's expansion of its supersession authority here thus requires, at least, additional implementing regulations to control the OAG's discretion in exercising and enforcing powers not expressly authorized by statute.

B. The Attorney General Argues For Supersession Power To Be Insulated From Judicial Review Because It Is Unbound By Any Rules, Regulations, Or Standardized Principles Delineating The Circumstances Under Which The Supersession Authority May Be Exercised; The Policies By Which It Will Be Carried Out; Or The Conditions To Warrant Its Conclusion.

Though it touts the OAG's broad supersession powers, the IAPP does not provide clarity or guidance on the events or circumstances that would warrant supersession. It does not list prerequisite events that would require or allow the OAG to assume control of a law enforcement agency. It does not provide procedural mechanisms that would allow a local law enforcement agency to challenge supersession. It does not specify the conditions necessary to allow or require the OAG to relinquish control of the law enforcement agency once supersession has commenced. In sum, there are no criteria, guidelines, or other standards outlining the factors that would allow or necessitate the Attorney General's use of the supersession authority. Rather, the IAPP provides that supersession may occur "whenever the Attorney General determines that it would be appropriate to do so." *IAPP* at 10. This broad and unfettered expression of authority does not meet *Metromedia*'s requirement that an expansion of agency powers be accompanied by additional implementing regulations to control administrative discretion. 97 N.J. at 332-33.

Courts review final administrative agency decisions under an arbitrary and capricious standard of review. *In re Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6*, 246 N.J. 462, 489 (2021). As the Appellate Division explained in its decision here, final agency decisions may be quasi-judicial or quasi-legislative. The former applies to "the power to adjudicate individual cases," and the latter applies to "the power to make rules that can have the effect of laws." *Id.* at 490. In some cases, the agency may act in a "hybrid manner," in which the action in question contains "features of rulemaking and adjudication." *Id.* In all cases, and regardless of whether the decisions at issue are quai-legislative or quasi-judicial, an agency's determination must rest on a "reasonable factual basis." *Id.* at 491. Moreover, the "arbitrary and capricious standard . . . demand[s] that the reasons for the decision be discernible," regardless of whether the action in question is quasi-judicial or quasi-legislative. *Id.*

Thus, "[a]lthough administrative agencies are entitled to discretion in making decisions, **that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review**." *In re Vey*, 124 N.J. 534, 543–44 (1991) (emphasis added). To facilitate effective judicial review, "[a]dministrative agencies must 'articulate the standards and principles that govern their discretionary decisions in as much detail as possible.'" *Id.* (quoting *Van Holten Group v. Elizabethtown Water Co.*, 121 N.J. 48, 67 (1990)). To the

extent "the absence of particular findings hinders or detracts from effective appellate review, the court may remand the matter to the agency for a clearer statement of findings and later reconsideration." *Id.*

Administrative rulemaking and quasi-judicial determinations both require clear and articulable standards to govern the action at issue and to facilitate effective judicial review. As this Court explained in *Metromedia*, "without published rules of procedure and substantive criteria for" the taking of the proposed action, affected parties will be "denied any meaningful opportunity for informal response to the proposed action." 97 N.J. at 330. Thus, all administrative agencies must engage in standardized practices and promulgate rules and other guidance so that regulated entities are aware of their rights and obligations in relation to the agency. Clear rules, procedures, and standards also ensure that the regulated community receives the due process to which it is entitled. To ensure that the regulated community receives appropriate procedural and other due process protections, agencies must proceed "with the utmost care, caution and clarity in exercising [their] decisional and regulatory responsibilities," must meet the "salutary" goals of "disciplin[ing] [their] own discretion" by "assur[ing] the greatest possible degree of predictability in [their] own actions," and must articulate "in as much detail as possible" the standards and principles which govern their decisions. *Crema v. Dep't of Env't Prot.*, 94

N.J. 286, 301 (1983). In essence, "[d]ue process means that administrators must do what they can to **structure and confine their discretionary powers through safeguards, standards, principles and rules**. This principle employs no balancing approach but simply holds that **due process requires some standards, both substantive and procedural, to control agency discretion**." *Id.* (emphases added) (internal citations omitted).

The *Crema* Court also noted that "the absence of established standards" governing an agency's action will "contribute[] materially to a confusing result," particularly where the standards governing the agency's discretion "[are] of so indefinite a nature that it is impossible to foretell what inferences may be drawn therefrom[.]" *Id.* The Court thus concluded that the agency's action "could not properly be taken in the absence of validly adopted rules and regulations establishing appropriate standards and procedures governing" the administrative approvals that were at issue in the case and for which the agency refused to provide express criteria for approval. *Id.* at 306.

The OAG's supersession authority, as announced and as imposed here, is not subject to the pre-determined standards and rules that this Court required in *Vey* and *Crema*. The Appellate Division thus concluded that the OAG does not have the statutory authority to supersede a municipal police department without consent. But that is only half the problem. Even assuming the OAG could, it

must do so pursuant to established rules, and that is particularly true here given that the supersession power the OAG seeks to wield is not expressly authorized by statute.

No rules or regulations define the strictures of the supersession power, and therefore there is no way for courts to engage in effective judicial review of the supersession power. A supersession decision never can be reviewed under the arbitrary, capricious, or unreasonable standard if there are no standards against which to judge it. This problem is only further amplified by the lack of any express legislative grant of authority to the OAG to supersede a municipal police department. The OAG here thus has divined for itself extraordinary supersession powers, and then has refused to confine that authority with any express rules or regulations. This Court never has endorsed such extreme and unfettered administrative authority and should not do so now.

The OAG has attempted to address this problem in its petition for certification by setting forth the instances in which supersession is warranted. The OAG variously defines these instances as situations in which a police department has "fallen short of the standards to which law enforcement must adhere" (Dp1); where required to address "loss of public trust" in a police department (Dp24); when a department requires "significant reform" (Dp32); or otherwise "when necessary" (Dp11, 29). Of course, these post-hoc

justifications, which are neither rules nor regulations, and which do not provide the regulated community with the procedural due process to which it is entitled, do nothing to solve the underlying issue here except to deliver a tacit admission that the OAG must offer some justification to this Court for exercising the supersession authority. Neither the Paterson Police Department nor any other police departments the OAG has superseded over the years were aware of these post-hoc standards at the time supersession began. Without such standards, none of the superseded entities -- nor any of the courts reviewing the supersession, including the Appellate Division here -- could have known the circumstances necessary to warrant supersession. Nor do after-the-fact justifications set forth in a brief meet the administrative rulemaking requirements that courts require for official administrative action.

The OAG has attempted to set forth the particular instances in which supersession is justified because it knows it must. Otherwise, and even assuming the OAG has the statutory authority it seeks here, the Court could not engage in effective judicial review to determine whether the supersession was arbitrary, capricious, or unreasonable. The OAG's failure to articulate those standards in the first instance and prior to supersession of either the Paterson Police Department or any of the other law enforcement entities it has superseded over

the years renders those actions arbitrary and capricious as a matter of law. *Vey*, 124 N.J. at 543-44; *Crema*, 94 N.J. at 301.

The OAG makes much of its assertion that supersession here was necessary and that it has exercised the authority many times in the past. Those arguments are irrelevant to the procedural deficiencies underlying the supersession. We still do not know the particular circumstances that will trigger supersession, the circumstances that might limit supersession only to the internal affairs function rather than the department generally, or the events that will bring supersession to an end. The OAG has controlled the Paterson Police Department for nearly two years, and has put forth no schedule or plan for when the supersession will conclude. Similarly, as noted in NJSACOP's appellate merits brief, supersession was used to take control of the Clark Township Police Department in July 2020, no final report was issued until November 2023, and the supersession continues to the present day.

As currently exercised, the OAG's supersession authority is a process undertaken without express statutory authority, without express rules or regulations to facilitate judicial review, and without any standards to control the OAG's discretion. The OAG stands as the sole arbiter to determine when and why supersession should begin and when and why, if ever, it should end. No statute or principle of administrative law provides, contemplates, or permits an

executive branch agency to exercise such unfettered discretion, which here has resulted in a years-long supersession with no end in sight. Accordingly, the Court should leave undisturbed, or at the very least affirm, the Appellate Division's decision requiring the OAG to return control of the Paterson Police Department's day-to-day operations to the appropriate municipal officials.

II. THE OAG IS NOT ENTITLED TO A STAY BECAUSE IT CANNOT SHOW THE IRREPARABLE HARM OR LIKELIHOOD OF SUCCESS ON THE MERITS NECESSARY TO OBTAIN A STAY.

Applications for a stay are adjudicated under the four-part test articulated in *Crowe v. De Gioia*, 90 N.J. 126 (1982). That four-part test requires a party to meet all of the following factors by clear and convincing evidence: (1) a reasonable probability of success on the merits, i.e., a "well-settled legal right;" (2) a balance of the equities in its favor; (3) substantial and immediate irreparable harm that cannot be rectified by later legal damages; and (4) the public interest in its favor. *Waste Mgmt. of N.J., Inc. v. Morris Cty. Mun. Utilities Auth.*, 433 N.J. Super. 445, 451-52 (App. Div. 2013). The OAG's request for a stay fails because it cannot meet any of these factors by the clear and convincing evidence courts require.

As explained above in Section I, *supra*, the OAG cannot show the existence of a reasonable probability of success on the merits or any well-settled legal right because the supersession authority it exercised here is untethered to

a statutory grant of authority and unbound by any statutory or administrative procedural strictures. No statute or judicial decision grants the OAG the authority to supersede a municipal police department any time it chooses, with or without notice, for any reason or no reason, for as long as it chooses. The OAG's failure to support its actions here with any specific legislative or judicial grant of authority ultimately is fatal to its ability to establish a well-settled legal right.

The OAG also is unable to show that it will suffer irreparable harm. As this Court explained in *Garden State Equality v. Dow*, the State (and consequently its executive branch agencies) does not suffer harm when it is prevented from enforcing or otherwise acting upon an unlawful course of action. *See* 216 N.J. 314, 323-24 (2013) (explaining that "there can be no irreparable harm" to a public entity where it is enjoined from taking unlawful action, and dismissing argument that the State suffers harm where it is enjoined from enforcing an act of the Legislature).

Even assuming the OAG has an interest in continuing its unlawful supersession, the harm it proposes is speculative and abstract. It makes much of its plans to "reform" the Paterson Police Department through various planned changes and the infusion of state funds. It does not explain in the required clear and convincing detail the reasons why its reforms will be irretrievably lost -- as

opposed to paused temporarily -- if it briefly ends the supersession during the pendency of this matter. It complains of "a recipe for chaos and decreased morale, along with lost momentum and potentially squandered investments," but provides no detail as to what this "decreased morale" and "lost momentum" will be or why it is irreparable, no evidence that these harms are certain to occur, and no explanation as to how "squandered investments" should be considered a form of irreparable harm given courts' typical refusal to find irreparable harm resulting from monetary loss. *See Garden St. Equal.*, 216 N.J. at 324 ("The State has presented no explanation for how it is tangibly or actually harmed . . . . It has not made a forceful showing of irreparable harm.")

Presumably, given his status as the State's chief law enforcement officer, the Attorney General could continue to provide oversight and assistance concerning the reforms to the lawfully appointed chief without unlawfully removing him and controlling all of the Department's daily operations. The OAG also could continue its reforms and funding initiatives if it succeeds in this matter and supersession is permitted to continue. Accordingly, there is no risk that the subject matter of the litigation could be "destroyed" if the OAG does not receive a stay. *See Naylor v. Harkins*, 11 N.J. 435, 446 (1953). At most, the OAG would suffer a temporary pause to its reform efforts or a temporary inability to directly control the reform efforts.

For similar reasons, and because the course of action it seeks is unlawful, the OAG also cannot show that the public interest or balance of equities weighs in its favor. The public interest cannot be furthered by a state agency's unlawful action, nor does the OAG possess any equitable interest in continuing an unlawful course. *See Garden St. Equal.*, 216 N.J. at 327-28, 329 (noting that balance of equities did not favor state where its "abstract harms" were weighed against "immediate and concrete" violations of the plaintiffs' rights, and that the public interest never can support unlawful conduct by state actors). Accordingly, because the OAG seeks to continue an unlawful and unprecedented course of conduct unsupported by any statutory grant of authority, and cannot show any concrete harm it will suffer if that unlawful action is paused temporarily, it is not entitled to a stay.

CONCLUSION

For the forgoing reasons, NJSACOP respectfully requests that this Court deny the OAG's petition for certification and deny the OAG's request for a stay. Further, even if this Court grants the petition, the NJSACOP argues that any modification or reversal of the Appellate Division decision include some requirements on how the OAG's currently unfettered view of suppression be modified.

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Dated: January 10, 2025