STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of:

LISA HARBATKIN,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the N.Y. Civil Practice Law & Rules,

- against -

New York County
Index No. 104933/09

NEW YORK CITY DEPARTMENT OF RECORDS AND INFORMATION SERVICES; BRIAN G. ANDERSSON, in his official capacity as Commissioner of the New York City Department of Records and Information Services; KENNETH R. COBB, in his official capacity as Assistant Commissioner and Records Access Officer, New York City Department of Records and Information Services; and, EILEEN M. FLANNELLY, in her official capacity as Deputy Commissioner and FOIL Appeal Officer, New York City Department of Records and Information Services,

Respondents-Respondents.

NOTICE OF MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Greenberg Traurig, LLP
Michael J. Grygiel
William A. Hurst
Cynthia E. Neidl
54 State Street, 6th Floor
Albany, New York 12207
(518) 689-1400
grygielm@gtlaw.com
hurstw@gtlaw.com
neidlc@gtlaw.com
Attorneys Pro Bono for Petitioner-Appellant Lisa Harbatkin

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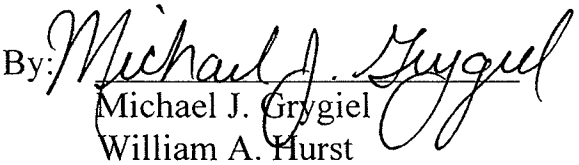
NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the annexed papers, and the record and briefs, the undersigned will move this Court at a Motion Term to be held July 25, 2011, for an order granting Petitioner-Appellant, Lisa Harbatkin, leave to appeal to the Court of Appeals. Leave to appeal is sought from a decision and order of the

Appellate Division, First Department, entered on May 31, 2011, that affirmed a judgment of Supreme Court, New York County (Marylin G. Diamond, J.), dated March 11, 2010, and duly filed and entered on March 18, 2010, denying Petitioner-Appellant's application, in a proceeding pursuant to N.Y. *Civ. Practice L. & R.* Article 78, to annul a determination of Respondents which denied Petitioner-Appellant's Freedom of Information Law request for unrestricted public disclosure of the historic "anti-Communist" case files maintained by the City of New York's Department of Records and Information Services, and ordering that the materials may not be disclosed to Petitioner-Appellant in unredacted form.

DATED: July 14, 2011
Albany, New York

GREENBERG TRAURIG, LLP

By: 

Michael J. Grygiel
William A. Hurst
Cynthia E. Neidl
54 State Street, 6th Floor
Albany, New York 12207
(518) 689-1400
grygielm@gtlaw.com
hurstw@gtlaw.com
neidlc@gtlaw.com

Attorneys Pro Bono for Petitioner Appellant Lisa Harbatkin

TO: The Honorable Andrew W. Klein, Clerk
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Michael A. Cardozo, Esq.
Corporation Counsel
Elizabeth I. Freedman, Esq.
Assistant Corporation Counsel
The City of New York Law Department
Appeals Division
100 Church Street
New York, New York 10007
(212) 788-1026
efreedma@law.nyc.gov

Attorneys for Respondents-Respondents

Itai Maytal, Esq.
Miller Korzenik Sommers LLP
488 Madison Avenue
New York, New York 10022
(212) 752-9200
imaytal@mkslex.com

Attorneys for Proposed Amici Curiae

PROCEDURAL HISTORY: TIMELINESS, JURISDICTION AND PRESERVATION

A copy of the Appellate Division, First Department's May 31, 2011, decision and order was served on Petitioner-Appellant's counsel with notice of entry by United States first class mail on June 10, 2011. A true and correct copy of the Appellate Division Order and Notice of Entry is annexed hereto as Exhibit 1. This motion, which is being served and filed within thirty-five (35) days of June 10, 2011, is therefore timely. *CPLR* 5513(a)-(b) and 2103(b)(2).

This Court has jurisdiction over this motion and the appeal pursuant to *CPLR* 5601(b)(1) because Petitioner-Appellant is seeking leave to appeal as a matter of right from an order of the Appellate Division which finally determined the proceeding and directly involved the construction of the Constitution of the United States. In the alternative, this Court has jurisdiction over the instant motion and proposed appeal pursuant to 5602(a)(l)(i) because this is a proceeding originating in the Supreme Court and Petitioner-Appellant is seeking leave to appeal from an order of the Appellate Division, not appealable as of right, that finally determined the proceeding. The First Department's May 31, 2011, decision and order finally disposes of Petitioner-Appellant's application to annul Respondents' determination denying her FOIL request, by affirming Supreme Court's upholding of that determination and its order denying disclosure of the

records at issue to Petitioner-Appellant. A true and correct copy of Supreme Court, New York County's judgment dated March 11, 2010, and entered on March 18, 2010, is annexed hereto as Exhibit 2.

The issues on which leave to appeal is sought were raised by Petitioner-Appellant both in Supreme Court (R. 24-31) and on her appeal to the First Department (Harbatkin Br., 18-46; Harbatkin Rep. Br., 3-18), and thus are preserved for this Court's review.[1]

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

QUESTIONS PRESENTED

1. The City of New York is the custodian of records concerning widely condemned investigations conducted during the mid-twentieth century into the alleged Communist Party affiliations of New York City public school teachers and others by the New York City Department of Law under the auspices of the New York City Board of Education. As a precondition to the exercise of the right to review these historic public records concerning its anti-Communist investigations

[1] References denoted with the letter "R" refer to the corresponding page(s) of the Record on Appeal in the Appellate Division, First Department, submitted herewith. The Brief on Appeal for Petitioner-Appellant Lisa Harbatkin In Support of Public Access to Agency Records Under FOIL dated December 29, 2010, and the Reply Brief on Appeal for Petitioner-Appellant Lisa Harbatkin In Further Support of Public Access to Agency Records Under FOIL dated April 1, 2011, and submitted to the appellate court below are referred to herein, respectively, by page number as "(Harbatkin Br., ___)" and "(Harbatkin Rep. Br., ___)." The Brief for Respondents dated March 22, 2011, and submitted to the First Department is cited herein by page as "(City Br., ___)."

(but not records on any other subject matter), the City of New York's Department of Records and Information Services requires any party seeking access to certify that he/she will not "record, copy, disseminate or publish in any form any names or other identifying personal information" obtained from the restricted materials. (R. 317) Petitioner-Appellant refused to sign the form containing this certification requirement because she would not agree to relinquish her First Amendment rights as a condition of access. (R. 21-22) Has the City of New York placed unconstitutional conditions on the exercise of free speech and research activities, and do those conditions also violate the First Amendment's content-neutrality requirement and lack the necessary procedural safeguards?

The Appellate Division, First Department did not determine this question, stating that a ruling on Petitioner-Appellant's constitutional challenge would be "merely advisory" because Supreme Court had not decided the issue.

2. In response to Petitioner-Appellant's Freedom of Information Law ("FOIL") request for access to its historic "anti-Communist" series of investigative files, the City of New York's Department of Records and Information Services partially disclosed some records, but withheld others and redacted the names of so-called confidential informants who reported on public school teachers during the anti-Communist investigations, the names of the targets of those investigations, the names of the public schools where the investigations were conducted nearly a half-

century ago, and even the names of the neighborhoods in which those schools were located, all on the ostensible grounds of protecting the identity of informants and others swept up in the investigations. Did the City's denials of public access to the records in unredacted format adequately establish that disclosure would cause an unwarranted invasion of personal privacy under FOIL?

The Appellate Division, First Department answered this question in the affirmative.

3. At the time teachers and informants were interrogated, the City promised them confidentiality — thereby establishing a cloak of secrecy intended more to leverage compliance and shield the Board of Education's own conduct from public scrutiny than to protect those who were targeted by its ideological cleansing activities. Does the City's agreement not to reveal in perpetuity the names or other identifying information relative to "teachers and other school personnel investigated and/or questioned by the Board and its lawyers" (R. 196) because they were suspected of political disloyalty contravene FOIL's presumption of open access to official government records by subordinating the City's disclosure obligations to the terms of a private confidentiality agreement?

The Appellate Division, First Department did not determine this question.

INTRODUCTION AND BACKGROUND

Petitioner-Appellant Lisa Harbatkin ("Ms. Harbatkin") respectfully submits this motion and accompanying memorandum of law in support of her appeal from the decision and order of the Appellate Division, First Department, dated and entered on May 31, 2011 (the "Decision," attached as Exhibit 1). The Decision affirmed Supreme Court's denial of Ms. Harbatkin's Petition, brought pursuant to New York's Freedom of Information Law ("FOIL"), Article 6 of the N.Y. *Public Officers Law*, §§ 84-90 *et seq.*, for unrestricted public disclosure of the historic "anti-Communist" case files maintained by Respondent the City of New York's Department of Records and Information Services (the "City"). The Decision refused to rule on Ms. Harbatkin's constitutional challenge to the City's imposition — without any procedural safeguards — of content-based restrictions on her use of the anti-Communist case files in her research and writing, in violation of her rights of free speech protected under the First Amendment to the United States Constitution. As discussed more fully herein, this Court should grant this motion in order to review these novel issues of significant public importance.

Ms. Harbatkin is a native New Yorker who has been actively engaged in scholarly research and writing related to the New York City Board of Education's notorious anti-Communist investigations which peaked in their intensity during the 1950's, known as the McCarthy Era and so-named for the anti-Communist

practices of Sen. Joseph McCarthy. Her work includes, *inter alia*, research and writing pertinent to how the Board of Education's anti-Communist campaign affected New York City public school teachers who were subjected to — and, in many instances, victimized by — these political loyalty investigations, and the lingering effect of the investigations on public and educational policy. (R. 14-15, 281-284)

In response to Ms. Harbatkin's FOIL requests, the City refused to disclose the names of individuals contained in the anti-Communist case files — compiled from the 1930s through the 1960s, when the Board of Education was conducting investigations into the political beliefs and associations of "approximately 1,100" (R. 16, 198) public school teachers — purportedly to protect their privacy. The First Department's cursory upholding of the City's denials of access to these records should be reversed by this Court, and the City should be directed to disclose the requested information. Disclosure will provide the general public with an opportunity to assess the circumstances culminating in the Board of Education's anti-Communist investigations of the mid-twentieth century, including the City's use of informants (both voluntary and involuntary) within the public school system to identify potential targets of those investigations. The public has the right to know this information consistent with FOIL's commitment to open government and public accountability on a matter that directly implicates an issue of significant

historic concern to New York's citizens. Putting aside that these materials are historically dated, the transparently pretextual nature of the City's privacy claim, which the Appellate Division rubber-stamped, is revealed by its willingness to supply the names of any and all teachers who were investigated to Ms. Harbatkin — *provided*, however, that she agrees not to publish them "in any form." (R. 317) The Appellate Division erred because its conclusory pronouncement — the Decision is devoid of analysis or explanation — that disclosure of the requested records would result in an unwarranted invasion of personal privacy failed to justify nondisclosure under FOIL in this instance.

The City's legal obstructionism did not stop with the mere denial of public access. Pursuant to a regulation[2] it enacted for the sole purpose of controlling public access to the anti-Communist case files, the City required Ms. Harbatkin — and all other citizens seeking access to the withheld records — to agree, in advance and as a condition of obtaining full disclosure, not to "record, copy, disseminate or publish in any form any names or other identifying information" concerning the school teachers who were interrogated by the Board of Education. (R. 317) There is no greater offense to the First Amendment and no greater harm to our

[2] Section 3-02 ("Municipal Archives Guidelines for Archival Use of Board of Education 'Anti-Communist' Case Files"), Chapter 2, Title 49 of the Rules of the City of New York ("Rule 3-02") and implementing Form MA-101D ("Form D"). (R. 68-69, 70) Subsequent to Ms. Harbatkin's initiation of the Article 78 proceeding in Supreme Court, the City apparently modified Form D by withdrawing its pre-publication approval and indemnification requirements. (R. 317)

constitutional order than a government that can prevent the publication of information with which it disagrees or of which it disapproves, which is exactly what the Decision has allowed here. By effectively affirming the validity and enforceability of Rule 3-02 and its implementing Form D, the First Department has allowed the City to require all individuals, as a condition of unrestricted access to the Board of Education's historic anti-Communist files, to certify that they will not disseminate or publish any names or personally identifiable material contained in those files. (R. 70, 317) This sweeping regulation, which holds those who would have unredacted access to the archives hostage to the conditions on publication imposed by the City, is not only a substantial and continuing impediment to Ms. Harbatkin's ongoing research (R. 281-285), but a form of censorship that is anathema to the marketplace of ideas. It strikes at the very core of the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In the end, there is surely something disturbing, and more than a little ironic, about the events that have brought Ms. Harbatkin to this Court: the City seeks, several decades after the fact, to prohibit Ms. Harbatkin from "naming names" in writing about this period in history. In a certain sense, this is the opposite of the

practices reflected in the case files, when the Board of Education wielded its power and authority to compel the systematic identification of public school teachers suspected of ideological infidelity. In this day and age, there is no reason for continuing to keep this information behind the government's closed doors, where the political interrogations memorialized in the records at issue were first conducted more than half a century ago.

There can be no doubt that the City's anti-Communist archives reflect a tragic, but important, chapter in not just the City's but the nation's history. Moreover, the City of New York is hardly the first governmental entity to seek to suppress embarrassing information about historic practices that were coercive or threatening to the citizens it was entrusted with governing. Yet if the lower courts are correct, Ms. Harbatkin and other researchers may be deprived of complete access to and prohibited from publishing information contained in what are unquestionably historically valuable and authentic documents. The chilling effect on Ms. Harbatkin's First Amendment activities could hardly be more severe. It is not too much to say that, ostensibly to protect the privacy of those citizens subjected to the ideological purges undertaken by its Board of Education several decades ago, the City has replicated the system of censorship characteristic of the repressive Communist regimes that it was seeking to combat during the McCarthy

period. If the lessons of the law and history have taught us anything, it is that the First Amendment does not tolerate such conduct.

REASONS FOR GRANTING LEAVE

Leave to appeal is warranted as a matter of right pursuant to *CPLR* 5601(b)(1) to permit this Court to decide whether the City's express conditioning of unredacted access to the "anti-Communist" series of case files on a relinquishment of the right to publish "any names" they contain violates the First Amendment. (R. 317) This purely constitutional issue has not previously been considered by this Court — or any court in New York State, to our knowledge. Contrary to the First Department's statement, consideration of this issue would not entail an "advisory" opinion because the City's regulation remains in full force and effect and continues to infringe Ms. Harbatkin's (and other citizens') First Amendment rights. A justiciable controversy is therefore present for adjudication by this Court.

In the alternative, the Court should grant leave pursuant to *CPLR* 5602(a)(1)(i) to decide whether the names of teachers and informants may be withheld from the "anti-Communist" case files because disclosure would constitute an unwarranted invasion of personal privacy under FOIL. In *Matter of New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 484 (2005), this Court recognized, for the first time, that a privacy interest may exist "in the feelings and

experiences of people no longer living." Ms. Harbatkin acknowledges, in accordance with that decision, that a descendible right of privacy may, in exceptional circumstances, exist under FOIL. However, this Court's solicitude for that interest in that case was attributable to the deeply personal nature of the 911 calls of those trapped in the inferno that was the World Trade Center towers on September 11, 2001. The historical records here are intrinsically different from those at issue in *Matter of New York Times*, and any privacy interest is no longer of comparable strength. The First Department's holding significantly expands the descendible right of privacy recently established in *Matter of New York Times*, and is not supported by the interests implicated on the instant appeal. We respectfully submit that the Appellate Division's misapplication of FOIL's personal privacy exemption in this context presents an issue of public importance not only to citizens of New York State but throughout the nation.

Finally, this Court should not allow promises of confidentiality made by the Board of Education to those it was interrogating to prohibit disclosure under FOIL. Although the First Department did not address this issue, if a government agency were permitted to bargain away the public's rights of access to its records by the simple expedient of promising confidentiality, FOIL would be rendered a dead letter. This, too, is an issue of surpassing public importance that goes directly to

FOIL's objective of promoting governmental accountability through transparency. N.Y. *Pub. Off. Law* § 84 (McKinney 2008).

POINT I

THE FIRST DEPARTMENT'S DECISION AND ORDER IS APPEALABLE AS OF RIGHT BECAUSE IT EFFECTIVELY UPHELD A VIOLATION OF PETITIONER-APPELLANT'S FIRST AMENDMENT RIGHTS

A. Ms. Harbatkin's Constitutional Claim Presents a Justiciable Controversy.

The City's Rule 3-02 (R. 68-69) and its accompanying Form D (R. 317) impose direct publication restrictions on anyone accessing the City's "anti-Communist" files. While members of the public may view the records in unredacted form, they are prohibited from recording, copying, disseminating or publishing in any form any names or identifying personal information contained in the records. (R. 317) The publication restrictions imposed by Rule 3-02 and Form D are unconstitutional because they are clearly a content-based governmental restriction *on publication*. (*See* Harbatkin Br., 42-46)

Both courts below utterly failed to address Ms. Harbatkin's constitutional challenge to the City's Rule and practices. The Appellate Division deemed her constitutional claim "merely advisory" solely because Supreme Court did not rule on it (citing *New York Pub. Int. Research Group, Inc. v. Carey*, 42 N.Y.2d 527, 529-30 (1977)). With all due respect, this is clearly erroneous: *because* the First

Department held that disclosure of names could be withheld under FOIL, it was then *required* to determine whether, consistent with the First Amendment, the City could condition disclosure on an agreement not to publish those names.[3] Here, unlike the legislation at issue in *Carey*, which had not gone into effect and may never have gone into effect unless approved by voters in a referendum, 42 N.Y.2d at 528, Rule 3-02 was officially adopted by the City in February of 2008 and took effect on March 26, 2008. (R. 20, 68-69) Further, Ms. Harbatkin refused to sign Form D in capitulation to the City's demand that she forfeit the right to publish any names contained in the "anti-Communist" case files. (R. 295-296) A justiciable controversy is therefore present, the resolution of which will have an "immediate practical effect" on her constitutional rights. *Carey*, 42 N.Y.2d at 530. "The need for judicial intervention is obvious when, because of the actions of one of the parties, a dispute arises as to whether there has been a breach of duty or violation of the law." *Id.* This is not a situation where the enforcement of Rule 3-02 and Form D "is beyond the control of the parties and may never occur." *Id.* at 531 (citation omitted). To the contrary, Rule 3-02's requirements are within the City's control and have in fact been imposed on Ms. Harbatkin. A "genuine legal

[3] The converse is also true: if the Appellate Division had determined (as it should have) that a descendible privacy interest did *not* outweigh the public's disclosure rights under FOIL, it would have had no need to reach the constitutional question raised by Ms. Harbatkin. *Fossella v. Dinkins*, 66 N.Y.2d 162, 167 (1985) ("In our view the statutes and policies of this State are alone sufficient to sustain the decisions reached below. There is no need to reach the Federal constitutional questions or the other issues raised in this proceeding.").

dispute" therefore exists requiring a judicial determination of "the legal rights and obligations of the parties" relative to the "coercive measures" adopted by the City. *Carey*, 42 N.Y.2d at 530. The First Department impermissibly ducked Ms. Harbatkin's First Amendment claim.

B. By Requiring That Ms. Harbatkin Not Publish "Any Names or Other Identifying Personal Information," the City Imposed Unconstitutional Conditions on Her First Amendment Rights.

The U.S. Supreme Court has repeatedly ruled that, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether" in the first instance). In the leading case of *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court held that a state college could not refuse to renew a non-tenured professor's contract because of his public criticism of the college administration's policies. *Id.* at 594-95. The *Perry* court flatly rejected the government's argument that its actions were permissible because the professor had no right to a government benefit:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a

> valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. ***It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.*** This would allow the government to "produce a result which [it] could not command directly."

Id. at 597 (emphasis supplied) (citation omitted).

Here, the City could hardly be clearer that in order for Ms. Harbatkin to be granted unrestricted access to a uniquely valuable repository of historical information, she cannot publish the names of the individuals targeted in the Board of Education's attempts at ideological cleansing, or of those who informed on them. The City has therefore placed an unconstitutional condition on Ms. Harbatkin's protected expressive activities: she must either give up her First Amendment rights or give up full access to the anti-Communist files. This is constitutionally impermissible, even assuming *arguendo* — contrary to Ms. Harbatkin's position and the requirements of FOIL — that the City properly withheld the names of teachers and informants in the first instance. "[A]lthough the government is under no obligation to provide various kinds of benefits, it may not deny them if the reason for the denial would require a choice between exercising First Amendment rights and obtaining the benefit." *Brooklyn Inst. of*