To be argued by:
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New York Supreme Court
Appellate Division: First Department

In the Matter of

JANON FISHER,

Petitioner-Respondent,

against

THE CITY OF NEW YORK OFFICE OF THE MAYOR,

Defendant-Appellant.

Case No.
2023-00339

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

In an era where judges—and their judicial opinions and personal histories—are scrutinized, politicized, and threatened, the media's unfettered and unfiltered access to judicial applicants' intimate information submitted only to a purely advisory body harms the public interest. Supreme Court, New York County (Hagler, J.), failed to take into account the limited role of the Mayor's Advisory Committee on the Judiciary and the chilling and deterrent nature of exposing judicial candidates' information to the public—a harm not just to the hopeful judges but to the public, who will have fewer candidates and potentially less candor from them as a result. By requiring the release of judicial applicants' completed questionnaires—containing exhaustive detail about the applicant's personal and professional lives—to the Mayor's Advisory Committee on the Judiciary ("the Advisory Committee"), Supreme Court made numerous errors.

First, that committee is advisory in name and function. It is the Mayor who appoints judicial nominees. While the Advisory Committee cultivates information about and recommends the

nomination of specific candidates, the Advisory Committee does not have the authority to appoint a judge or even ensure the Mayor chooses one of its recommended candidates. Without more, the Advisory Committee cannot be considered an agency under the definition of New York's Freedom of Information Law (FOIL). This Court need go no further.

But even if FOIL covered the Advisory Committee, Supreme Court erred in dismissing the public interest and privacy concerns raised by the disclosure of these questionnaires. As New York courts have repeatedly noted, there is a close relationship between the assurance of confidentiality and the candor required by judicial nominees. If confidentiality cannot be assured, nor can candor. Above and beyond that, the potential that disclosure might deter applicants should not be discounted: the public interest strongly weighs in favor of exempting these exhaustive questionnaires from disclosure. Finally, the sheer amount of detail about these private individuals counsels in favor of exemption. This is exactly the kind of intimate personal information that private individuals should have and retain control over. This Court should reverse.

QUESTIONS PRESENTED

1. Where the Advisory Committee is a purely advisory body, making recommendations that the Mayor can essentially ignore and serving no governmental function under the definition provided by Public Officers Law § 86(3), is it exempted from FOIL disclosure?

2. Even assuming the Advisory Committee is an agency subject to FOIL, where the public interest counsels in favor of confidentiality over disclosure, does the release of the information contained in these questionnaires warrant the public interest privilege and implicate the privacy exemption?

STATEMENT OF THE CASE

A. The Mayor's Advisory Committee on the Judiciary and the judicial appointment process

The Mayor's Advisory Committee on the Judiciary was first established by Mayor Koch in 1978.[1] Each Mayor has reestablished the Committee through executive order in essentially the same form over the past 50 years (R142, 157, 162). The executive order

[1] N.Y.C. Exec. Order No. 10 (April 11, 1978), https://www.nyc.gov/assets/records/pdf/executive_orders/1978EO010.PDF.

at issue here—like those before it—created a 19-member committee to recruit, evaluate, consider, and nominate judicial candidates for appointment and reappointment (R145, 170). For each open position requiring mayoral appointment, the Advisory Committee nominates three candidates for the Mayor's consideration (R175). The Mayor may then choose a judge from those three nominated candidates and the Advisory Committee conducts a public hearing on the Mayor's chosen nominee (R144). All applicants seeking judicial appointment—in other words, those seeking appointment or reappointment in the New York City Criminal Court, Family Court, or Civil Court on an interim basis—must complete a Uniform Judicial Questionnaire and submit it to the Advisory Committee (R171). Only the questionnaire of the Mayor's nominated candidate is shared with the Judiciary Committee of the New York Bar Association—the remaining questionnaires are not (R175).

The 23-page questionnaire is extensive and detailed, asking the candidates to completely and thoroughly answer 40 questions—many with subparts (R118-41). The questionnaire requests basic

information, like the applicant's name, past and present addresses, and citizenship status (*id.*). It also requests more intimate information, like the applicant's relationship status, the occupations and business addresses of anyone the applicant lives with, and the applicant's relationships with attorneys and judges (*id.*). Many questions revolve around the applicant's past employment, including whether they were ever disciplined or terminated; the applicant's past tax and financial history, including any bankruptcy proceedings; the applicant's past unlawful conduct, arrests, or involvement with litigation or investigation, including as a witness; and, the applicant's current or prior drug or alcohol abuse (*id.*).

B. Petitioner's FOIL request and administrative appeal

In October 2020, petitioner Janon Fisher requested a copy of all the questionnaires for applicants "currently under review" by the Advisory Committee pursuant to the New York State Freedom of Information Law ("FOIL") (R110). The City of New York Office of the Mayor ("the Mayor's Office") denied that request, citing Public

Officers Law § 86(3), § 87(2)(b)(f), (g), and § 89(2)(b), as well as noting that "any records responsive to your request are exempt from disclosure" (R147).

Fisher also requested an advisory opinion from the New York State Committee on Open Government ("COOG") (R149-52). COOG addressed the Mayor's Office's denial of petitioner's request on the ground that the records were in the possession of an advisory commission—not an agency as defined by Public Officer Law § 86(3) (R150). COOG disagreed with the Mayor's Office's position, opining that the Advisory Committee "served more than a purely advisory capacity" as the "Mayor may not act unless the Committee has nominated a particular judge" (R150-51).

The Mayor's Office provided three additional grounds for denying Fisher's request: (1) personal privacy; (2) safety of the candidates; and (3) as inter- or intra-agency materials (R147). As to the asserted privacy grounds, COOG recognized that portions of the questionnaire could be redacted—like an applicant's address or information related to an applicant's children—but believed that an applicant's education or public employment history could be

disclosed even if that disclosure would reveal the identity of those applying (R151). As to the safety concerns, COOG opined that Mayor's Office could not withhold the entire questionnaires on this ground—only records reflecting home addresses or personal information related to applicant's children could be withheld (*id.*).

With COOG's opinion in hand, Fisher appealed the Mayor's Office's denial (R111-13). The Mayor's Office again denied Fisher's request, stating that the denial was "supported by the legislature's intent of protecting privacy made explicit by Public Officer's Law § 87(2)(b) and § 89(2)(b)" (R154). The Mayor's Office explained that the background review process for judicial candidates was "considered highly confidential for good reason" (R155). Specifically, the Mayor's Office explained that if applications became subject to media or public scrutiny—whether or not a candidate was ever appointed to a judgeship—it would "chill the candor" and prevent qualified candidates from even applying to those positions (*id.*). Even the disclosure of an applicant's name "risks embarrassment and reputational damage" (*id.*).

In denying Fisher's appeal, the Mayor's Office also noted that sensitive and personal information included in this questionnaire is explicitly exempted from disclosure by FOIL, including employment, medical or credit histories, and personal references of applicants for employment (*id*.). Finally, the Mayor's Office made clear that the questionnaire required information from the applicants that, if released publicly, "would endanger the safety of potential judicial nominees and their families" (R156). Unlike the initial denial, the denial on appeal did not discuss the question of whether the Advisory Committee was an agency under Public Officer Law § 86(3) (*id*.).

C. The instant article 78 proceeding

Fisher then filed this article 78 petition (R10). Fisher argued that the Mayor's Office had failed to establish these records fell into the privacy exemption and the public interest outweighed any privacy interests of the judicial nominees (R17-18). Fisher also asserted that the Mayor's Office had "dropp[ed] any argument" that the Advisory Committee was not an agency (Index No. 157755/2021, NYSCEF No. 4 at 14 n.68), despite the Office's

citation to a Third Department case in its answer, *Snyder v. Third Dep't Judicial Screening Committee*, 18 A.D.3d 1100 (3d Dep't 2005), where that court held that a judicial screening committee—like the Advisory Committee—was not subject to FOIL as an advisory committee (R99). Additionally, Fisher claimed that the Mayor's Office did not meet its burden to show either that these records endangered the judicial nominees' safety or that they are exempt as interagency records (Index No. 157755/2021, NYSCEF No. 4 at 17-19).

In response to Fisher's petition, the Mayor's Office argued that the public interest privilege protected the records and that disclosing the questionnaires would risk chilling the applicants' candor (R99). The Mayor's Office also argued that disclosing the questionnaires would "constitute an unwarranted invasion of personal privacy" (R100).

At oral argument on the petition, Fisher conceded that some information from the questionnaires must be redacted, but argued that the public interest privilege could not protect these documents from disclosure entirely (R205). Fisher also claimed that the safety

concerns raised by the Mayor's Office were "mere speculation" (R206). In response, the Mayor's Office made clear that the public interest would be harmed were this material to be disclosed, that Fisher's request is an unwarranted invasion of personal privacy, and that much of the information contained in applicants' answers would raise safety concerns (R215-19). In conclusion, the Mayor's Office argued that the potential disclosure would chill the candor—and prevent applications—warranting these denials (R223).

The court recognized that no party believed a wholesale disclosure of the questionnaires would be appropriate, but found that the "real thrust of the argument is privacy" (R222). According to the court, the public interest and safety concerns were only "minimally connected to this case" (*id.*). The court also clarified the Mayor's Office's position on whether the Advisory Committee was an agency within the meaning of FOIL, noting that that question was "a major argument within the litigation that [the court] looked at and it's also part of [COOG's] letter" (R224). The Mayor's Office admitted it had not raised that argument during the hearing (*id.*).

After dismissing the safety and public interest concerns, the court concluded that only the concern of personal privacy protected any of the information contained in the questionnaires (R225-29). The court determined that the Mayor's Office "must redact all personal information and must provide … the public information" (R228). Public information, according to the court, included certain categories of information, like the dates of attendance at academic institutions, any licensure the candidate has, and any public employment the candidate has held (R227-29). The court ordered the parties to submit a redacted version of the questionnaire for approval (R229). The Mayor's Office appealed that order and invoked the automatic stay under CPLR 5519(a)(1) (Index No. 157755/2021, NYSCEF No. 28).

ARGUMENT

POINT I

THE ADVISORY COMMITTEE IS NOT AN AGENCY WITHIN THE MEANING OF PUBLIC OFFICERS LAW § 86(3)

A. Realistically appraising the Advisory Committee's function, it serves a purely advisory role—making recommendations to the Mayor who is not required to accept them.

The Mayor's Advisory Committee on the Judiciary is just that—an advisory committee. It is not an "agency" within the definition of Public Officers Law § 86(3), and therefore its records are exempt from FOIL disclosure. As defined by the statute, an "agency" is "any state or municipal department," including a committee, but only if it performs "a governmental or proprietary function." Public Officers Law § 86(3). Rather than performing a governmental function, the Advisory Committee merely advises the Mayor. Because the appointment of judicial candidates is ultimately within Mayor's discretion—as the Third Department has recognized in a substantially similar case, *Snyder v. Third Dep't Judicial Screening Comm.*, 18 A.D.3d 1100, 1102 (3d Dep't 2005)—the Advisory Committee is not an agency.

In *Snyder*, the Third Department explained that "[t]he mere attachment of the label 'advisory' to a body or committee is insufficient to circumvent FOIL." *Id.* at 1101. But, here, a "realistic[] apprais[al]," as required to assess whether an entity falls within the ambit of FOIL, *Perez v. CUNY*, 5 N.Y.3d 522, 530 (2005), confirms the Advisory Committee's advisory role. Closely examining the criteria that informs whether the Advisory Committee exercises a governmental function, it is apparent that it does not: (1) it was created by executive order—much like the judicial screening committee at issue in *Snyder* was, *Snyder*, 18 A.D.3d at 1101; (2) it does not share power with the Mayor to appoint candidates, but merely evaluates and nominates candidates, *id.* at 1101-02; and, (3) it has no "decision-making authority to implement its own initiatives," but rather prescribed functions without enforcement mechanisms. *Smith v. CUNY*, 92 N.Y.2d 707, 714 (1999). A realistic appraisal of the Advisory Committee's functions then is that of a limited advisory body—one that does not have the discretion to implement its own

responsibilities or share authority with the Mayor over the appointment of judicial candidates.

There are sound policy reasons to protect advisory bodies like this one from disclosure. As the cases analyzing interagency documents have made clear, persons in advisory roles should be able to express their opinions freely, and their deliberative documents should be exempted from FOIL. *See, e.g.*, *Sea Crest Constr. Corp. v. Stubing*, 82 A.D.2d 546, 549 (2d Dep't 1981). The same concerns are present here—documents submitted to this advisory body warrant that same protection to allow that body to candidly assess and criticize the candidates free from the scrutiny disclosure would bring.

Although the Mayor must choose from the Advisory Committee's recommended candidates, the Mayor does not have to appoint the candidates that the Committee nominates, can reject any of the nominees, and can ask the Committee to vet additional candidates for his review, at the Mayor's discretion—exemplifying the Committee's limited advisory function. *See Snyder*, 18 A.D.3d at 1101; *Goodson Todman Enters. v. Town Bd. of Milan,* 151 A.D.2d

642, 643 (2d Dep't 1989) (holding Open Meetings Law does not apply to a committee where it "possesses no power, statutory or otherwise, to implement its recommendations, but exists at the discretion of the appellant merely to provide advice—which may be accepted or rejected"); *Baumgarten v. Koch*, 97 Misc. 2d 449, 451 (Sup. Ct. N.Y. Cty. 1978) ("the Mayor was legally free to reject the names of persons submitted to him by the committee"). Moreover, the Mayor created the Advisory Committee by executive order and could unilaterally terminate the Advisory Committee by executive order at any time. Because the Committee serves in an purely advisory capacity—and thus does not perform a governmental function—it is not an agency within the meaning of Public Officers Law § 86(3).

B. This Court can and should consider the threshold issue of whether the Advisory Committee is even a covered entity under FOIL.

This issue is preserved. As the court itself stated during the oral argument resolving this petition, the question of whether the Advisory Committee was an agency was "a major argument within

the litigation that [the court] looked at and it's also part of [COOG's] letter" (R224). Of course, "arguments raised before the agency are preserved on appeal." *Matter of Nur Ashki Jerrahi Community v. New York City Loft Bd.*, 80 A.D.3d 323, 327 (1st Dep't 2010). That an attorney declared they were not arguing that the Advisory Committee was not an agency during the oral argument is of no moment for two reasons.

First, the Mayor's Office's arguments during an oral article 78 proceeding do not morph this issue into one that is unpreserved. While an argument may be unpreserved in an article 78 proceeding if not raised before the agency, *W. Vill. Assocs. v. Div. of Hous. & Cmty. Renewal*, 277 A.D.2d 111, 113 (1st Dep't 2000), this argument was—as Supreme Court recognized—raised in both the requests made to and the denial made by the Mayor's Office (R224). An issue is raised—even if not argued at a later hearing—through papers submitted to the agency alone, as this Court has held. *Nur Ashki Jerrahi Cmty. v. N.Y.C. Loft Bd.*, 80 A.D.3d at 327 (holding an issue preserved where not raised before the ALJ at an OATH hearing but raised in a letter sent to the agency before the final decision).

So too, this argument was "fully articulated" in those papers. *See, e.g.*, *220-52 Assoc. v. Edelman*, 18 A.D.3d 313, 315 (1st Dep't 2005). In response to the agency's initial denial citing the definition of agency as one of the reasons these documents are exempt, COOG expounded at length upon its opposite view on whether the Advisory Committee was an agency (R150-51). Fisher also included an extended discussion of this question in his appeal of the initial denial (R64). Because the court—rightly—recognized this issue was a major argument within the litigation as well as one that was fully articulated below (R224), it is preserved for this Court's review.

The twin goals of the preservation doctrine—judicial economy and finality, *see Banc of Am. Sec. LLC v. Solow Bldg. Co. II, L.L.C.*, 77 A.D.3d 533, 542 (1st Dep't 2010) (McGuire, J., concurring)—would also not be diminished were this Court to recognize this argument as preserved. Not only did Fisher have the opportunity to contest this issue at the administrative level, but the Mayor's Office briefed it and Fisher responded to it, so there can be no question that Fisher had notice of this issue. Simply put, this issue does not present the kind of unfairness that article 78 preservation

rules typically guard against: this is not a newly raised issue left wholly unaddressed during the agency's determinations. *See Seitelman v. Lavine*, 36 N.Y.2d 165, 170 n.2 (1975) (noting that courts may consider any issues raised in the original tribunal even if not raised at subsequent appeals). As the Court of Appeals has made clear, so long as a party has notice and the opportunity to be heard, there is no prejudice in reaching that issue. *Id.*

Fisher's footnote in his papers in Supreme Court asserting that "OOM has already conceded that MACJ is an agency subject to FOIL by dropping any argument to the contrary from its Appeal Denial Letter" (Index No. 157755/2021, NYSCEF No. 4 at 14 n.68) is thus misguided. The Mayor's Office's initial denial explicitly cites the subsection of the Public Officers Law that defines "agency" as one of the reasons it believed these records were exempted from FOIL disclosure (R58). And the Mayor's Office's decision on appeal concedes nothing—it merely focuses on the numerous other reasons why these records are exempted from disclosure (R154-55). Because the initial denial invoked this definition as one of the grounds for its decision, *Missionary Sisters of the Sacred Heart, Ill. v. N.Y. State*

Div. of Hous. & Cmty. Renewal, 283 A.D.2d 284, 288 (1st Dep't 2001), the lack of an extended discussion of this issue in a single document during the administrative appeal is irrelevant.

Second, even if this issue were unpreserved, it is a legal issue appearing on the face of the record. Although the parties did not address this issue at oral argument, whether the Advisory Committee constitutes an agency under Public Officers Law § 86(3) is a purely legal issue that this Court can reach regardless. *See, e.g.*, *Rojas-Wassil v. Villalona*, 114 A.D.3d 517, 517 (1st Dep't 2014) ("legal issues appearing on the face of the record which could not have been avoided may be reviewed by this Court for the first time on appeal"). Not only is this issue determinative, it is strictly and stereotypically legal. *See Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.*, 65 A.D.3d 405, 408 (1st Dep't 2009). It is a question of pure statutory interpretation, which asks this Court to interpret whether the Committee performs a "governmental function" and thereby qualifies as an "agency" under Public Officers Law § 86(3). Because this issue could not have been "obviated or cured" below—and is, instead, a threshold question

that this Court must decide one way or the other, *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969)—it could be raised on appeal for the first time. Indeed, if the Mayor's Office is correct that the Advisory Committee cannot and does not fall under that definition, this Court must reverse.

Importantly, this legal question is also apparent on the face of the record. The record includes the Mayor's Office's initial denial of Fisher's request, referring to the subsection of the law that defines an agency as well as COOG's advisory opinion, which extensively addresses this exact question (R151). The Court thus has everything it needs to interpret Public Officers Law § 86(3) in this context: in addition to the presented and analyzed legal question in Fisher's requests and the Mayor's Office's denial, the record includes past and present Executive Orders that established the Advisory Committee and explained its role and functions as well as a document containing frequently asked questions about the Committee (R45, 67, 112, 148, 158, 163, 170). Because all the support for this argument can be found within the record on appeal, *Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.*,

65 A.D.3d at 408, the record on appeal is sufficient to permit this Court's review. As it is clear that the Advisory Committee is not an agency under Public Officers Law § 86, this Court can and should resolve this purely legal, threshold question on appeal.

POINT II

ALTERNATIVELY, PREVENTING THE CHILL OF APPLICANTS' CANDOR IS PROTECTED BY THE PRIVACY EXEMPTION AND THE PUBLIC INTEREST PRIVILEGE

The two interrelated doctrines of public interest and personal privacy intersect to protect these questionnaires from disclosure. While the court below granted redactions of "all personal information" and permitted the provision of any "public information" contained in these questionnaires, that compromise position fails to take into account that sharing even some of the "public information" in this context will chill the candor of applicants' responses and harm the public interest. This is no standard FOIL case, where the only balancing involves that of the requestors' public interest against the private interest of those whose information may be shared. *Matter of N.Y. Times Co. v. City*

of New York Off. of the Mayor, 194 A.D.3d 157, 165 (1st Dep't 2021). Here, public interest weighs on both sides of this equation.

Consider the many qualified applicants to judgeships who have prestigious positions across the legal field—positions they might risk, or cases they might jeopardize, were it known they were interested in leaving their position and moving on to a new one as a judge. Or think of the reputational harms—in a profession where reputation carries significant weight—that could result if a candidate applied but was never nominated. For those reasons, candidates might then never apply—contrary to the public interest.

Analyzing the proper balance between petitioner's interest in this information weighed against the interests in maintaining the confidentiality of these questionnaires, it is crucial that there are both public and privacy interests in preventing disclosure here. Taken together, those two concerns outweigh the public interest in disclosure. *Baumgarten v. Koch*, 97 Misc. 2d at 452, citing *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113 (1974); *Jones v. State of New York*, 58 A.D.2d 736, 736 (4th Dep't 1977) (noting the public interest in disclosure "must ... give way to the public interest in enabling the

government effectively to conduct sensitive investigations involving matters of demonstrably important public concern")). Not only does the judicial applicant have a right to control their information and be assured of confidentiality when applying for these prestigious posts so that they may be candid with the body evaluating their candidacies, but the public also has a right to garner the best judicial candidates. Both interests are secured by confidentiality, and both interests are undercut if there is a concern that the applications will be widely and permanently disseminated.

Courts have thus repeatedly recognized that the public interest heavily weighs on the side of the government in situations like these. *See, e.g.*, *Toker v. Pollak*, 73 A.D.2d 584, 584 (1st Dep't 1979) (finding that the Advisory Committee was entitled to the protections of the public interest privilege where, "because of the public interest nature of the matter, unbridled discovery could conceivably do damage to the usual functioning of a most valuable institution"). In a case involving judicial nominee records maintained by the forebear to the Advisory Committee, a court expounded on just this question, holding that "the interest of an

individual in gaining access to confidential information must give way to the overriding public interest in assuring that only the most qualified candidates are appointed to judicial office." *Baumgarten v. Koch*, 97 Misc. 2d at 452. If "the files of [the Advisory Committee] were subject to disclosure, the free flow of information to [the Advisory Committee] and particularly adverse comments would slow to a trickle or dry up completely." *Id.*

That court recognized what Supreme Court here failed to: that "[c]onfidentiality and candor are complementary to one another. Destroy one and the other vanishes." *Id.*, citing *Lambert v. Barsky*, 91 Misc. 2d 443, 444 (Sup. Ct. N.Y. Cty. 1977). In order to properly evaluate and nominate candidates to these important positions, the Advisory Committee relies on the nominees' candor in answering personal questions honestly. With the threat of disclosure looming, not only is there greater risk of omissions but—to the detriment of the public interest—a high risk that qualified nominees will be deterred from even applying.

This case also strikes at two interrelated components of privacy: disclosure here would diminish the judicial candidates'

ability to control their personal information—information that the questionnaire has long promised would be confidential (R21), *see Matter of Harbatkin v. N.Y.C. Dept. of Records & Info. Servs.*, 19 N.Y.3d 373, 380 (2012); *Jones*, 58 A.D.2d at 736—as well as invade the depths of the candidate's intimate information.

The first point, related to the candidate's autonomy, is likely to deter candidates from applying at all: if a candidate knows their private information—provided under the guise of confidentiality—will be accessible to anyone who asks for it, they are simply less likely to apply in the first place. Indeed, the United States Supreme Court has highlighted the importance of allowing private individuals to control their personal information—even that which is neither particularly intimate nor embarrassing. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989).[2] Although they have applied to serve in public office,

[2] The New York State Court of Appeals has confirmed that resort to cases decided under the federal Freedom of Information Act—FOIL's federal equivalent—is "instructive" in interpreting the New York statute and its exemptions. *Lesher v. Hynes*, 19 N.Y.3d 57, 64-65 (2012); *see also* L 1977, ch 933 (Letter of Co-Sponsor (explaining the purpose of an amendment to the Public Officers Law was to "conform New York State's version of Freedom of Information to the Federal law").

until and unless they are nominated or appointed, many of these judicial applicants will remain private individuals long after they apply.

Any public interest in extensive personal and professional information about all applicants, the majority of whom will not be appointed to a judicial position, is far outweighed by the applicant's privacy interests and their interest in controlling the dissemination of their own intimate information. Even for those who are nominated by the Advisory Committee, the extensive and exhaustive information requested here—which could easily end up spread across the internet or on social media, where that information might reside in perpetuity—would be "offensive and objectionable to a reasonable person of ordinary sensibilities." *Asian Am. Legal Defense Fund & Educ. Fund v. NYPD*, 41 Misc. 3d 471, 479 (Sup. Ct. N.Y. Cty. 2013).

Second, the extent of the "public information" that Supreme Court potentially ordered disclosed here makes that chilling effect all the more likely. Consider for example the information that would now be disclosable: malpractice suits, arrests, charges,

sanctions, bar discipline, resignations, bankruptcies, and past drug or alcohol use. A highly qualified applicant—who may never even be nominated by the Advisory Committee nor appointed by the Mayor—might not wish to disclose to the public or have splashed across newspapers that they filed for bankruptcy 30 years ago. To avoid dredging up what could have been a traumatic, life-changing experience for them, they might never even apply to be a judge.

Reappointment brings up another set of public interest concerns. The Advisory Committee "was created in an attempt to … assure that incumbent [j]udges were only reappointed if they had demonstrated competence in office." *Baumgarten v. Koch*, 97 Misc. 2d at 451. But references for in-office judges—by adversaries appearing before them or colleagues on the bench—can hardly be expected to be candid when there is a risk that those responses may be disclosed publicly. Take for example a critical reference from an attorney that was intended to remain confidential: if then publicly shared, that attorney may be hesitant to appear before that judge again, at the expense of representations or even the zealous advocacy required by a lawyer on behalf of any client. Without those

candid references, however, the Advisory Committee would lose a valuable tool in determining whether a sitting judge warrants reappointment.

There is no question then that maintaining the confidentiality of these records aids the public interest in vetting and reappointing qualified judges. *Snyder*, 18 A.D.3d at 1102 ("confidentiality is a recognized necessity of the process"). And even releasing just the name of an applicant—in the situation where, for example, the applicant does not want their boss, clients, or colleagues to know of their application—could deter that potentially qualified candidate from applying, another harm to the public interest.

But neither Supreme Court nor COOG took those chilling considerations into account. Supreme Court's explicit reliance on COOG's opinion is misplaced for that reason. COOG opined, and Supreme Court explicitly agreed, that "there are aspects of the questionnaire that reflect information which, if disclosed would not constitute an unwarranted invasion of personal privacy (e.g., education, licensure, public employment, etc.)," and therefore could be disclosed (R151). But COOG's opinions are nonbinding and

should only be considered persuasive "based on the strength of their reasoning and analysis." *Matter of Thomas v. N.Y.C. Dept. of Educ.*, 103 A.D.3d 495, 498 (1st Dep't 2013).

COOG's opinion, however, is not persuasive. By opining that education, licensure, and public employment would not constitute an unwarranted invasion of personal privacy, COOG ignored FOIL's explicit categorization that "disclosure of employment" is an unwarranted invasion of personal privacy. Public Officers Law § 89(2)(i). Ignoring the statutory text deprives this opinion of any persuasiveness at all. *John P. v. Whalen*, 54 N.Y.2d 89, 96 (1981). COOG's opinion also fails to engage with any of the Mayor's Office's analysis of the weighty public interests at stake or the chilling nature of disclosure here, instead addressing—and dismissing—only the personal privacy and safety concerns the Mayor's Office put forth (R151). Supreme Court's express reliance on COOG's decision, coupled with COOG's ignorance of the statutory language at issue here, undermines the court's decision to release these questionnaires—both with respect to this specific category of information and in general.

And even as to the safety concerns at issue here, COOG and Supreme Court were also unduly dismissive. COOG and the court believed that, after the applicants' home addresses were redacted, there would be no further safety concerns (R151, 225). But an agency need only demonstrate the *possibility* of endangerment in order to invoke the safety exemption pursuant to Public Officers Law § 87(2)(f), and far more than just the disclosure of applicants' home addresses could put the applicants and their families at risk. *See Ruberti, Girvin & Ferlazzo P.C. v. N.Y. State Div. of State Police*, 218 A.D.2d 494, 499 (3d Dep't 1996). In *Ruberti*, for example, the court affirmed the redaction of troop, zone, and station assignments for police officers—not dissimilar to judicial applicant's work addresses, phone numbers, or past addresses. *Id.* And, importantly, this Court has repeatedly emphasized that it is the mere possibility of danger that matters, *see, e.g.*, *Matter of Bellamy v. N.Y.P.D.,* 87 A.D.3d 874, 875 (1st Dep't 2011); unfortunately, the rise of crime against judges has made that

possibility greater than it once was.[3] Indeed, revealing judicial applicants' names alone presents such a risk—not to mention their political parties, work experiences, or other identifying information.

Of course, that is not to say that there is no public interest in the transparency of the process. But the public has a chance to weigh in on the judicial *nominees*: before each appointment, the Advisory Committee holds a public hearing about the candidates and solicits public input about each candidate. Simply put, it cannot be said that there is no transparency in this process or that the public does not have an opportunity to vet and register their complaints about the candidates—as opposed to the mere applicants—to public office. And because disclosure here would chill the candor, deter candidates from applying, and place private individuals without the means to control their intimate information, this Court should reverse.

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[3] Susan J. Kohlmann, *The Disturbing Trend of Threats and Violence against Judges and the Vital Importance of Judicial Security*, New York City Bar (June 24, 2022), https://s3.amazonaws.com/documents.nycbar.org/files/6.24.22-JudicialSecurity.pdf.

CONCLUSION

This Court should reverse and dismiss the petition.

Dated: New York, NY
April 17, 2023

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of the Application of Case No. 2023-00339

JANON FISHER,

Petitioner-Respondent,

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

against

THE CITY OF NEW YORK OFFICE OF THE MAYOR,

Respondent-Appellant.

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1. The index number in the Court below is 157755/2021.
2. The full names of the original parties appear in the caption above. There have been no changes in the parties.
3. This proceeding was commenced in the Supreme Court, New York County.
4. This proceeding was commenced by notice of petition on August 21, 2021. Issue was joined by the verified answer on November 4, 2021.
5. Petitioner commenced this Article 78 proceeding to challenge the denial of an October 21, 2020 request under the Freedom of Information Law, N.Y. Pub. Off. Law § 84, et seq. ("FOIL") to the Respondent, New York City Office of the Mayor.
6. This appeal is from an order and judgment of the Honorable Shlomo S. Hagler, Supreme Court, New York County, entered on December 2, 2022.
7. This appeal is being taken on a fully reproduced record.