No. 19-_____

# 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.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, guarantees the right of U.S. citizens to access the courts of each of the 50 States, regardless of state residency. N.Y. CPLR Article 85 (N.Y. CPLR §§ 8501-8503) imposes on plaintiffs who are not residents of New York the burden of posting security for costs as a condition precedent to their access to the state courts. It articulates no reason for imposing that requirement and none is apparent.

The question presented is:

Whether Article 85 is consistent with the Privileges and Immunities Clause despite its discrimination against nonresidents of New York and the material burden it creates on their access to New York's courts.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the opinion of the New York State Court of Appeals.

## OPINIONS AND ORDERS BELOW

The opinion of the New York State Court of Appeals (Pet. App. 1-15) is reported at *Clement v. Durban*, 32 N.Y.3d 337 (2018). The opinion of the intermediate appellate court (Pet. App. 16-29), the Appellate Division of the New York State Supreme Court, is reported at *Clement v. Durban*, 43 N.Y.S.3d 515 (N.Y. App. Div. 2d Dep't 2016). That court's subsequent order granting the petitioner leave to appeal to the New York State Court of Appeals is reproduced in the appendix. (Pet. App. 37-38). The opinion of the trial court (Pet. App. 30-36), the New York State Supreme Court, is available at *Clemente v. Durban*, 2013 WL 12182302 (N.Y. Sup. Ct. 2013).

## JURISDICTION

The opinion of the New York State Court of Appeals issued on November 14, 2018. On January 31, 2019, the petitioner timely applied for an extension of her deadline to petition for a writ of certiorari. (Application No. 18A803). Justice Ginsburg granted the application on February 6, 2019, extending the petitioner's time to file until April 15, 2019.

This Court has jurisdiction under 28 U.S.C. 1257(a).

Consistent with this Court's Rule 29.4(c), a copy of this petition has been served on the Attorney General of New York.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**The Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1**. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

**N.Y. CPLR § 8501. Security for costs.**

**(a) As of right.** Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made.

**(b) In court's discretion.** Upon motion by the defendant with notice, or upon its own initiative, the court may order the plaintiff to give security for costs in an action by or against an assignee or trustee for the benefit of creditors, a trustee, a receiver or debtor in possession in bankruptcy, an official trustee or committee of a person imprisoned in this state, an executor or administrator, the committee of a person judicially declared to be incompetent, the conservator of a conservatee, a guardian ad litem, or a receiver.

**N.Y. CPLR § 8502. Stay and dismissal on failure to give security**. Until security for costs is given pursuant to the order of the court, all proceedings other than to review or vacate such order shall be stayed. If the plaintiff shall not have given security for costs at the expiration of thirty days from the date of the order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor.

**N.Y. CPLR § 8503. Undertaking**. Security for costs shall be given by an undertaking in an amount of five hundred dollars in counties within the city of New York, and two hundred fifty dollars in all other counties, or such greater amount as shall be fixed by the court that the plaintiff shall pay all legal costs awarded to the defendant.

## INTRODUCTION

N.Y. CPLR Article 85 (N.Y. CPLR §§ 8501-8503) is a solution in search of a problem. It subjects out-of-state plaintiffs (but not in-state plaintiffs, out-of-state defendants, or out-of-state intervenors) to special burdens and does so for no apparent reason. Indeed, over the course of this litigation, the defendants and the three courts below articulated five competing theories on how to justify these special burdens. The State of New York has been conspicuously silent. (*See* Pet. App. 2-3 n.2).

Article 85 offends the Federal Constitution. Protecting federalism and delineating the rules by which

the several States interact with one another, the Privileges and Immunities Clause prohibits discrimination by one State against the residents of another State. By compelling nonresident plaintiffs (but no one else) to post security for costs, Article 85 discriminates against the residents of other States by compelling them to act to their detriment in a manner not required of New York residents. Failure to comply shuts them out of New York's courts.

This case involves a rear-end collision into a lawfully stopped vehicle. The defendants' liability is a virtual certainty. N.Y. Pattern Jury Instr.—Civil 2:82 ("Since [plaintiff's] vehicle was struck in the rear, you must find that [defendant] was negligent, unless [defendant] has provided an adequate explanation that does not involve any negligence on (his, her) part."). But just because the petitioner exercised her constitutional right to move from New York to another State, the court below, applying Article 85, compelled her to post security for costs as a condition precedent to her continued maintenance of this litigation. Petitioner cannot pay the security unconstitutionally required by New York law. Her plainly meritorious case is all but certain to be dismissed, absent this Court's intervention.

## STATEMENT OF THE CASE

### A. Petitioner's Underlying Injury

One afternoon in January 2010, the petitioner was a passenger in a car stopped at an intersection in Brooklyn. The traffic signal facing her car was red and her driver was patiently awaiting her turn to proceed. Without warning, a car owned by the New York City Police Department and driven by Respondent Thomas Durbin rear-ended her car. As a result, she suffered considerable injuries.

### B. The Trial Court Subjected Petitioner to Discrimination on Account of Her Nonresidency

Petitioner began this action in April 2011. At the time, she was a New York resident. She subsequently moved to Georgia, exercising her constitutional right to move interstate.

At a discovery compliance conference held before the state trial court in April 2012, petitioner's counsel noted that the petitioner had moved to Georgia and asked the court to fix a date certain for her deposition and order that her mandatory medical examination take place one or two days after the deposition. Respondents opposed that reasonable request, which would ultimately be granted.

Two days after that conference, in apparent retaliation for events at that conference, the respondents

moved under N.Y. CPLR § 8501(a) for an order "compelling plaintiff to furnish security for costs, and [ordering] that all proceedings be stayed until plaintiffs [*sic*] do so."

N.Y. CPLR § 8501(a) provides that, unless a nonresident plaintiff "has been granted permission to proceed as a poor person," upon request by the defendant, a judge "shall" order nonresident plaintiffs to furnish a security for costs. N.Y. CPLR § 8502 provides that the action "shall" be stayed until the plaintiff pays the required security. It also provides for dismissal after 30 days have passed without that security being paid. *Id.* N.Y. CPLR § 8503 sets a statutory minimum for the aforementioned security of $250 in counties outside New York City and $500 in the five counties within the City.

Petitioner timely opposed the motion, arguing that Article 85 is an unconstitutional breach of the privileges and immunities granted to all U.S. citizens. Respondents defended Article 85, arguing that § 8501 has the purpose of "obviate[ing] the danger of the [plaintiff's] property being placed beyond reach of a court's process by a plaintiff[] who has been ordered to pay the costs of litigation."

17 months later, in September 2013, the trial court granted the respondents' motion and directed petitioner to post $500 or risk having her case dismissed.

(Pet. App. 35-36).[1] Upholding the constitutionality of Article 85, the trial court asserted a new justification: The "additional costs associated with domesticating a judgment for costs relating to an out of state resident is[,] in this Court's view[,] a reasonable and legitimate concern and interest of this State and its citizens." (Pet. App. 36). It did not explain how the costs of domesticating a judgment relate to the security for costs required by Article 85, which secures the statutory costs allowable under N.Y. CPLR Article 82. No part of Article 82 pertains to the costs of judgment enforcement, particularly not judgment enforcement outside New York.

The trial court immediately stayed the case under N.Y. CPLR § 8502. (Pet. App. 36). It has remained stayed ever since.

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[1] The trial court wrote that "the motion for *summary judgment* is granted." (Pet. App. 36) (emphasis added). Being that no motion for summary judgment was filed and the trial court's entire opinion related to the respondents' motion to stay pending the petitioner's provision of a security deposit (Pet. App. 30-36), it is clear that this reference to "summary judgment" was in error; the trial court meant the "motion for security for costs is granted."

### C. The Intermediate Appellate Court Affirmed on an Alternative Theory

The intermediate appellate court began its opinion noting that the appeal "raises a constitutional issue of first impression in the appellate courts." (Pet. App. 17). It framed the issue:

> CPLR 8501(a) and 8503 require nonresident plaintiffs maintaining lawsuits in New York courts to post security for the costs for which they would be liable if their lawsuits were unsuccessful. On this appeal, we are asked to determine whether this requirement violates the Privileges and Immunities Clause[.]"

*Id.*

Relying on *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998), it found Article 85 justified by two distinct "substantial reason[s] for the difference in treatment between nonresidents and residents." (Pet. App. 28). *First*, it identified "the fact that nonresident plaintiffs are unlikely to have assets in New York that may be used to enforce a costs judgment." *Second*, it found "a substantial relationship to the State's objective of deterring frivolous or harassing lawsuits and preventing a defendant from having to resort to a foreign jurisdiction to enforce a costs judgment." (Pet. App. 28-29). It cited no evidence suggesting that either factor motivated the enactment of Article 85. No such evidence is in the record and, apparently, no such legislative findings were ever made. Moreover, the

intermediate appellate court made no attempt to determine whether Article 85 is adequately tailored to achieving those asserted objectives.

### D. The Court of Appeals Affirmed on yet Another Theory

Less than one month after oral argument, the Court of Appeals likewise sustained Article 85. (Pet. App. 1). It first noted several of this Court's cases requiring each "State [to] treat all citizens, resident and nonresident, *equally*." (Pet. App. 4-5) (emphasis added). Yet, in the very next paragraph, it opined that this Court has not "insisted on equal treatment for nonresidents 'to a drily logical extreme.'" (Pet. App. 5). Relying mainly on *McBurney v. Young*, 569 U.S. 221 (2013), and *Canadian Northern R.R. Co. v. Eggen*, 252 U.S. 553 (1920), the Court of Appeals reasoned that as long as "nonresidents are given access [to a State's courts] on 'reasonable and adequate...terms,'" "no fundamental right protected by the Privileges and Immunities Clause has been burdened." (Pet. App. 8) (alternation in original). Finding that Article 85 affords nonresidents "reasonable and adequate access to the New York courts," the court below held those provisions do not "impair[] [petitioner's] fundamental right of access to our courts." (Pet. App. 12-14).

In a footnote, the court below acknowledged a conflict between its decision and that of *Gerace v. Bentley*, 65 V.I. 289, 2016 WL 4442556 (V.I. 2016), now before this Court as *Bentley v. Vooys*, No. 18-709

(distributed for conference of Apr. 18, 2019). (Pet. App. 13 n.5). It purported to distinguish this case from *Bentley* on the ground that the security there required was "$6,000" and the security required here is a "more modest $500." *Id.*[2]

### E. The Privileges and Immunities Clause

The Privileges and Immunities Clause guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.[3] The Clause was intended to "confer on [all citizens of the United States]...a general citizenship" and to grant to each of them "all the privileges and immunities[] which the citizens of [another] state would be entitled to under the like circumstances." Joseph Story, 3 Commentaries on the Constitution of the United States § 1800, pp. 674-75 (1833). Similarly, as Justice Field explained a generation later:

> It was undoubtedly the object of the [Privileges and Immunities Clause] to place the citizens of each State upon the *same* footing with citizens of other States, so far as

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[2] In fact, the security bond demanded in *Bentley* is $2,100, not $6,000. *Bentley*, 65 V.I. at 295.

[3] While the Clause references "Citizens," rather than "residents," this Court has held that "citizenship and residency are essentially interchangeable." *S. Ct. of Virginia v. Friedman*, 487 U.S. 59, 64 (1988).

> the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. *It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this*.

*Paul v. State of Virginia*, 75 U.S. 168, 180 (1868) (emphasis added) (quoted favorably in *McBurney*, 569 U.S. at 226, 229, and *Lunding*, 522 U.S. at 296). The Clause thus protects those "fundamental privileges and immunities" that are "essentially coextensive with those calculated to achieve the purpose of forming a more perfect Union." *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (citing Justice Bushrod Washington riding circuit in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3230)).

Even so, the Privileges and Immunities Clause does not prohibit States from ever distinguishing between its residents and nonresidents. Rather, its

reach is limited to "fundamental" privileges, *McBurney*, 569 U.S. at 226, meaning those "basic and essential activities, interference with which would frustrate the purposes of the formation of the Union[.]" *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 387 (1978).

Access to courts is one of the privileges considered "fundamental." *Id.*; *McBurney*, 569 U.S. at 231. As this Court has explained,

> [t]he right to sue and defend in the courts...is the right *conservative of all other rights*, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states *to the* ***precise extent*** *that it is allowed to its own citizens*.

*Chambers v. B&O R. Co.*, 207 U.S. 142, 148 (1907) (emphasis added). Thus, the Privileges and Immunities Clause guarantees all U.S. citizens the right to access the courts of other states "*equally* with the citizens of the [forum] state," *Missouri Pac. R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922) (Taft, *C.J.*) (unanimous) (emphasis added). It "establishes a "norm of comity" and a "guarantee[]" of "equality of treatment." *Austin*, 420 U.S. at 660.

The Clause has the vital—"perhaps" primary—purpose of protecting "the structural balance essential

to the concept of federalism." *Id.* at 662. So any deprivation of a fundamental privilege, no matter how trivial to the victim, is an affront to federalism and the Constitution itself. *See id.*

When a State discriminatorily restricts nonresidents' access to a fundamental privilege it can avoid liability under the Privileges and Immunities Clause only if it can show that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *S. Ct. of N.H. v. Piper*, 470 U.S. 274, 284 (1985); *Lunding*, 522 U.S. at 294, 298. "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means." *Piper*, 470 U.S. at 284.

Said differently, courts review apparent violations of the Privileges and Immunities Clause with *intermediate scrutiny*: "[I]f the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65 (citing *Piper*).[4]

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[4] *Cf. Milavetz, Gallop & Milavetz v. U.S.*, 559 U.S. 229, 249 (2010) (To "withstand intermediate scrutiny," a law "must directly advanc[e] a substantial governmental interest and be n[o] more extensive

## REASONS FOR GRANTING THE WRIT

The high courts of New York and the Virgin Islands are divided on whether the Privileges and Immunities Clause permits states to discriminate against nonresidents by compelling them, because of nothing but their residency, to post a security for costs as a condition on using the state courts. While that issue is rarely litigated, it silently arises often (perhaps daily) around the country. It needs to be finally resolved. This case provides an ideal vehicle to do so.

While this Court has never opined on the issue, its jurisprudence—both when discussing the Privileges and Immunities Clause and when discussing other comparable constitutional provisions—contradicts New York's position. At the heart of the matter is determining who or what the Privileges and Immunities Clause is intended to protect, the individual discriminated against, as New York's high court assumed, or the integrity of the Union, as this Court has said many times. This case thus provides the Court an opportunity to clarify both the law governing the Privileges and Immunities Clause and the practical significance of its role in upholding the "norm of comity" on which the integrity of the Union depends.

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than is necessary to serve that interest." (internal quotation marks omitted) (alterations in original)).

## I. The Decision Below Conflicts with the Decision of the Supreme Court of the Virgin Islands

As the court below acknowledged, its decision conflicts with that of the Virgin Islands. It claimed to distinguish this case from *Bentley* on the ground that the security in *Bentley* was larger than the security imposed here. (Pet. App. 13 n.5). Its distinction, which rests in part on a factual error—the security demanded in *Bentley* is $2,100, *Bentley*, 65 V.I. at 295, not $6,000 (*see* Pet. App. 13 n.5)—is as illusory as it is irrelevant.

N.Y. CPLR § 8503 imposes a *minimum* security of $250 in most of the counties of New York State and $500 within the five boroughs of New York City. It sets no upper limit. Thus, it gives trial courts nearly limitless discretion to demand security deposits well above $6,000, even though the demand might shut down litigation (as it did here). Upholding Article 85 because $500 is less than $6,000 (or $2,100) is thus rather tenuous.

The Virgin Islands statute at issue in *Bentley* likewise does not demand a fixed security. But unlike the New York statute, the Virgin Islands statute sets a *maximum* security of $1,000 for the first defendant and $500 for each additional defendant, and demands that the total security not be greater than $3,000. 5 V.I.C. § 547. Thus, the Virgin Islands statute is far *less* burdensome than New York's. Yet the Virgin Islands statute was struck down as unconstitutional and the New York statute was upheld. Justifying that

result on the happenstance that, in this particular case, the New York statute created a smaller burden than the one imposed under the Virgin Islands statute in a different isolated case is all the more tenuous.

More fundamentally, the attempt to distinguish this case from *Bentley* fails because the comparative size of the financial burdens imposed by the two statutes is irrelevant. *Bentley* held—correctly, as petitioner explains *infra*—that § 547 unconstitutionally imposes a discriminatory burden on nonresidents of the Virgin Islands by automatically staying and then dismissing their cases but not the cases of similarly situated Virgin Islands residents. *Bentley*, 65 V.I. at 308, 310-11. The size of the mandated security for costs that a nonresident must pay to avoid dismissal is not the relevant burden. Rather, it is the discriminatory mandatory stay and dismissal. Thus, the size of the security for costs did not factor at all into *Bentley's* analysis. *See id.* at 310-11. Nor did it consider the plaintiffs' wherewithal. *See id.* at 300 n.1, 301 n.2, 310-11.[5]

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[5] As explained above, an apparent Privileges and Immunities violation is reviewed with intermediate scrutiny. This discussion addresses only the initial inquiry—whether access to a fundamental privilege has been discriminatorily restricted based on state residency—as the court below resolved this case at that

The court below, however, held that a party who "identif[ies] a facially discriminatory restriction that relates to a protectable fundamental right" has not thereby stated a discriminatory burden prohibited by the Privileges and Immunities Clause. (Pet. App. 12). The mere fact that a State has discriminatorily limited access to its courts on the basis of residency is not enough. Rather, the party must also show that she has been denied "reasonable" and "adequate" access to the state courts. If she has not been so denied, she has stated no cognizable burden. (Pet. App. 12-14). On that rationale, any discriminatory burden that the nonresident is presumptively[6] able to bear (such as a mandated $500 security imposed against nonresidents only) presents no constitutional problem. (Pet. App. 12-14).

The court below effectively held that a State may discriminatorily compel nonresidents to lend it money before they may use the state courts. So too, it follows,

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stage. It thus did not need to apply intermediate scrutiny.

*Bentley* did. It held that "residency status bears little relationship to the difficulty of being able to collect a cost award." *Bentley*, 65 V.I. at 309. It thus had no problem finding § 547 unconstitutional. *Id.* at 311.

[6] Petitioner argued below that she cannot pay the $500 security. No factual findings have been made about her finances. The court below merely *presumed* that petitioner can afford the security.

a State may require nonresidents to offer a blood sample, take a haircut, and wear a bowtie before being permitted to use its courts—a State is entitled under the Constitution to impose any condition it choses, so long as the nonresident is presumptively able to meet that condition. Whatever the merits of that theory, it directly conflicts with *Bentley*.

## II. The Decision Below Is Irreconcilable with This Court's Privileges and Immunities Jurisprudence

The Court of Appeals' holding also conflicts with this Court's precedent. This Court has consistently held, without exception, that a State may not discriminate against nonresidents in granting access to fundamental privileges, unless the deprivation survives intermediate scrutiny.

### A. Residency-Based Restrictions on the Exercise of a Fundamental Privilege Trigger Intermediate Scrutiny

When a State discriminates against the residents of another State in the provision of a fundamental privilege, the primary injury is not to the person denied equal access to the privilege but to the Union itself. As this Court noted, the primary purpose of the Privileges and Immunities Clause, which prohibits this discrimination, is to protect "the structural balance essential to the concept of federalism." *Austin*, 420 U.S. at 662. It follows logically that the mere fact

of discrimination, rather than the extent of any burden, is the salient issue in any Privileges and Immunities case.

This Court's jurisprudence confirms that whenever a State discriminates against nonresidents while providing a fundamental privilege, it presumptively violates the Privileges and Immunities Clause, triggering intermediate scrutiny. That the nonresident can endure the discrimination and still have access to the fundamental privilege does not license the State's discrimination.

*Ward v. Maryland*, this Court's first Privileges and Immunities Clause case, established long ago that the Clause presumptively prohibits States from any sort of discrimination against nonresidents in the provision of fundamental privileges. Maryland had prohibited certain specified commercial enterprises absent licensure. For a non-resident of the State, the necessary license cost $300 per year. Maryland residents needed to pay only a variable fee ranging between $12 and $150. 79 U.S. 418, 426 (1870). *Ward* noted that although a State may tax nonresidents, it may "not in any way discriminat[e]" against nonresidents. *Id.* at 428. It was "unhesitatingly of the opinion that the statute in question...is discriminating" and thus unconstitutional. *Id.* at 429. In reaching its holding, *Ward* did not consider the amount of money at

stake or anyone's ability to pay. It explained, the Privileges and Immunities Clause

> plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce...to be exempt from *any* higher taxes or excises than are imposed by the State upon its own citizens.

*Id.* at 430 (emphasis added). Its purpose is to ensure that the States treat each other as equals, showing no favoritism and exhibiting no protectionism. *Id.* at 431-32.

Since *Ward*, this Court has had many opportunities to consider the Clause's prohibition against discriminatory taxation based on residency. Its bottom line has not changed much in that time: "noncitizenship or nonresidence [is] an improper basis for locating a special burden." *Austin*, 420 U.S. at 662. No State may subject nonresidents to differential treatment "more onerous in effect than those imposed under like circumstances upon citizens of the...State." *Lunding*, 522 U.S. at 297 (alternation in original). Rather, "substantial equality of treatment for resident and nonresident taxpayers" is required. *Id.*

Admittedly, N.Y. CPLR Article 85 does not impose a discriminatory *tax* in that the money it requires a nonresident plaintiff to deposit with the court will be returned to the plaintiff if she is not ultimately required to pay the defendant's costs. Nor does Article

85 directly influence a nonresident's ability to earn a living, unlike the statute at issue in *Ward*. A different fundamental privilege is at issue: access to courts. But *Ward*, *Austin*, *Lunding*, and other similar cases provide a helpful analogy and bright line rule: Discrimination by a State against nonresidents is constitutionally suspect when it involves restrictions to a fundamental privilege. The substitution of a tax on earning a livelihood for a mandate to give a State an involuntary loan or else forfeit an otherwise meritorious claim (and thus the fundamental privilege of access to the courts) changes nothing or else cuts in petitioner's favor. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Austin*, 420 U.S. at 661. The same cannot be said for statutes—like Article 85—that compel citizens to loan money to the government as a condition on the exercise of their rights.

In *every* other context it is likewise the "norm of comity," not the extent of any discriminatory burden, that this Court considers when determining whether a fundamental privilege might have been improperly burdened. *Id.* at 660. As a result, it is simply irrelevant that one might have the wherewithal to overcome the discriminatory burden and enjoy the relevant privilege. Thus, this Court had no problem finding a fundamental privilege discriminatorily burdened by a statute requiring attorneys to establish state residency before being admitted to its bar. *Piper*, 470 U.S.

at 280-83. That an attorney could overcome the burden simply by moving, *see id.*, or by taking the state bar exam (rather than seeking admission by reciprocity), *Friedman*, 487 U.S. at 65-66, was just not relevant. Rather, all that mattered was the offending State's failure to permit nonresidents to exercise a fundamental privilege of citizenship "on terms of *substantial equality* with its own residents." *Id.* at 66 (emphasis added).

Comity between the several States is the touchstone of Privileges and Immunities jurisprudence. Everything turns on it. Not one of this Court's cases says otherwise.

So considering, one might find confusing the following language in what would become the progenitor of modern Privileges and Immunities jurisprudence: "Like many other constitutional provisions, the privileges and immunities clause is not an absolute." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). It appears that this language indeed confused the court below. (*See* Pet. App. 5-6). That was needless; our mystery is resolved by *Toomer's* next sentences:

> [The Privileges and Immunities Clause] does not preclude disparity of treatment in the many situations where there are *perfectly valid independent reasons* for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a *close relation* to them.

*Id.* at 396 (emphasis added). All *Toomer* meant is that once a court identifies discrimination against a nonresident, its inquiry shifts to reviewing that discriminatory provision with intermediate scrutiny. *See Piper*, 470 U.S. at 284.[7] The court below read *Toomer* to mean that discrimination in the delivery of a fundamental privilege is sometimes not cognizable. (Pet. App. 5-7). It misunderstood *Toomer*.

New York violated the norm of comity. It treats nonresidents on terms not substantially equal with residents as they try to use the state courts—unquestionably a fundamental privilege of citizenship. The court below upheld Article 85 on the ground that it imposed no cognizable burden. That holding departs from this Court's cases and the norm of comity embodied in the Privileges and Immunities Clause.

### B. *McBurney* Is Fully Consistent with Prior Precedent and Does Not Support the Decision Below

The court below treats *McBurney* as though it represents some sort of sea change. (*See* Pet. App. 8, 12). It does not.

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[7] The intermediate scrutiny test is articulated most clearly in *Piper*, 470 U.S. at 284. It should be no surprise that *Piper's* principal authority on that point is this very language from *Toomer*. *Id.*; *see also id.* at n.17.

*McBurney* involved Virginia's discriminatory exclusion of nonresidents from its FOIA; Virginia's FOIA granted its residents access to "all public records...of the Commonwealth" but "grant[ed] no such right to non-Virginians." 569 U.S. at 224. The *McBurney* plaintiffs asserted that this discrimination unconstitutionally limited their access to four distinct fundamental privileges and immunities. *Id.* at 226-27. This Court disagreed. *Id.* at 224, 227.

1. *McBurney* held that the last of the alleged privileges and immunities, the right to "access public information," is "not protected by the Privileges and Immunities Clause." *Id.* at 227, 232. To so demonstrate, the Court explored historical evidence to determine whether that privilege has "been enjoyed by the citizens of the several states" since the founding or is otherwise "basic to the maintenance or well-being of the Union." *Id.* at 233-34 (internal citations omitted). Finding no such historical evidence and noting that FOIA laws "are of relatively recent vintage," *McBurney* found that access to information is not a fundamental privilege. *Id.* at 234.

Nowhere else did *McBurney* reference historical norms and practices. It did so only to determine whether a privilege discriminatorily restricted is "fundamental." But it readily found that the remaining alleged privileges are indeed "fundamental." *Id.* at 227-32. Once it characterized a privilege as fundamental, it made entirely different inquiries, as the next paragraphs describe.

2. Regarding the second of the alleged privileges, "the ability to own and transfer property," *id.* at 227, *McBurney* found no burden at all. Although FOIA, because of its discrimination against nonresidents, is unavailable to enable them to locate records necessary to facilitate the purchase and transfer of property, "like title documents[,] mortgage records, ... [and] real estate tax assessment records," that information is readily available from other sources. *Id.* at 229-30. Thus, held *McBurney*, the FOIA's discrimination against nonresidents meant only that nonresidents would need to "conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process." That is not a cognizable burden, if it is a burden at all. *Id.* at 230-31.

3. Similarly, *McBurney* upheld Virginia's FOIA in the face of discriminatory restrictions impacting access to Virginia's courts in that it allegedly created an "information asymmetry between adversaries based solely on state citizenship." *McBurney*, 569 U.S. at 231. This Court disagreed on the facts; it held that the FOIA does *not* create any cognizable information asymmetry. It noted specifically that nonresidents have full and equal access to civil discovery procedures that are themselves "sufficient to provide noncitizens with any relevant, nonprivileged documents needed in litigation." *Id.* Similarly, "Virginia law gives citizens and noncitizens alike access to judicial records." *Id.* at 232. Indeed, the Court noted, one of the *McBurney* plaintiffs was ultimately able to obtain "much of [the

documents] he sought" under a different Virginia statute. *Id.* He had not yet filed his underlying lawsuit, *McBurney v. Cuccinelli*, 780 F.Supp.2d 439, 449 (E.D. Va. 2011), and likely would have obtained anything else he needed through civil discovery. *See McBurney*, 569 U.S. at 231. FOIA's discrimination thus did not create substantial inequality.

4. Addressing the first claimed privilege, "the opportunity to pursue a common calling," *McBurney* adopted a very different sort of analysis. *Id.* at 227. It acknowledged the existence of a protected privilege and facial discrimination restricting access to that privilege. But it nonetheless upheld Virginia's FOIA under intermediate scrutiny.

*McBurney* noted that Virginia's FOIA was not "enacted for the protectionist purpose of burdening out-of-state citizens." *Id.* at 227-28. Nor was it "enacted in order to provide a competitive economic advantage for Virginia citizens." *Id.* at 228. Rather, it was intended as "a mechanism by which those who ultimately hold sovereign power (*i.e.,* the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power." *Id.* While *McBurney* did not expressly adopt the language of intermediate scrutiny or the test delineated in *Piper*, the point remains the same. *McBurney* upheld Virginia's FOIA because "(i) there is a substantial reason for the difference in treatment" (namely, the need to allow those who hold the sovereign power to gain an accounting from those chosen to

exercise that power) and "(ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective" of permitting its residents to gain that accounting. *Id.* at 228-29; *Piper*, 470 U.S. at 284.

*McBurney* does not hold, as the court below suggested, that discriminatory restrictions on access to the courts of a State are acceptable as long as nonresidents are also given "reasonable and adequate," but inferior, access. (Pet. App. 8). Rather, it holds, just as the rest of this Court's Privileges and Immunities cases do, that everything turns on interstate comity. It found no violation for discriminatory restrictions on access to records because the burden restricted is not a "fundamental privilege" and thus does not cognizably impact interstate comity. It found no violation for discriminatory restrictions on the right to earn a living because those restrictions, while imposing a cognizable burden, survived intermediate scrutiny. And it found no violation for discriminatory restrictions on the ability to transfer property and on access to the courts because it found that nonresidents and residents were treated with "substantial equality," long a part of this Court's Privileges and Immunities jurisprudence. *Id.* at 227 (quoting *Piper*, 470 U.S. at 280); *Toomer*, 334 U.S. at 396; *Austin*, 420 U.S. at 664-65. True, quoting *Eggen*, *McBurney* says that a State must provide access that is "reasonable and adequate" even though not "technically and precisely the same" as the access provided to residents.

569 U.S. at 231. But that language, taken together with the rest of the opinion, is just a restatement of the requirement of "*substantial* equality." *McBurney*, after all, held that the plaintiffs there had *full* access to the courts, even though the terms of their access differed from that afforded state residents. *See id.* at 232. Nonresidents need not be treated precisely the same as residents, but their access to courts must be "reasonable," meaning that it may not substantially differ from the access given to residents. Anything less is inherently unreasonable as it upends the norm of comity.

If New York had treated residents and nonresidents with "substantial equality," petitioner would have no gripe against the State. Her complaint is that, just because of her nonresidency, she has not been treated with substantial equality. *Accord McBurney*, 569 U.S. at 231-32. That petitioner will be afforded access to the courts if she complies with New York's discriminatory security requirement, surrendering some of her hard earned money to be held by New York for some indefinite time, is inadequate precisely because it fails to honor the requirement of substantial equality. Petitioner has not paid and cannot pay the security for costs and, absent this Court's intervention, will likely have her plainly meritorious case dismissed for no reason other than that she is not a resident of New York. New York's similarly situated residents do not face dismissal.

The absence of substantial equality is not remedied by the court below's assertion that statutes mandating nonresident plaintiffs to post security for anticipated costs "are a fixture in states across the country." (*See* Pet. App. 10). As *McBurney* shows, such considerations are relevant only to aid the determination that a restricted privilege is or is not "fundamental." 569 U.S. at 232-34. Access to courts is certainly a fundamental privilege. *See id.* at 231. It has been discriminatorily restricted on account of state residency. The ubiquity of that unconstitutional restriction (if it is indeed ubiquitous) does not justify it.

### C. This Court's Ancient Dicta Changes Nothing

The court below put much weight on *Eggen*. (Pet. App. 12-13). But *Eggen's* pertinent holding is not materially different from that of *McBurney's*: States need not afford nonresidents precisely the same access they afford residents, but the access given nonresidents must be substantially equal. *Eggen*, 252 U.S. at 560-61. *Eggen* perhaps goes a step further than *McBurney*, adding that where any inequality suffered by the nonresident is due to the laws of the nonresident's home state, "he may not successfully complain" if the foreign state does not *expand* the rights given him by his home state. *Id.* at 563. But that holding is both intuitive and irrelevant here.

*Eggen* considered a "borrowing statute," providing that the statute of limitations governing a claim by a

nonresident is the shorter of the periods provided by the resident's home state and the forum state. *Id.* at 558. When the forum state has the shorter statute of limitations, both residents and nonresidents are subject to the same limitations period. *Id.* at 560. That is obviously not discriminatory at all. When the nonresident's home state has the shorter statute of limitations, the nonresident remains subject to that shorter limitations period while residents are afforded the longer period prescribed in the forum state. *Id.* But that differential treatment, explained the Court, reflects the nonresident's home state's law. The Privileges and Immunities Clause does not require the foreign state to "revive[]" rights expired under the law of his home state. *Id.* at 563.

Admittedly, there are two sentences in *Eggen* that need explanation. *First*, *Eggen* declares:

> A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given *free* access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

*Id.* at 562 (emphasis added). This statement is not fully consistent with this Court's Privileges and Immunities jurisprudence because it suggests that some undefined minimum quantity or quality of access to the courts of a state, rather than substantial equality,

is the touchstone. Such a rule, however, is difficult to square with the rest of *Eggen's* language. And the fact that *Eggen* never defines the minimum threshold or offers any guidance on where it lies strongly suggests that *Eggen* did not intend to shun the requirement of substantial equality or adopt some different test. More significantly, this language (whatever it was intended to mean) creates no issue here given its minimum requirement of "free access." Petitioner was not afforded free access to New York's courts. Her access is encumbered by a discriminatory requirement that she cannot meet and, as a result, is facing dismissal before having an opportunity to have her case heard.

*Second*, another sentence in *Eggen* states with approval that "security for costs has very generally been required of a nonresident, but not of a resident citizen," suggesting that this discriminatory treatment does not raise Privileges and Immunities concerns. *Id.* at 561. That statement conflicts with this Court's modern jurisprudence. Because it long pre-dates "intermediate scrutiny" and pivotal cases such as *Toomer*, 334 U.S. 385 (decided in 1948), it has "little—if any—persuasive value." *Bentley*, 65 V.I. at 310.

In any event, because both statements in *Eggen* are "unnecessary to the decision in the case," as explained above, they are dicta. Black's Law Dictionary, *Obiter Dictum* (10th ed. 2014). Second Circuit Judge Pierre Leval offers a useful test to help distinguish holding from dicta:

> If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum. The dictum consists essentially of a comment on how the court would decide some other, different case[.]

Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1256 (2006) ("*Dicta About Dicta*"). Both definitions certainly describe these two statements in *Eggen*.

No part of *Eggen's* dicta should detain this Court. "[D]icta settles nothing," *SCA Hygiene Prod. v. First Quality Baby Prod.*, 137 S.Ct. 954, 965 (2017) (quotation marks omitted), even when it appears over and over again—for example, in over 24 appellate opinions between 1895 and 1952. *See id.* at 969 (Breyer, *J.*, dissenting).

Several other statements adorning the opinion below are likewise culled from dicta. For example, the court cites *Blake v. McClung*, 172 U.S. 239 (1898), as support for its claim that discriminatory mandated securities for costs are constitutional. (Pet. App. 12-13). But *Blake* itself makes clear that the sentence on which the court below relies is *not* part of *Blake's* holding:

> We must ***not*** be understood as saying that a citizen of one state is entitled to enjoy in

> another state every privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people, in which citizens of other states may not participate.... For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it *may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident*. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states.

172 U.S. at 256 (emphasis added). The quoted text is the only language in *Blake* on this issue, which was not part of its holding. *Blake* makes this statement without support, analysis, citation, or limitation. *Blake* merely *assumed* it; *Blake* did not *decide* it. *See Dicta About Dicta*, 81 N.Y.U. L. Rev. at 1274-75. *Blake's* dicta is contradicted by many decisions of this Court in the intervening 121 years.[8]

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[8] *Kentucky Fin. v. Paramount Auto Exch.*, 262 U.S. 544 (1923), likewise cited by the court below for the same point (Pet. App. 13), is similar. *Kentucky Finance* merely assumed a rule on securities for costs, without exploring it and citing only *Eggen* as support, writing in dicta and only to help explain what it did

## III. The Holding of the Court Below Clashes with the Law Governing Other Comparable Constitutional Provisions

Suppose a State informs one of its residents that he is prohibited from ever expressing his opinion while on public property unless he gives the State a $500 loan. The State cites no nondiscriminatory objective it hopes to achieve through this involuntary loan program and never asserts that expressions of opinion on public property impose severe financial costs on the State. The State agrees to return the speaker's $500 to him as soon as he is willing to give up the right to speak freely on public property or when he dies. Constitutional?

Consider another person prohibited by her State from attending religious services unless she loans the State $500 on the same terms. Constitutional?

It is fairly obvious that both hypotheticals pose serious (perhaps insurmountable) constitutional obstacles. The Constitution prohibits government from coercing would-be speakers not to speak. "[T]he fact that no direct restraint or punishment is imposed" does not matter because "indirect 'discouragements'

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*not* hold. 262 U.S. at 551. Worse, *Kentucky Finance* is not even a Privileges and Immunities case. It rests on the Equal Protection Clause. *Id.* at 549-51. That is all the more reason to reconsider its passing assumptions.

undoubtedly [can] have the same coercive effect" as direct ones. *Am. Commun. Ass'n v. Douds*, 339 U.S. 382, 402 (1950). If the mandated $500 loan is intended to or does in fact quell public expression, it is likely unconstitutional. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 512-13 (1996).

The analysis is not much different as for the free exercise of religion. "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (citation omitted). It makes no difference that the law imposes no harsh penalty (such as imprisonment) on the exercise of religion. *Id.* at 403-04.

The court below held that precisely the same facts, when stated in the Privileges and Immunities Clause context, pose no serious constitutional question. What explains this difference?

As petitioner explained above, a State's failure to allow residents and nonresidents alike to enjoy fundamental privileges with substantial equality is presumptively unconstitutional, no matter how trivial the burden might seem to the victim individually. That is so because the purpose of the Privileges and Immunities Clause is not to protect the individual from discrimination on account of residency. It is, rather, to protect the *Union* by upholding and enforcing the norm of comity between the States. That certainly

distinguishes claims under the Privileges and Immunities Clause from those under the Speech and Free Exercise Clauses. But that distinction should cut in petitioner's favor. Because the triviality of the burden to the individual does not matter, so long as her access to a fundamental privilege of citizenship has been restricted because of her state residency, her ability to suffer the penalty imposed should not matter. The mere fact that the courthouse doors have been closed to her until she surrenders her assets in ways that residents need not, for no reason other than her nonresidency, is an affront to interstate comity and thus the Constitution.

## IV. This Case Is an Excellent Vehicle for Resolving the Issue

The issues in this appeal arise often but are rarely litigated. The amount of money at issue in cases such as this is generally inadequate to justify the years of litigation and associated expenses. (Indeed, petitioner here disputes a $500 obligation. Seeking to fight that obligation, she has (though counsel) spent many times that amount in litigation. She can do so only because her attorneys are litigating on contingency and share her desire to right this common wrong.) This case presents the Court with a rare opportunity to address state statutes that impose special burdens on nonresident plaintiffs.

For four reasons, it also presents an ideal vehicle to do so:

1. The petitioner's underlying claim against the respondents is virtually ironclad. She was injured as a passenger sitting in a legally stopped vehicle, waiting at a red light, when Respondent Durbin drove a vehicle into the rear of hers. If her case again sees the light of day, it is all but certain to lead to a judgment against the respondents. The petitioner will therefore never owe costs. Requiring her to post $500 to cover a costs judgment is unjust given the underlying facts and given petitioner's instance that she cannot make the payment.

2. The procedural history is about as uncomplicated as procedural history gets. The trial court stayed this case in the midst of discovery because of N.Y. CPLR Article 85. It has remained stayed ever since. Petitioner appealed and lost. She then received leave to appeal to the Court of Appeals, did so, and again lost. Now she petitions this Court for relief.

3. The facts pertinent to the Privileges and Immunities question are straightforward and not disputed. Everyone agrees that Article 85 discriminates against nonresidents because of their nonresidency. Everyone agrees that petitioner is not a resident of New York. Everyone agrees that petitioner's case has been indefinitely stayed and will likely be dismissed (unless this Court intervenes) *because* she is a nonresident who has not deposited $500 of her own money with New York. Everyone agrees that petitioner claims an inability to pay the $500 security but has elected not to go through the

humiliating process of having herself declared a "poor person" by a New York court (itself a burden on access to courts cognizable under the Privileges and Immunities Clause). *See* N.Y. CPLR § 8501. And everyone agrees that the constitutional question was adequately raised and has been preserved. All that is left is the constitutional question itself.

4. Petitioner has a very strong chance of prevailing on the merits. As she explained above, there can be no serious doubt, given this Court's jurisprudence, that the discrimination she has suffered constitutes a cognizable burden under the Privileges and Immunities Clause. The question that remains is whether it survives intermediate scrutiny. It does not.

Under the prevailing test, courts ask whether "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284. "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means." *Id.* The burden of proof on both points rests exclusively with the State. *Lunding*, 522 U.S. at 298. It will thus be New York's obligation to show 1) a substantial problem *actually* motivated its discrimination against nonresidents (no justification invented after the fact will do, *see Piper*, 470 U.S. at 284-85 & nn. 17, 19; *Friedman*, 487 U.S. at 67-70), 2) the discrimination is substantially related to solving that problem,

and 3) other feasible less restrictive methods of solving that problem were unavailable. New York cannot prevail on any one of those points.

*First*, New York has never articulated a substantial problem that needed a solution. The respondents, the trial court, and the intermediate appellate court all hypothesized on what the problem might have been, although they found no agreement among themselves. (*See*, *e.g.*, Pet. App. 28-29, 36). As noted, after-the-fact speculation does not help in any event. In dicta, the Court of Appeals asserts:

> The legislative history for CPLR article 85 indicates that mandatory security for costs was...intended "to obviate the danger of the property being placed beyond reach of a court's process by a plaintiff, who has been ordered to pay the costs of litigation[.]"

(Pet. App. 11). But the "legislative history" it references, reproduced in Appendix E, does not support that contention. That quote was written in 1959, long after New York began discriminating against nonresidents, and appears in the "Third Preliminary Report of the Advisory Committee on Practice and Procedure" by a committee created to facilitate New York's adoption of a new civil procedure code. It appears not in any authoritative gloss on the statutes but in the editor's notes explaining why the Advisory Committee made the decisions it did. No evidence suggests that

the state legislature, in whole or in part, adopted or even *read* anything written in those notes.

Moreover, the context in which that quote appears is significant. It is reproduced here, in context (internal citations omitted):

> The requirement that persons imprisoned under execution for a crime and their assignees must give security for costs, found in subdivisions 3 and 4 of present section 1522, has been omitted. A prisoner in a state prison for a term less than for life may not bring an action in the courts.... However, a prisoner is not immune from process and suit by virtue of his imprisonment when he is a cost debtor. Since the purpose of requiring security for costs is to obviate the danger of the property being placed beyond reach of a court's process by a plaintiff, who has been ordered to pay the costs of litigation, there seems to be no reason why an imprisoned person should be required, solely on the ground of his imprisonment, to give security for costs.

(Pet. App. 41-42). The language on which the Court of Appeals relies was not proved or decided but merely assumed by the Advisory Committee and stated in passing only to support a remarkably different proposition. The court below hinged an awful lot on very little. This quote is plainly inadequate to meet New York's burden.

*Second*, Article 85 is utterly irrational. There is no reason it should apply only to plaintiffs and not to defendants and intervenors; only to nonresidents and not also to residents. There is no justification for the mandatory minimums of $250 and $500, which are arbitrary and inadequate in nearly all cases.[9] Nor is there any justification for the statutory differentiation between cases within New York City and those without (costs do not vary by county). There is no reason the requirement should apply only to costs and not also attorney's fees or economic damages. There is no reason a daily commuter from New Jersey or Connecticut into New York City who has assets and business in the City ought to be subject to this costs requirement. And there is no reason to believe that it is harder for a resident of the City to enforce her judgment against a plaintiff in Newark, New Jersey (less than 15 miles away) than against a plaintiff in Watertown, New York (over 300 miles away and about 25 miles from the Canadian border).

Being that Article 85 is inherently illogical and simultaneously overbroad and underinclusive, it cannot be substantially related to solving whatever problem it was supposed to solve. *See Bentley*, 65 V.I at 309, 311.

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[9] Costs are fixed by statute and typically total a lot more than $500. N.Y. CPLR §§ 8201-03.

*Third*, there are many far less restrictive means available to New York to aid resident defendants collect their judgments against nonresident plaintiffs. Most obviously, New York could have required *all parties* (regardless of state residency and procedural distinctions) to post a security for costs. Or it could have mandated some initial brief inquiry into the apparent merits of a case, giving trial judges discretion to impose security requirements following that initial assessment. There is no evidence that New York considered those or any other possibilities. Its protectionist objectives got in the way.

Petitioner has a high likelihood of winning on the intermediate scrutiny analysis, just as she has a high likelihood of winning on her underlying claims. Her case deserves to go forward.

## CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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