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CHLOÉ K. MOON
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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

REPLY BRIEF FOR APPELLANT

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for Appellant
100 Church Street
New York, New York 10007
212-356-2611 or -1671
cmoon@law.nyc.gov

RICHARD DEARING
LORENZO DI SILVIO
CHLOÉ K. MOON
of Counsel

September 15, 2023

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PRELIMINARY STATEMENT

Petitioner Janon Fisher wholly misunderstands the nature of the Mayor's Advisory Committee on the Judiciary. It is a committee established by the Mayor, in an order fully revocable by the Mayor, for the sole purpose of identifying and advising the Mayor of highly qualified applicants for judgeships. It is not an agency. To carry out its advisory role, the Advisory Committee undertakes a confidential process to review qualifications, history, and references of candidates. As the City has shown, the order below should be reversed for two main reasons.

First, the Mayor's Advisory Committee on the Judiciary is not an "agency" subject to FOIL. This issue is preserved because it was raised, and both Fisher and the trial court were aware of the key arguments. Even if it were unpreserved, the Court can and should evaluate this purely legal question to ensure consistent and appropriate treatment of judicial candidates. And, on the question's merits, Fisher cannot overcome our showing that the Mayor's Advisory Committee is outside of FOIL's reach, because it lacks appointment power or any form of enforcement capability.

Second, even if FOIL applied, judicial candidates' questionnaires are subject to multiple exemptions from disclosure, including the privacy exemption and the safety exemption. Fisher minimizes not only the intrusive nature of the questionnaires and the detailed personal information they contain—implicating serious safety concerns in an age when judges are increasingly receiving threats—but also the harms of disclosure to the public, the judges and judicial candidates themselves, and to anyone thinking about applying. A proper FOIL analysis must weigh *all* of the privacy and public interests at stake. Fisher's failure to recognize those clear harms—to the judges, their safety, and the public—dooms his arguments. For this reason, too, the Court should reverse.

ARGUMENT

POINT I

FISHER FAILS TO OVERCOME THE CITY'S SHOWING THAT THE COMMITTEE SERVES A PURELY ADVISORY ROLE

A. The Advisory Committee is not an "agency" within the meaning of FOIL.

The Advisory Committee serves a purely advisory role, and is therefore not an agency subject to FOIL. Fisher stretches to argue that the Advisory Committee is an agency because it supposedly "shar[es] the appointment power" with the Mayor (Respondent's Brief (Resp. Br.) 14). But as explained in our opening brief, the appointment of judicial candidates is within the Mayor's sole discretion, not within the Advisory Committee's, and so the Advisory Committee does not qualify as an "agency" within the meaning of FOIL.

Fisher's primary argument that the Advisory Committee's role is an "integral component[] of the governance structure" misunderstands the nature and function of the Advisory Committee (Resp. Br. 15). For instance, Fisher mistakenly relies on *Perez v. City Univ. of N.Y.*, 5 N.Y.3d 522 (2005), which held that the City

University of New York's College Senate was subject to FOIL. But the Court of Appeals in *Perez* listed numerous ways in which the College Senate was integral to the "comprehensive university governance scheme": it (1) "recommend[ed] policy on all College matters," (2) was "explicitly imbued with the power to formulate new policy recommendations … in areas as far-reaching as college admissions, degree requirements, curriculum design," (3) "review[ed] proposals for and recommend[ed] the creation of new academic units and programs of study," (4) "function[ed] as a proxy for the faculty councils," and (5) was "the only body that c[ould] initiate changes to the [governing charter]." *Id.* at 529-30.

It was the breadth, variety, and texture of the College Senate's powers that informed the Court's conclusion that it carried out key governmental functions. Thus, the Court held, "[r]ealistically appraising" the Senate's role, it did not operate as solely an "advisory body," but rather performed functions of "both advisory and determinative natures which are essential to the operation and administration of the college." *Id.* at 530. Nothing similar is true of the Advisory Committee here. In fact, in *Perez*, the

Court of Appeals expressly contrasted the College Senate with a judicial advisory committee that the Third Department found not to be an agency in *Snyder v. Third Dep't Judicial Screening Comm.*, 18 A.D.3d 1100 (3d Dep't 2000).

The Advisory Committee here—created by a mayoral executive order that the Mayor retains exclusive authority to revoke—lacks any of the expansive powers that were critical to the Court's holding in *Perez*. The Advisory Committee has no "decision-making authority to implement its own initiatives," but rather serves prescribed advisory functions without enforcement mechanisms. *Smith v. City Univ. of N.Y.*, 92 N.Y.2d 707, 714 (1999). Fisher ignores this crucial distinction; the Advisory Committee cannot enforce its recommendations, and it has no power over its own role in the judicial process.

So too, the Advisory Committee's role is decidedly limited. Fisher attacks a strawman in arguing that there is no bright line rule between entities created by statute versus executive order (Resp. Br. 14 n.1). But our position does not hinge on the existence of any such line. The relevant point is that the particular executive

order that created the Advisory Committee demonstrates its narrow and limited role in advising the Mayor—unlike the College Senate in *Perez*, which was delegated "a number of responsibilities" by statute. *Perez*, 5 N.Y.3d at 529. Here, the Mayor can unilaterally terminate the Advisory Committee by executive order at any time, whereas the College Senate must perform the functions delegated to it by the Legislature absent a statutory amendment.

Fisher is thus forced to fall back on the Committee on Open Government ("COOG") opinion, which he claims properly found that the Advisory Committee played a "necessary role" in judicial appointments (Resp. Br. 13). But he fails to even grapple with the points raised in our opening brief (App. Br. 28-30)—never disputing that COOG opinions are not binding when they "d[o] not address respondent's expressed concern." *Matter of Dig. Forensics Unit v. Records Access Officer*, 214 A.D.3d 532, 534 (1st Dep't 2023). His reliance on that opinion—for that reason, and those raised in the City's opening brief—is therefore misplaced.

Fisher's attempt to distinguish *Snyder* (*see* Resp. Br. 15-16) likewise falls flat. That case is directly on point. There, as here, the

Judicial Screening Committee's purpose was to ensure high quality appointments through the use of submitted forms that were to "remain confidential except as regards the individual appointed by the Governor." *Snyder*, 18 A.D.3d at 1100. And, like the Mayor here, the Governor could choose to appoint no one as the result of the Screening Committee's advice and instead ask the Committee to screen additional candidates. *Id.* at 1102. Lastly, Fisher attempts to distinguish *Snyder* on the ground that the Judicial Screening Committee in that case was limited to providing information about *interim* appointees (Resp. Br. 16). The interim nature of the appointment had no bearing on the holding of *Snyder* or *Perez*. It is instead the limited role of the Advisory Committee and the ability of the executive to reject its advice that defeats any argument that it is functioning as a government agency subject to FOIL.[1]

[1] Fisher also relies on *MFY Legal Servs., Inc. v. Toia*, 93 Misc. 2d 147 (Sup. Ct., N.Y. Cnty. 1977) (*see* Resp. Br. 13). But that non-binding case predates the well-reasoned *Snyder* decision by almost three decades.

B. The "agency" question is preserved and, in any event, reflects a pure issue of law.

Despite Fisher's contention that the Office of the Mayor waived any argument that the Advisory Committee is not an agency at the trial level (Resp. Br. 11), the Court can and should consider the threshold issue of whether the Advisory Committee is a covered entity under FOIL. Fisher's argument oversimplifies the facts: he never mentions that the court below stated during the oral argument that the question of whether the Advisory Committee is an agency was "a major argument within the litigation that [the court] looked at" (R224). And Supreme Court's acknowledgment that this issue was at the center of the COOG advisory opinion that Fisher sought on that question (R224) belies any suggestion that he did not have ample notice or a full and fair opportunity to contest this purely legal issue at every stage of this litigation.

Fisher wrongly claims that this threshold issue was never addressed in our briefing below (Resp. Br. 11). But, in fact, the City cited the *Snyder* case that Fisher now attempts to distinguish (*supra* at 6-7, *see* Resp. Br. 15-16). And, as even Supreme Court recognized (R224), the issue was fully raised before the agency,

preserving it. As this Court has repeatedly held, an issue is raised—even if not argued at a later hearing—through papers submitted to the agency alone when, as is the case here, the papers "fully articulate[]" the issue (App. Br. 16-17 (citing *Nur Ashki Jerrahi Cmty. v. N.Y.C. Loft Bd.*, 80 A.D.3d 323, 327 (1st Dep't 2010); *220-52 Assoc. v. Edelman*, 18 A.D.3d 313, 315 (1st Dep't 2005))). Not only did COOG discuss the "agency" question at length after Fisher specifically sought their advice (R150-51), but he also included an extended discussion of it in his appeal of the initial denial (R64)—fully articulating this issue.

And as explained in our opening brief, recognizing this purely legal issue to be addressable results in no prejudice to Fisher: not only did he have the opportunity to contest this issue at the administrative level, but Fisher's own request that COOG share its opinion on this issue led to further development of the point (R150-51).

While no prejudice would result to Fisher if this Court were to reach the issue, a failure to do so would prejudice the judicial candidates who have already applied and submitted their

questionnaires to the Advisory Committee. After all, affirming on this ground would jeopardize those judicial candidates' private information—candidates who were assured that this information was "confidential" and thus were not on notice that they could be publicly shared. Even if the issue were unpreserved here, it would remain available to be raised in response to future FOIL requests for similar questionnaires. The prudent path—to ensure consistent treatment of all candidates' questionnaires—is for the Court to reach and resolve now whether the Advisory Committee is subject to FOIL. And, of course, even if this issue were unpreserved, it is a purely legal question that could not have been "obviated or cured" below, allowing this Court to reach it (*see* App. Br. 19-20).

POINT II

NOR HAS FISHER SHOWN THAT THE PUBLIC AND PRIVATE INTERESTS, PROPERLY BALANCED, SUPPORT DISCLOSURE

Even if FOIL applied, multiple, overlapping statutory exemptions bar disclosure of the questionnaires. Fisher's attempt to trivialize the serious concerns of privacy, safety, and public

interest implicated by the release of judicial candidates' detailed questionnaires should be rejected.

First and foremost, the questionnaires are protected by the privacy exemption, triggering the well-established test balancing public and private interests. *See* Public Officers Law § 87(2)(b); *Matter of N.Y. Times Co. v. N.Y.C. Off. of the Mayor*, 194 A.D.3d 157, 165 (1st Dep't 2021). Here, a proper balancing weighs against disclosure. This Court has recognized that, even where the public interest in scrutinizing governmental officials is at stake, that interest can be outweighed by privacy interests of certain persons where public disclosure would have "the *potential* to be embarrassing or offensive, [and] could also be detrimental to the reputations or livelihoods of such persons or entities." *Matter of Asian Am. Legal Defense & Educ. Fund v. N.Y.C. Police Dep't*, 125 A.D.3d 531, 532 (1st Dep't 2015) (emphasis added).

That is the case here. Consider a judicial candidate who fills out the comprehensive questionnaire asking detailed, often intrusive, questions about all aspects of their life (*see* App. Br. 4-5), but is rejected for that position. If that questionnaire were publicly

disclosed, such disclosure would undoubtedly have the *potential* to embarrass or be detrimental to that person's reputation and livelihood, as explained in our opening brief. That is especially true where such privacy has been "promised," as was the case here (*see* R119). *See Matter of Harbatkin v. N.Y.C. Dep't of Records & Info. Servs.*, 19 N.Y.3d 373, 380-81 (2012). Even the fact that an individual unsuccessfully applied to be nominated for a judgeship may rightly be seen as sensitive, and something the individual would fairly wish not to be known to the general public, the legal community at large, or their current employer.

Fisher tries to skirt these problems by changing tack—arguing that the balancing test weighs in favor of disclosure because the public has an interest in the release of information prior to "a candidate's appointment or reappointment" (Resp. Br. 23). But that is a red herring, as information about any selected candidate, once the Mayor has appointed one, is already made available.[2] Moreover, unlike the public employees in *Kwasnik v.*

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[2] Importantly, Fisher concedes that once a judicial candidate becomes the nominee—as opposed to a private citizen merely applying to be one—a public

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City of New York, 262 A.D.2d 171 (1st Dep't 1999), whose identities were already known and who already served in a taxpayer-funded positions, many judicial applicants are private citizens not in public roles (*see* Resp. Br. 21, 23-24). Fisher's reliance on *Hernandez v. Office of the Mayor*, 2011 N.Y. Slip Op. 33073(U), at *1 (Sup. Ct., N.Y. Cty. Nov. 23, 2011), demonstrates that central misunderstanding: *Hernandez* involved an actual nominee, not a candidate or applicant—a distinction that Fisher's description of the case elides (*see* Resp. Br. 23). *Id.* at *10.

When Fisher eventually recognizes the heart of his expansive request here—that all candidates' information, not just that of the nominees, be disclosed (*see* Resp. Br. 23-24)—he does so by arguing that much of this information is already readily available. But if that is so, he has no need to seek the release of these questionnaires.

In any event, even for those who are eventually nominated, the extensive and exhaustive information requested here, including

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hearing is held, where the public has the opportunity to both learn and give input about the nominee (*see* Resp. Br. 5-6). There is no question then that the public does know the identity of, and many details about, the judicial candidates that become nominees (*contra* Resp. Br. 1, 23).

information about their relationships, their past unlawful conduct, or the lives of those with whom they reside—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. N.Y.C. Police Dep't*, 41 Misc. 3d 471, 479 (Sup. Ct., N.Y. Cnty. 2013). Such privacy concerns are far from "minimal," as Fisher claims (Resp. Br. 24).

As a last resort, Fisher argues that courts may not weigh *any* public interests in order to apply the privacy exemption (Resp. Br. 17-18). But no such hard and fast rule exists in the caselaw. This Court should not take Fisher's narrow view, which would unduly limit the privacy exemption's long-standing balancing test. *See N.Y. Times Co. v. N.Y.C. Fire Dep't*, 4 N.Y.3d 477, 486 (2005). Fisher offers no reason for this Court to ignore the public interests at stake in protecting the privacy of the judicial candidates.[3] Assurances of confidentiality are often given—as they were here—to serve public

[3] What's more, the potential for these questionnaires to be "exploited by media" weighs heavily in favor of recognizing the privacy exemption here. *Id.*

interests in achieving candor or a robust applicant pool. *Harbatkin* makes clear that such assurances weigh in the privacy analysis, 19 N.Y.3d at 380-81—and the strong public interests that are promoted by extending and honoring them should figure in as well.

Because the privacy exemption relies on a balancing test, the concerns present in the public interest privilege are *not* made completely irrelevant, as Fisher insists (Resp. Br. 18). The case he turns to, *Doolan v. Board of Cooperative Educational Services*, 48 N.Y.2d 341, 347 (1979), does not suggest otherwise. To begin, *Doolan* has nothing to say about the privacy or safety exemptions applicable here. *Id*. And Fisher reads too much into a single sentence of dicta from that case, that "the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed," stretching it to mean more than it does. The law does not require that the questionnaires be disclosed without regard for the serious privacy *and* public interest concerns at stake. As we explained in our opening briefing, both of those interests prevent disclosure here: (1) the judicial applicant has an interest in controlling their intimate information and relying on the

express assurance of confidentiality when applying for these prestigious posts so that they may be candid with the body evaluating their candidacies, and (2) the public has an interest in garnering the best judicial candidates.

Fisher also argues that the release of the candidates' questionnaires does not raise safety concerns, characterizing these concerns as "speculative" (Resp. Br. 18, 24-26). But he ignores that 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). Because this Court has repeatedly emphasized that it is the mere possibility of danger that matters, *see, e.g.*, *Matter of Bellamy v. N.Y.C Police Dep't,* 87 A.D.3d 874, 875 (1st Dep't 2011), Fisher's failure to grapple with the unfortunate rise of crime against judges condemns his argument.[4]

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[4] Susan J. Kohlmann, *The Disturbing Trend of Threats and Violence against Judges and the Vital Importance of Judicial Security*, New York City Bar (June

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Especially as the questionnaires seek intrusive and intimate information, much of which could put a judicial candidate at risk by not only identifying who they are but also providing ample detail about their professional and personal lives, Supreme Court was wrong to allow the release of the questionnaires.

Fisher's brief trivializes the seriousness of the risks that would be posed by the questionnaires' disclosure. Not only does he wrongly dismiss the safety and privacy concerns attending disclosure, but he also fails to recognize the strong public interest in keeping the questionnaires confidential. Fisher's refusal to admit that there is any public interest in preventing the disclosure here (*see* Resp. Br. 21)—or to admit that any embarrassment could result from the release of the candidates' information publicly (*see* Resp. Br. 23)—makes clear the extreme nature of his position.

True, judicial processes require transparency. But that undisputed principle does not justify disclosure here. On the one hand, Fisher fails to recognize the vast amounts of transparency

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24, 2022), https://s3.amazonaws.com/documents.nycbar.org/files/6.24.22-JudicialSecurity.pdf.

baked into the judicial nomination process—which provide an opportunity for everyone, journalist or citizen, to garner information and to be heard about the actual nominee to serve in the role of judge. On the other hand, Fisher fails to explain how disclosing candidate questionnaires—including those of unsuccessful candidates—would promote transparency goals to an extent that would warrant the resulting intrusion on personal privacy, dangers to safety, and impairment of the public interest.

Finally, though Fisher points out that questionnaires for judges in Arizona are made public (*see* Resp. Br. 18-19), that far-flung example of a different policy choice hardly defeats the points raised here. And Fisher glosses over an important distinction between Arizona's process and New York City's: in Arizona, the candidates know in advance that the information they provide will be made public, whereas here candidates have long been promised confidentiality. That promised confidentiality should not be lightly thrown away. This Court should reverse.

CONCLUSION

This Court should reverse and dismiss the petition.

Dated: New York, NY
September 15, 2023

Respectfully submitted,

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for Appellant

By: 
CHLOÉ K. MOON
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-2611
cmoon@law.nyc.gov

RICHARD DEARING
LORENZO DI SILVIO
CHLOÉ K. MOON
of Counsel

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