No. _____

# In the Supreme Court of the United States

CHARMAINE CLEMENT,
*Plaintiff-Petitioner*,

*v.*

THOMAS DURBAN, POLICE DEPARTMENT OF THE CITY OF NEW YORK, & THE CITY OF NEW YORK
*Defendants-Respondents.*

## APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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*Counsel for Petitioners*

To the Honorable Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Second Circuit:

On November 14, 2018, the Court of Appeals of the State of New York issued its opinion in this appeal, affirming the decision of the state trial court. A copy of the Court of Appeals' opinion is attached as Exhibit A. The Court of Appeals held that the Privileges and Immunities Clause of the federal Constitution, art. IV, § 2, does not prohibit New York from discriminating against nonresidents by diminishing their access to the courts of New York on account of non-residency. No separate judgment or mandate issued. Pursuant to Supreme Court Rules 13(1) and 30(1), petitioner must file her petition for a writ of *certiorari* by February 12, 2019, which is 90 days after November 14. This application is made more than ten days prior to that deadline, as required by Supreme Court Rule 13(5). Because this appeal concerns the scope of a privilege created by the federal Constitution, this Court has authority to grant *certiorari* pursuant to 28 U.S.C. 1257.

The petitioner is Charmaine Clement. She was injured in 2010 while sitting as a passenger in a vehicle, stopped at a red light. Her

vehicle was rear-ended by a car owned by the New York City Police Department and driven by Thomas Durbin. The respondents are Thomas Durbin, the Police Department of the City of New York, and the City of New York.

At the time she initiated this suit, in April 2011, Ms. Clement resided in New York. She later moved to Georgia. In April 2012, in the midst of discovery, the respondents moved under N.Y. C.P.L.R. § 8501(a) for an order compelling plaintiff to furnish a security for costs. That statute gives trial judges no discretion. It provides that, upon request by the defendant, a judge "shall" order non-resident plaintiffs to furnish a security for costs. *Id.* N.Y. C.P.L.R. § 8502 provides that the action shall be stayed until the security for costs has been paid. It also provides for dismissal after 30 days have passed without that security being paid. *Id.*

Petitioner timely opposed that motion, raising the Privileges and Immunities Clause then and again at every subsequent stage in this litigation. The trial court granted respondents' motion, staying this litigation and demanding that petitioner pay the security for costs or face dismissal of her plainly meritorious action. The petitioner timely filed an interlocutory appeal to New York's intermediate appellate court, which

affirmed. Petitioner sought and received leave to appeal to the Court of Appeals, which likewise affirmed. Petitioner has not paid the mandatory security for costs and cannot do so. Her case remains stayed. Unless this Court intervenes, her case will likely soon be dismissed.

The Court of Appeals' opinion is remarkable. Purportedly applying this Court's precedents, it states that although court access is a fundamental privilege and immunity of United States citizenship, and is thus fully protected by the Privileges and Immunities Clause, States are free to discriminatorily restrict a nonresident's access to the state courts, without any showing of need or any state interest. Rather, all a State must show is that the non-resident has access to state courts on terms that are "reasonable and adequate" for the non-resident's needs. Exhibit A at 9-11. As petitioner will demonstrate, this Court's precedents demand far more of a State that desires to discriminate against U.S. citizens who reside out of state.

The Court of Appeals expressly recognized that it diverged from a recent decision of the Supreme Court of the Virgin Islands, *Gerace v. Bentley*, 65 V.I. 289, 2016 WL 4442556 (V.I. 2016), which is now before this Court as *Bentley v. Vooys*, No. 18-709 (respondents' brief in

opposition due Feb. 19, 2019). Exhibit A at 10 n.5. It attempted to distinguish *Gerace* by noting that the mandated security there was $6,000 while the security required of the petitioner here is a "modest" $500. *Id.* It cites no case for the remarkable proposition that the protections of the Privileges and Immunities Clause only begin once the economic damages caused by a State's discrimination against a nonresident reach some unstated threshold. Again, as petitioner will demonstrate, this Court's precedents foreclose the Court of Appeals' distinction.

Due to the press of other matters—the undersigned has three appellate briefs (on behalf of parties, not *amici*), oral argument before the Second Circuit, and many other professional and personal obligations all within the next 30 days—petitioner does not anticipate concluding her petition for a writ of *certiorari* within the time allotted. Accordingly, she must request an extension of her deadline.

As noted, this litigation has been stayed. Accordingly, no court and no party will be prejudiced in any way by extending the petitioner's time to file her petition.

Furthermore, extending petitioner's time to file will likely extend her due date beyond the close of petition-stage briefing in *Bentley v. Vooys*, No. 18-709. That will mean that the petitioner and respondents in this appeal will all be able to benefit from the petition-stage briefing in *Bentley*. This Court will likely benefit from better, more comprehensive, briefing that considers arguments raised not just by the parties to this case but also by the parties in *Bentley*. The Court will thus have the benefit of more nuanced deliberation as it decides how to resolve the *Bentley* petition and the petition soon to be filed in this case.

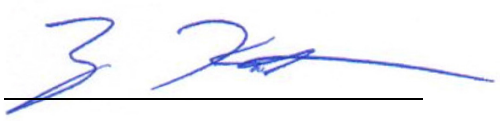
Respondents' counsel states that the respondents have no objection to this application.

Accordingly, the petitioner requests an additional 60 days (further extended by Supreme Court Rule 30(1)), until and including Monday, April 15, 2019, in which to petition for a writ of *certiorari*. Petitioner hopes to file her petition long before this new requested deadline and will endeavor to do so.

Dated: Baltimore, Maryland
January 31, 2019

Respectfully submitted,

THE BERKMAN LAW OFFICE, LLC
*Attorneys for Petitioner*

by: 

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