

# New York Supreme Court

## APPELLATE DIVISION—FIRST DEPARTMENT

LUKASZ GOTTWALD p/k/a DR. LUKE,  
KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

CASE NO.  
2021-03036

—against—

*Plaintiffs-Appellants,*

KESHA ROSE SEBERT p/k/a KESHA,

—and—

*Defendant-Respondent,*

PEBE SEBERT, VECTOR MANAGEMENT, LLC AND JACK ROVNER,

*Defendants.*

*(Caption continued on inside cover)*

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**BRIEF FOR AMICI CURIAE ADVANCE PUBLICATIONS, INC.,  
ASSOCIATED NEWSPAPERS LTD., THE ASSOCIATED PRESS,  
BUZZFEED, INC., CABLE NEWS NETWORK, INC., THE DAILY BEAST  
COMPANY LLC, DAILY NEWS, LP, DOW JONES & COMPANY, INC.,  
MACMILLAN PUBLISHING GROUP, LLC, THE MEDIA LAW  
RESOURCE CENTER, INC., NATIONAL PRESS PHOTOGRAPHERS  
ASSOCIATION, NEWSDAY LLC, NBCUNIVERSAL MEDIA, LLC,  
THE NEW YORK TIMES COMPANY, NYP HOLDINGS, INC.,  
NEWS 12 NETWORKS LLC, PENGUIN RANDOM HOUSE LLC,  
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REUTERS  
NEWS & MEDIA, INC., VICE MEDIA GROUP, VOX MEDIA, LLC, AND  
WNET IN SUPPORT OF RESPONDENT'S MOTION FOR  
REARGUMENT OR LEAVE TO APPEAL**

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KESHA ROSE SEBERT p/k/a KESHA,

*Counterclaim Plaintiff-Respondent,*

—against—

LUKASZ GOTTWALD p/k/a DR. LUKE,  
KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

*Counterclaim Defendants-Appellants,*

—and—

DOES 1-25, inclusive,

*Counterclaim Defendants.*

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## STATEMENT OF INTEREST OF AMICI CURIAE

*Amici* urge this Court to grant the motion filed by Defendant-Respondent Kesha Rose Sebert (“Sebert”) seeking reargument or, in the alternative, leave to appeal the Court’s March 10, 2022 Memorandum and Order (the “Decision”) to the New York Court of Appeals. Because this case raises important “questions of law . . . which . . . ought to be reviewed,” CPLR 5713, leave to appeal is particularly appropriate.

*Amici* are prominent media companies, press organizations, and publishers that promulgate news nationally and internationally, including within New York State.<sup>1</sup> Included among the *Amici* are news organization that have their main offices in New York City or its immediate suburbs, including *The New York Times*, *The Wall Street Journal*, *The Daily News*, *The New York Post*, News 12 Networks, and the publishers of *The New Yorker* and *New York Magazine*. This case presents issues of substantial importance to *Amici* because they are often the target of “Strategic Lawsuits Against Public Participation”—or “SLAPP” suits—and, therefore, have already been frequent beneficiaries of New York’s revised anti-SLAPP statute. *See* CPLR 3211(g); New York Civil Rights Law §§ 70-a, 76-a. The Decision—which held that the anti-SLAPP statute does not apply retroactively—both calls into question rulings already rendered in libel cases against *Amici* and creates uncertainty

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<sup>1</sup> Annexed as Appendix A is a list describing each entity that has joined this *Amici* brief.

as to the status of other cases currently pending against them. Further, because the other Appellate Departments have not yet affirmatively opined on the applicability of the anti-SLAPP statute to matters pending on the statute's effective date, it is possible that media organizations, including *Amici*, will face inconsistent standards based purely on the location where the cases against them were filed. As these cases implicate media organizations' First Amendment freedoms, such uncertainty is untenable.

Accordingly, as set forth in greater detail below, *Amici* urge this Court to grant Sebert's motion for leave to appeal the Decision so that the New York Court of Appeals can promptly resolve this question and issue a decision that binds *all* New York courts. For the reasons explained in Sebert's motion, *Amici* believe that this decision should hold that the anti-SLAPP statute applies to cases pending on the statute's effective date.<sup>2</sup>

### **STATEMENT OF FACTS AND PROCEEDINGS**

New York courts have long recognized that frivolous defamation suits exact an intolerable toll on the press. *See, e.g., Immuno A.G. v. Moor-Jakowski*, 145 A.D.2d 114, 126-27 (1st Dep't 1989), *aff'd*, 74 N.Y.2d 548 (1989). Among other things, these lawsuits force journalists and media organizations to shift their

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<sup>2</sup> For this reason, *Amici* also support granting reargument of the Court's Decision and, upon reargument, entering a substitute Decision and Order that affirms the decision of the New York Supreme Court, which held that the anti-SLAPP statute applies retroactively.



attention away from reporting the news and to, instead, focus on defending their work in state and federal courts.

In an attempt to curtail infringements of First Amendment rights, in 1992, the New York Legislature enacted one of the nation's first anti-SLAPP laws. *See* 1992 N.Y. Sess. Laws ch. 767 (A299) (McKinney). The statute was intended to “provide the utmost protection for the free exercise of speech, petition, and association rights.” L.1992, Ch. 767 § 1. Despite this intention, the Legislature's goals were foiled by the statute's definition of “public participation” to include only applications for government entitlements and by decisions from New York courts, which interpreted the statute narrowly.

In November 2020, in order to better accord the statute with its stated purpose, the Legislature enacted amendments that expanded the definition of public participation to include “any communication in a place open to the public or a public forum in connection with an issue of public interest” and “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest[.]” N.Y. Civil Rights Law § 76-a(1)-(2). In addition, the revised statute provided that in order to recover damages, plaintiffs must “establish[] by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false”—a standard known as “actual malice.” *Id.* at § 76-a(2). The

amendments also provided additional rights to SLAPP defendants, including requiring courts to consider their affidavits on motions to dismiss, prioritizing hearing their motions, and awarding them attorneys’ fees and other damages in actions that were “commenced or continued without a substantial basis in fact and law.” *See* CPLR 3211(g)(2); N.Y. Civil Rights Law § 70-a.

Since the statute’s enactment, media organizations have operated under the understanding—reinforced by the New York Legislature, state courts, and federal courts—that the revisions to the anti-SLAPP statute applied to cases pending at the time the statute was enacted. Notably, while earlier versions of the statute indicated that it was to apply prospectively “to actions commenced on or after” the statute’s effective date, *see* A5991, § 3 (2019-20) (as introduced), the final statute removed this prospective language and provided only that it was to take effect “immediately,” *see* L. 2020, Ch. 250, § 4. And New York Civil Rights Law § 70-a provides that defendants subject to actions “commenced *or continued* without a substantial basis in fact and law” are entitled to attorneys’ fees and other damages. In addition, Senator Brad Hoylman, the statute’s sponsor, explained in his Memorandum in Support of the Legislation: “[A]s drafted, and as narrowly interpreted by the courts, the application of Section 76-a has failed to accomplish” the objective of “provid[ing] the utmost protection for the free exercise of speech.” “By revising the definition of an ‘action involving public petition and participation,’ this

amendment to Section 76-a will better advance the purposes that the legislature originally identified in enacting New York’s anti-SLAPP law.” Sponsor Mem. of Sen. Hoylman (July 22, 2020), <https://www.nysenate.gov/legislation/bills/2019/s52>. On no less than *fifteen* occasions, New York state and federal courts held that the text of the statute combined with this legislative history clearly established that the statute was intended to retroactively apply to pending matters and, accordingly, applied the statute to such cases.<sup>3</sup> *Amici* respectfully submit that those decisions reached the correct conclusion on retroactivity.

On March 10, 2022, this Court issued the Decision, which held that the anti-SLAPP statute does not apply retroactively to cases pending on the date the statute was enacted. *See Gottwald v. Sebert*, 2022 WL 709757, at \*1 (1st Dep’t March 10, 2022). Directly contradicting the numerous trial court decisions, this Court explained, “[t]he fact that the amended statute is remedial, and that the legislature

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<sup>3</sup> *See Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21 (S.D.N.Y. 2020); *Coleman v. Grand*, 523 F. Supp. 3d 244 (E.D.N.Y. 2021); *Sackler v. Am. Broad. Cos.*, 71 Misc. 3d 693 (Sup. Ct. N.Y. Cty. 2021); *Veritas v. N.Y. Times Co.*, 2021 WL 2395290 (Sup. Ct. Westchester Cty. Mar. 18, 2021); *Kurland & Assocs., P.C. v. Glassdoor, Inc.*, 2021 WL 1135187 (Sup. Ct. N.Y. Cty. Mar. 22, 2021); *Sweigert v. Goodman*, 2021 WL 1578097 (S.D.N.Y. Apr. 22, 2021); *Reus v. ETC Hous. Corp.*, 72 Misc. 3d 479 (Sup. Ct. Clinton Cty. 2021); *Massa Constr., Inc. v. Meany*, No. 126837/2020 (Sup. Ct. Ontario Cty. May 13, 2021) Dkt. 92 at 2; *Reilly v. Crane Tech Sols., LLC*, 2021 WL 2580281 (Sup. Ct. N.Y. Cty. June 23, 2021); *Cisneros v. Cook*, 2021 WL 2889924 (Sup. Ct. N.Y. Cty. July 7, 2021); *Griffith v. Daily Beast*, 2021 WL 2940950 (Sup. Ct. N.Y. Cty. July 13, 2021); *Cent. for Med. Progress v. Planned Parenthood Fed’n of Am.*, 551 F. Supp. 3d 320 (S.D.N.Y. 2021); *Lindberg v. Dow Jones & Co.*, 2021 WL 3605621 (S.D.N.Y. Aug. 11, 2021); *Goldman v. Reddington*, 2021 WL 4099462 (E.D.N.Y. Sept. 9, 2021); *Harris v. Am. Acct. Ass’n*, 2021 WL 5505515 (N.D.N.Y. Nov. 24, 2021); *Kesner v. Buhl*, 2022 WL 718840 (S.D.N.Y. Mar. 10, 2022); *see also Shahidullah v. Shankar*, 2022 WL 286935 (D. Md. Jan. 31, 2022) (applying New York’s anti-SLAPP statute retroactively).

provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments.”

*Id.*

### **ARGUMENT**

Under the New York Constitution, leave to appeal to the New York Court of Appeals “shall be allowed when required in the interest of substantial justice.” *See* N.Y. Const. Article VI, § 3(b)(6). As the Court of Appeals’ Rules of Practice make clear, leave to appeal is warranted when “the issues are novel or of public importance, present a conflict with prior decisions of the[] Court, or involve a conflict among the departments of the Appellate Division.” 22 NYCRR § 500.22(b)(4). In addition, New York courts have historically recognized that leave to appeal is appropriate when a decision has “settled a principle of law affecting the decision of numerous other cases.” *Lynch v. Sauer*, 16 Misc. 362, 362 (Sup. Ct. App. Term 1896); *Handy v. Butler*, 183 A.D. 359, 361 (2d Dep’t 1918) (holding that leave to appeal is warranted if “the case (1) has settled a principle that may affect the decision in numerous other cases, or (2) conflicts directly with one of this court or of the Court of Appeals, or (3) construes or interprets a public statute, or (4) affects large public interests or is of public importance, or (5) presents a question that is new so far as the decisions of this state are concerned.”).

This case easily meets these standards. The ripple effects of this Court’s

Decision extend far beyond the parties in this action. For over a year, media organizations have benefitted from the application of the anti-SLAPP statute in pending cases, expending time and resources briefing the issue and, in some instances, even having cases against them dismissed with prejudice under the statute's standards. The Decision pulls the rug out from under the media, calling into question cases that have long been resolved and leaving parties confused as to how they should proceed with their pending cases. Complicating things even further, federal courts sitting in diversity are now faced with conflicting guidance on how to apply the anti-SLAPP statute.

*Amici* thus ask the Court to grant Sebert leave to appeal the Decision to the New York Court of Appeals. For the reasons set forth in greater detail in Sebert's motion, *Amici* firmly believe that the anti-SLAPP statute applies to cases pending on the date of the statute's enactment. Regardless, however, leave to appeal should be granted so that the Court of Appeals can issue a decision that creates uniformity among New York courts and ensures that all parties to defamation lawsuits are proceeding efficiently under the appropriate standards.

## **I. THE DECISION HAS PROFOUND EFFECTS ON MEDIA ORGANIZATIONS**

While *Gottwald* itself involves plaintiffs suing an individual defendant based on allegedly defamatory statements shared with third-parties, SLAPP suits often involve media defendants, like *Amici*, that have been sued by the dissatisfied subjects

of their publications. *See* N.Y. Civil Rights Law § 76-a (defining an “action involving public petition and participation” to include “communication in . . . . a public forum . . . in connection with an issue of public concern” or “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest”).

Even when SLAPP suits are not ultimately successful, they provide a powerful weapon to plaintiffs by forcing media organizations to focus their resources on litigation rather than on reporting the news. As one article in the American Bar Association’s “Communications Lawyer” put it:

Even when SLAPP plaintiffs cannot prevail on the merits, they can punish their targets with time-consuming and costly litigation, thereby deterring similar speech in the future. Indeed, SLAPPs are often brought by the wealthy or influential against the less-well-resourced or powerful. Would-be speakers are forced into a perverse cost-benefit analysis, weighing the value of participating in public debate against the burden of defending against a lawsuit. SLAPPs also have a deleterious effect on the ability of journalists to deliver the news, with the specter of frivolous lawsuits hanging over their reporting on the rich and powerful.<sup>4</sup>

*See also Ernst v. Carrigan*, 814 F.3d 116, 117 (2d Cir. 2016) (SLAPPS are lawsuits “brought primarily to chill the valid exercise of a defendant’s right to free speech.”).

Even prior to the enactment of the anti-SLAPP statute, New York courts

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<sup>4</sup> Shannon Jankowski and Charles Hogle, “SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws,” American Bar Association Communications Lawyer (Mar. 16, 2022), available at: [SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws \(americanbar.org\)](https://www.americanbar.org/publications/communications-lawyer/2022/mar-16-2022/slapp-ing-back-recent-legal-challenges-to-the-application-of-state-anti-slapp-laws/).

recognized the toll that vexatious defamation cases take on media organizations. In *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980), the New York Court of Appeals warned that, “[t]he threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.” See also *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 137 (1992) (“[C]ourts since *Sullivan* have been vigilant about the potential ‘chilling effect’ the threat of defamation actions can have on public debate.”). Accordingly, New York appellate courts have instructed that such suits call out for early dismissal whenever possible. See *Immuno*, 145 A.D.2d at 128 (“To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such instruments of harassment and coercion inimical to the exercise of First Amendment rights.”); *Freeze Right Refrig. & Air Cond. Servs., Inc. v. City of N.Y.*, 101 A.D.2d 175, 181 (1st Dep’t 1984) (“[C]ourts should not be oblivious to the crippling financial burden which the defense of libel claims entails, even for major news organizations, and the consequent chilling effect this burden can have on the dissemination of news.”).

Expeditious resolution of defamation actions has only become more important in the current political climate, where defamation suits brought by powerful

individuals and designed to chill speech have become increasingly prevalent.<sup>5</sup> Thus, the revisions to the anti-SLAPP statute—by broadening the definition of “public participation,” requiring that plaintiffs plead and prove that defendants acted with “actual malice,” and ordering mandatory attorneys’ fees for prevailing defendants, among other things—help to ensure that defamation cases against the media are resolved promptly, in accordance with the principles long-enumerated by New York courts.

In short, by denying the media the ability to invoke the protections of the amended anti-SLAPP statute in pending pre-amendment cases, the Decision unquestionably affects weighty public interests and is of profound public importance.

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<sup>5</sup> See, e.g., Gillian Brassil, “Judges dismiss Devin Nunes’ defamation lawsuits against Republican strategist,” THE FRESNO BEE (Sept. 16, 2021), available at: [Devin Nunes lawsuit against GOP strategist dismissed in VA | The Fresno Bee](#) (explaining that Congressman “Nunes, R-Tulare, has filed 10 lawsuits since 2019 against news organizations, people and entities whom he claims have defamed him. Almost all of the defendants in these suits have been dismissed or dropped.”); Ted Johnson, “Donald Trump’s Campaign Sues Wisconsin TV Station for Continuing to Air Super PAC Ad Attacking His Coronavirus Response, DEADLINE (Apr. 13, 2020), available at: [Donald Trump’s Campaign Sues Local TV Station Over Super PAC’s Coronavirus Ad – Deadline](#) (“The lawsuit was filed after the campaign fired off cease and desist letters to stations across the country threatening them with legal action if they continue airing the ad. Trump’s campaign also has warned not just of lawsuits but that they could ‘put your station’s license in jeopardy.’”); Marc Tracy, “Trump Campaign Sues the Washington Post for libel,” THE NEW YORK TIMES (Mar. 3, 2020), available at: [Trump Campaign Sues The Washington Post for Libel - The New York Times \(nytimes.com\)](#) (“President Trump’s re-election campaign sued The Washington Post for libel on Tuesday, citing two opinion articles from last year that linked Mr. Trump to Russian election interference. The action came a week after Mr. Trump’s campaign filed a similar lawsuit against The New York Times. Mr. Trump’s attacks on news organizations have been a defining mark of his presidency . . .”).



## II. THE DECISION CREATES UNCERTAINTY IN THE LAW AND POSES THE POSSIBILITY OF INCONSISTENT DECISIONS

The Decision—in holding that the anti-SLAPP statute does not apply to cases pending at the time the statute’s revisions went into effect—creates immense uncertainty for media organizations by casting doubt on decisions previously issued by state trial courts, potentially rendering moot the briefing undertaken by parties in pending cases, and leaving federal courts with unclear guidance on how to apply New York state law when sitting in diversity.

First, numerous cases that were pending at the time the anti-SLAPP revisions went into effect have already been dismissed under the anti-SLAPP statute. For example, in *Sackler*, 71 Misc. 3d 693, the New York Supreme Court, New York County dismissed a case brought by a plaintiff named David Sackler, who alleged that defendants, in reporting on Purdue Pharma’s involvement in the opioid epidemic, mistakenly used a photograph of him rather than the David Sackler of Purdue Pharma. Although the case was filed prior to the anti-SLAPP statute’s revision, the court held that the statute nonetheless applied retroactively to the case in accordance with “the remedial and beneficial purpose of the statute,” *id.* at 698, and the plaintiff failed to establish by clear and convincing evidence that the defendant published the photograph with “actual malice.” *Id.* at 700. On March 29, 2022—over one year after *Sackler* was dismissed—the plaintiff filed a motion for leave to renew, arguing that “[g]iven the First Department’s decision in *Gottwald*

... this Court’s decision applying the revised anti-SLAPP statutes retroactively cannot stand.” *See* Index No. 155513/2019, Dkt. No. 69, ¶ 15. The court has not yet decided whether to re-open the case.

So too, in *Reus*, 72 Misc. 3d 479, a mere two-months after the *Sackler* dismissal, the New York Supreme Court, Clinton County, dismissed a defamation case stemming from a report on landlord-tenant lawsuits. Just like in *Sackler*, the court held that even though the case was filed prior to the anti-SLAPP statute’s revision, the statute still applied. *See id.* at 485 n.1. And, as in *Sackler*, the court held that there was “no evidence that [d]efendant acted with actual malice” in publishing the subject article. *Id.* at 487. But, in contrast to this Court’s Decision in *Gottwald*, when the *Reus* dismissal was appealed to the Third Department, the appellate court affirmed the lower court’s holding.<sup>6</sup>

Thus, it now appears that media organizations sued in the Third Department prior to the anti-SLAPP statute’s effective date *can* take advantage of the statute’s protections, while media organizations sued in the First Department *cannot*. But providing different rights to media organizations based on nothing more than the location within New York where the plaintiff filed suit is incredibly prejudicial. This

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<sup>6</sup> The Third Department did not directly address the anti-SLAPP statute. It did note, however, that the court “examined plaintiffs’ remaining contentions”—which necessarily include arguments about the anti-SLAPP statute—but found “them to lack merit.” *Reus v. ETC Housing Corp.*, 2022 WL 617904, at \*4 (3d Dep’t Mar. 3, 2022).

inconsistency can be easily resolved by a decision from the New York Court of Appeals.

In addition, the uncertainty created by the Decision is not limited to previously decided cases; it affects pending cases as well. One particularly noteworthy example is *Griffith v. Daily Beast* (Case No. 100114/2020, Sup. Ct. N.Y. Cty.), a defamation case that was filed in January 2020. There, the defendants initially moved to dismiss, arguing that the plaintiff—who asserted that she was a private figure—failed to plead that the defendants published the challenged article with “gross irresponsibility” (*i.e.* the standard of fault under New York law that applied even in private figure libel suits when the challenged publication reported on a matter of “public concern”). *Id.* Dkt. 23. While that dismissal motion was pending, the legislature enacted the revisions to the anti-SLAPP statute. The defendants alerted the court to these revisions and argued that the statute’s “actual malice” standard must apply to the case. The court, without reviewing the defendants’ letter, issued an order denying defendants’ motion to dismiss under the “gross irresponsibility” standard. *Id.* Dkt. 39. Defendants immediately filed a motion to renew under the anti-SLAPP statute and a notice of appeal from the court’s denial of dismissal under the “gross irresponsibility” standard. *Id.* Dkts. 41, 42. In response, the trial court held that the anti-SLAPP statute *did* apply to the case, and ordered the defendants to submit a renewed motion to dismiss under the “actual malice” standard. *Id.* Dkt. 75 at 5.

While that motion remains pending, it appears that it may now be mooted by the Decision.

This leaves the *Griffith* defendants in a difficult situation. Because the court indicated that the “gross irresponsibility” standard was no longer applicable to the case, the defendants spent time and resources drafting a new motion to dismiss under the “actual malice” standard of the anti-SLAPP statute rather than perfecting their appeal from the trial court’s order. If the Decision stands, and if the *Griffith* court does not reinstate its earlier order, the defendants will be forced to enter into discovery on both the issue of “gross irresponsibility” and the plaintiff’s status as a public figure and will have lost their opportunity to promptly prosecute an interlocutory appeal of the court’s original decision. If, at some later point in time, the Court of Appeals *does* determine that the anti-SLAPP statute applies to pending cases, that discovery will be irrelevant, meaning both parties will have incurred even further unnecessary time and fees. Such litigation expense is *precisely* the harm that the anti-SLAPP statute was designed to protect against by facilitating early dismissal of defamation actions.

Thus, as *Griffith* demonstrates, it is imperative that the Court of Appeals be given the opportunity to determine the applicability of the anti-SLAPP statute as early as possible to ensure that all parties in defamation actions will be proceeding with their cases under the correct legal standards.

Finally, the Decision leaves federal courts with unclear guidance regarding the application of the anti-SLAPP statute. “A federal court sitting in diversity must follow the law as enunciated by the highest court of the state, here, the New York Court of Appeals.” *Williams v. J.P. Morgan & Co.*, 199 F. Supp. 2d 189, 191 (S.D.N.Y. 2002). Where the New York Court of Appeals has not ruled on an issue, however, federal courts are “bound to apply the law as interpreted by a state’s intermediate appellate courts unless there is persuasive evidence that the state’s highest court would reach a different conclusion.” *V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010); *see also, e.g., Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134 (2d Cir. 1999) (Federal courts must “apply the law as interpreted by New York’s intermediate appellate courts . . . unless we find persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion.”).

Here, without a ruling from the New York Court of Appeals, federal courts may apply the anti-SLAPP statute inconsistently. While the First Department held in *Gottwald* that the statute does not apply to cases pending at the time of its enactment, and while some federal courts may choose to follow the First Department’s ruling, as noted above, numerous other courts reached the opposite conclusion, and the Third Department in *Reus* affirmed dismissal of a pre-amendment case where the anti-SLAPP statute was applied. It is, therefore, also

possible that some federal courts may find that this plethora of case law is “persuasive evidence” that the anti-SLAPP statute *should* apply to pending cases. A decision from the Court of Appeals would ensure that New York state and federal courts apply the anti-SLAPP statute uniformly.

### **III. *GOTTWALD* IS AN APPROPRIATE VEHICLE FOR THE COURT OF APPEALS TO DETERMINE WHETHER THE ANTI-SLAPP STATUTE APPLIES TO PENDING CASES**


In addition to being the first appellate court case to directly opine on the retroactivity of the anti-SLAPP statute, the procedural posture of *Gottwald* makes it a particularly appropriate vehicle for the Court of Appeals to determine whether the anti-SLAPP statute applies to pending cases. Specifically, on July 22, 2021, this Court certified to the Court of Appeals another question from *Gottwald*—whether Plaintiff, Lukasz Gottwald, is a “public figure.” *See* Case No. 2020-01908, Dkt. No. 69. That issue remains pending. *See* Case No. APL-2021-00131. Because both questions implicate the “actual malice” standard (*i.e.*, if Gottwald is a public figure he must prove that Sebert acted with “actual malice” when she made the challenged statements, and if the anti-SLAPP statute applies, Gottwald must likewise prove “actual malice”), it is only logical for the Court of Appeals to decide both issues.

### **CONCLUSION**

For the foregoing reasons, *Amici* urge this Court to grant Sebert’s motion and permit this issue to be appealed to the New York Court of Appeals.

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Respectfully Submitted,

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## **PRINTING SPECIFICATION STATEMENT**

This *Amici* Brief has been prepared in compliance with the Practice Rules of the Appellate Division, First Judicial Department, specifically Rule 1250.8 mandating the Form and Content of Briefs. 22 NYCRR § 1250.8. Consistent with this Rule, the Brief has been composed on a computer: it has been drafted in Times New Roman font, a proportionally-spaced typeface, with double line spacing. The body of the brief is sized in 14 pt. font and the footnotes in 12 pt. The Brief— inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of authorities, and certificate of compliance—is 4,188 words.



**APPENDIX A**  
DESCRIPTION OF *AMICI*

**Advance Publications, Inc.** Advance Publications, Inc. is a diversified privately-held company that operates and invests in a broad range of media, communications, and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

**Associated Newspapers Ltd.** Associated Newspapers Ltd. is a United-Kingdom based media company that owns and operates the news websites MailOnline and DailyMail.com. MailOnline is one of the world's largest English speaking newspaper websites, with over 24 million unique monthly visitors.

**The Associated Press ("AP").** AP is a news cooperative organized under the Not-for-Profit Corporation Law of New York. AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services, and Internet content providers. On any given day, AP's content can reach more than half of the world's population.

**Buzzfeed, Inc.** BuzzFeed, Inc. is home to the best of the Internet. Across pop culture, entertainment, shopping, food, and news, its brands drive conversation and inspire what audiences watch, read, buy, and obsess over next. Born on the Internet in 2006, BuzzFeed is committed to making it better: providing trusted, quality, brand-safe news and entertainment to hundreds of millions of people; making content on the Internet more inclusive, empathetic, and creative; and inspiring its audience to live better lives.

**Cable News Network, Inc. ("CNN").** CNN owns and operates numerous news platforms and services.

**The Daily Beast Company LLC.** The Daily Beast delivers award-winning original reporting and sharp opinion from big personalities in the arenas of politics, pop culture, world news, and more.

**Daily News, LP.** Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the oldest media companies in the country with its first issue dating back to 1919. The Daily News' website, NYDailyNews.com, receives approximately 30 million page views and 10 million unique visitors each month.

**Dow Jones & Company, Inc.** Dow Jones & Company, Inc. is the world's leading provider of news and business information. Through The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

**Macmillan Publishing Group, LLC.** Macmillan Publishing Group, LLC is a New York-based group of U.S. publishers that includes Celadon Books, Farrar, Straus and Giroux, Flatiron Books, Henry Holt & Company, Macmillan Audio, Macmillan Children's Publishing Group, St. Martin's Publishing Group and Tor Books. The U.S. publishing group is part of Macmillan Publishers, a global trade book publishing group with prominent imprints around the world. Macmillan publishes a broad range of award-winning books for children and adults in all categories and formats.

**The Media Law Resource Center, Inc. ("MLRC").** MLRC is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative, and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine, and book publishers, TV and radio broadcasters, and digital platforms, and over 200 law firms working in the media field. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

**National Press Photographers Association ("NPPA").** NPPA is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include television and still photographers, editors, students, and representatives of businesses that serve the visual journalism industry. As the "Voice of Visual Journalists" since its founding in 1946, the NPPA has vigorously promoted the constitutional right of journalists as well as freedom of press in all its forms, especially as it relates to visual journalism.

The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

**Newsday LLC.** Newsday LLC is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

**NBCUniversal Media, LLC.** NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production, and marketing of news, entertainment, and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network, Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports, and public affairs programming. NBC News produces the "Today Show," "NBC Nightly News with Lester Holt," "Dateline NBC," and "Meet the Press."

**The New York Times Company.** The New York Times company is the publisher of *The New York Times* and the website nytimes.com.

**NYP Holdings, Inc.** NYP Holdings, Inc. owns and publishes the New York Post, the oldest continuously published daily newspaper in the United States. It is published in print and online.

**News 12 Networks LLC.** News 12 Networks LLC is a group of regional cable news television channels in the New York metropolitan area. They provide news coverage 24 hours a day, focusing primarily on regions of the metro area outside of Manhattan, Queens, and Staten Island. News 12 Networks is owned and operated by Altice USA.

**Penguin Random House LLC.** Penguin Random House LLC publishes adult and children's fiction and nonfiction in print and digital trade book form in the U.S. The Penguin Random House global family of companies employ more than 10,000 people across almost 250 editorially and creatively independent imprints and publishing houses that collectively publish more than 15,000 new titles annually. Its publishing lists include more than 60 Nobel Prize laureates and hundreds of the world's most widely read authors, among whom are many investigative journalists covering domestic politics, the justice system, business, and international affairs.

**Reporters Committee for Freedom of the Press (the “Reporters Committee”).** The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

**Reuters News & Media, Inc. (“Reuters”).** Reuters, the news and media division of Thomson Reuters, is the world’s largest multimedia news provider, reaching billions of people worldwide every day. Reuters provides business, financial, national and international news to professionals via desktop terminals, the world's media organizations, industry events and directly to consumers.

**VICE Media Group.** VICE Media Group is the world’s preeminent youth media company. It is a news, content, and culture hub and a leading producer of award-winning video, reaching young people on all screens across an unrivaled global network.

**Vox Media, LLC.** Vox Media, LLC is the leading modern media company, reaching audiences everywhere they are. Known for editorial properties including Vox, SB Nation, New York Magazine, The Dodo, and NowThis, the company’s portfolio features the most relevant, respected, and engaging editorial properties and voices. The company is also home to award-winning storytelling businesses such as Vox Media Studios and the Vox Media Podcast Network, as well as innovative technologies that support the entire media industry, including the Concert advertising marketplace. Vox Media, LLC proves that quality can scale.

**WNET.** WNET is the parent company of THIRTEEN, WLIW21, NJ PBS, Interactive Engagement Group, and Creative News Group and the producer of approximately one-third of all primetime programming seen on PBS nationwide. Locally, WNET serves the New York City metropolitan area with unique on-air and online productions and innovative educational and cultural projects. Over seven million viewers tune in to THIRTEEN, WLIW21, and NJ PBS each month, and the stations’ websites reach another 480,000 people. The news programming produced by WNET affiliates includes NJ Spotlight News and MetroFocus.