

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD NATOFSKY

Petitioner,

v.

THE CITY OF NEW YORK,

Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE A
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Richard Natofsky is an individual.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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

Applicant-Petitioner, Richard Natofsky, respectfully requests an extension of time to file a petition for writ of certiorari. Sup. Ct. R. 13.5. The earliest deadline for Applicant-Petitioner to file his petition is Monday, October 7, 2019, which is ninety days from Tuesday, July 09, 2019, the date the Second Circuit denied the petition for rehearing en banc. For good cause set forth herein, Applicant-Petitioner requests this deadline be extended by sixty days so that the new deadline would be Friday, December 06, 2019.

BACKGROUND

This case arises from allegations of disability discrimination, under the Rehabilitation Act of 1973 (the "Rehabilitation Act"), by the City of New York and other city officials ("Respondents"). *Natofsky v. City of New York*, 921 F.3d 337, 346 (2nd Cir. 2019), rehearing en banc denied July 7, 2019; *see also Natofsky v. City of New York*, No. 14 CIV. 5498 (NRB), 2017 WL 3670037, at *12 (S.D.N.Y. Aug. 8, 2017). Applicant-Petitioner ("Natofsky") alleged Respondents discriminated against him on the basis of his disability, a severe hearing impairment, when Respondents gave him negative performance reviews and ultimately demoted him with a substantial pay cut. The negative performance reviews were based on Natofsky's failure to quickly respond to emails, which Natofsky had previously informed Respondent Shaheen Ulon was due to his disability. Natofsky alleged he was unable to respond to emails during meetings because his severe hearing impairment required him to focus on

what the speaker was saying. Even with his hearing devices, Natofsky needed to focus on the speaker's words—and sometimes lips—to understand what was being said. This caused a delay in his email responses and eventually led to his negative performance reviews, demotion, and pay cut.

The district court granted Respondents' motion for summary judgment on all claims under the Rehabilitation Act. Addressing Natofsky's employment discrimination claim, the District Court held that Natofsky failed to show that Respondent Ulon's negative performance reviews were "motivated solely by disability discrimination [,]" and that he was demoted for a discriminatory reason. *Natofsky*, 2017 WL 3670037 at *11-13. On appeal, the Second Circuit addressed the causation standard for employment discrimination claims under the Rehabilitation Act. The Second Circuit held the Rehabilitation Act incorporated the Americans with Disabilities' ("ADA") causation standard for claims of employment discrimination on the basis of disability. *Natofsky*, 921 F.3d at 346. Additionally, the Second Circuit held the ADA's "on the basis of disability" language was identical in meaning to Title VII's "because of" language. *Id.* at 349. Thus, the Second Circuit concluded the but-for standard—not the mixed motive standard—applied to the ADA and the Rehabilitation Act for claims of employment discrimination. Natofsky's Motion for Rehearing En Banc was denied by the Court.

OPINION BELOW

Pursuant to Supreme Court Rule 13.5, a copy of the District Court opinion is attached as Appendix A; a copy of the April 18, 2019 Second Circuit majority and

dissenting opinions are reproduced at Appendix B, and the July 09, 2019 Second Circuit denial for a rehearing en banc is reproduced at Appendix C.

REASONS EXTENSION IS JUSTIFIED

The specific reasons why an extension of time is justified are as follows:

1. The Penn State Law Civil Rights Appellate Clinic has only recently agreed to serve as co-counsel for Applicant-Petitioner in this matter; and this matter is unusual based upon its complexity and its record.
2. Given the record in this case and the fact that the Penn State Civil Rights Appellate Clinic has only recently agreed to serve as co-counsel, additional time is necessary and warranted to allow new counsel to fully review the record, analyze the significance of the issues presented, and prepare a focused and concise petition for certiorari for this Court's review.
3. The ADA, as incorporated by the Rehabilitation Act, is currently engulfed in confusion regarding the application of the but-for and mixed motive causation standards for cases of employment discrimination on the basis of disability. This confusion has caused the federal courts to have conflicting standards of causation in similar cases of employment discrimination. On August 20, 2019, the Ninth Circuit in *Murray v. Mayo Clinic* overruled its precedent in *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005), and held that the motivating factor causation standard is no longer applicable in

claims of employment discrimination under the ADA. *Murray v. Mayo Clinic*, No. 17-16803, 2019 WL 3926945, at *6 (9th Cir. Aug. 20, 2019).

Because of the Ninth Circuit's recent decision in *Murray*, additional time is warranted to better understand the overlap of issues between the Ninth Circuit's decision in *Murray* and the issues presented in Natofsky's case.

4. The Court has keen interest in clarifying issues of causation under federal employment discrimination laws. Just this year, this Court has granted certiorari in two cases, *Babb v. Wilkie* and *Comcast Corp. v. Nat'l Ass'n of African Am. Owned Media*, both cases involving similar issues of causation. *See Babb v. Wilkie*, 139 S. Ct. 2775 (2019) (granting certiorari to clarify the proper causation standard under the Age Discrimination in Employment Act of 1969); *see also Comcast Corp. v. Nat'l Ass'n of African Am. Owned Media*, 139 S. Ct. 2693 (2019) which is set for argument on Nov. 13, 2019 (granting certiorari to clarify the proper causation standard under 42 U.S.C. § 1981).
5. The additional time will also permit counsel to thoroughly analyze the briefs in *Babb* and *Comcast* and to hear the Court's concerns regarding the appropriate causation standard in these cases which address a similar issue as the one that would be presented to the Court in this case.
6. No prejudice would result from this extension.

CONCLUSION

For the foregoing reasons and good cause shown, Applicant-Petitioner respectfully requests Your Honor grant this application to extend the time to file a petition for writ of certiorari to Friday, December 06, 2019.

Respectfully submitted,

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Dated: September 25, 2019