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New York Supreme Court

Appellate Division—First Department

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

Plaintiffs-Appellants,

– against –

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Respondent,

– and –

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

Appellate Case No.: 2021-03036

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.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION OF DEFENDANT-RESPONDENT FOR REARGUMENT OR, IN THE ALTERNATIVE, LEAVE TO APPEAL

DANIEL M. PETROCELLI, ESQ.
(*of the Bar of the State of California*)
by Permission of the Court
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067
(310) 553-6700
dpetrocelli@omm.com

ANTON METLITSKY, ESQ.
LEAH GODESKY, ESQ.
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000
ametlitsky@omm.com
lgodesky@omm.com

Attorneys for Defendant/Counterclaim Plaintiff-Respondent Kesha Rose Sebert

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ARGUMENT

Before the panel decision, nearly two dozen state and federal courts—including a decision affirmed by the Third Department—had held that the 2020 amendments to the anti-SLAPP law applied retroactively to pending cases. The panel's contrary decision has unsettled New York law on a question of substantial public importance—precisely the circumstance in which leave to appeal to the Court of Appeals, if not reargument, is warranted.

Dr. Luke's response fails to grapple with any of this. He does not recognize that the panel's decision has substantially altered this Department's prior approach to analyzing the retroactivity of remedial statutes. Before this case, the First Department (like the others) recognized that the general presumption against retroactivity does not apply to remedial legislation. But under the panel's opinion, even remedial legislation (which the 2020 Act undoubtedly is, as the panel recognized) is subject to a presumption of non-retroactivity. That approach conflicts with the prior precedent of this Court and the very recent precedent of other Appellate Departments, which is enough by itself to warrant Court of Appeals review.

But that is not all. Dr. Luke also does not offer any plausible explanation for why the 2020 Act's drafting history—which demonstrates a very intentional removal of the bill's prospective-application-only provision—is not all but

dispositive of the Legislature's retroactive intent, when the precedent of this Court and the Court of Appeals makes clear that such drafting history is key evidence of legislative intent. Dr. Luke also does not explain why the statutory language—especially the directive that the statute applies to all cases "commenced or continued"—does not require retroactive application when he himself read that same language below as establishing retroactivity. And Dr. Luke simply has no answer for why a Legislature that intends a statute to take effect immediately and to provide a meaningful remedy to victims of harassing, speech-stifling retaliatory litigation would also intend for those same victims to continue to lack any such remedy if they happened to be sued before November 2020. The panel also overlooked these points, even though they are crucial under Court of Appeals precedent. Leave to appeal, if not reargument, is required to allow the Court of Appeals to clarify how its precedent applies in these circumstances.

Maybe most important, though, is Dr. Luke's complete failure to appreciate the tremendous importance of the question presented. For one thing, the panel's novel approach—applying a presumption of non-retroactivity to remedial statutes—will impact every retroactivity case involving remedial legislation going forward. The decision is thus self-evidently important, especially because it creates a conflict with other Appellate Departments and thus disuniformity in New York law.

And then there is the question of whether the 2020 Act itself is retroactive. Dr. Luke gamely argues that this question is unimportant. But that argument is hard to take seriously in light of the numerous parties who have taken the time and spent the resources to prepare amicus curiae submissions in support of Kesha's motion. The perspectives of these amici are all quite different—they range from the Senator who sponsored the 2020 amendments, to many of New York's and the country's largest and most influential media organizations, to prominent gender-equality organizations, to other SLAPP-suit defendants dragged into court after speaking out about sexual assault or harassment. The amici's message, however, is clear and consistent: the panel's decision, which contradicts the decisions of nearly two dozen prior courts and imports substantial uncertainty into the law, presents a question of crucial public importance and should be reviewed by the Court of Appeals now. And given the nature of the underlying SLAPP suits—which are proceeding closer to trial and final judgment each day—if leave to appeal is not granted now, the Court of Appeals would effectively be precluded from ever resolving this important question.

The motion for reargument or, in the alternative, leave to appeal to the Court of Appeals should be granted.

A. The Panel's Novel Construction Of *Regina* Creates A Conflict With Prior Precedent Of This Court And Of Other Appellate Departments

As Kesha's motion explained, the panel's opinion reflects a substantial shift in the Court's approach to analyzing the retroactivity of remedial legislation. Before the panel's decision, New York courts (including this Court) all agreed that the general presumption against retroactivity did not apply to such legislation. But the panel held that the non-retroactivity presumption now also applies to remedial legislation under the Court of Appeals' recent decision in *Matter of Regina Metropolitan Co., LLC v. New York State Division of Housing & Community Renewal*, 35 N.Y.3d 332 (2020).

Dr. Luke's response is that *Regina* is correct and did not change the law. Opp. 15. That is exactly right, which is the whole problem—*Regina* had nothing to do with standards applicable to remedial legislation, which is why other Appellate Departments after *Regina* continue to hold (consistent with this Court's pre-*Regina* precedent) that the presumption against retroactivity does not apply to such legislation. Dr. Luke does not even attempt to answer this point. And the result is a division among the Appellate Departments on a self-evidently important legal question based on the panel's novel construction of Court of Appeals precedent. Leave to appeal is not only warranted but necessary in those circumstances. *See City of New York v. 2305-07 Third Ave. LLC*, 142 A.D.3d 69,

75 (1st Dep't 2016) ("[L]eaveworthy cases are ones in which 'the issues are novel or of public importance, present a conflict with prior decisions of this Court [i.e., the Court of Appeals], or involve a conflict among of the departments of the Appellate Division" (quoting 22 NYCRR § 500.22(b)(4))).

1. At points in his brief, Dr. Luke seems to suggest that only statutes with explicit retroactivity language have retroactive effect. *E.g.*, Opp. 25. But of course, that is not so. When a statute contains explicit retroactivity language, the question whether it applies retroactively is easy. The statutory-interpretation doctrine at issue in this and other similar cases, however, applies in the many cases where "the Legislature did not state" its "preference" in express terms. *Matter of Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122 (2001). In such cases, the rule has been established for decades: (i) non-remedial legislation is "presumed to have prospective application," but (ii) "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *Id.*; *accord, e.g.*, *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998); *Matter of Jaquan L.*, 179 A.D.3d 457, 459 (1st Dep't 2020).

As Dr. Luke correctly points out, Opp. 2 (citing *Majewski*, 91 N.Y.2d at 584), this does not mean that every remedial statute is automatically deemed retroactive—the Court must still inquire into the statute's text, context, and history for clues as to the Legislature's intent. *See, e.g.*, *Majewski*, 91 N.Y.2d at 583-87.

But the crucial point is the applicable presumption. And as this Court very recently recognized, the rule for remedial legislation is "[a]n exception to the general principle that statutes are to be applied prospectively unless the language expressly, or by necessary implication, requires otherwise." *Jaquan L.*, 179 A.D.3d at 458-59. As the Fourth Department put it, while statutes are generally presumed non-retroactive, "an exception is generally made for so-called remedial legislation or statutes dealing with procedural matters." *Matter of Town of Greece*, 147 A.D.3d 1382, 1383 (4th Dep't 2017) (quotations omitted). This Court and other courts in this State have therefore long understood that the presumption against retroactivity does not apply to remedial statutes.

Until now. The panel agreed that "the amended statute is remedial." Op. at 3. Yet it nevertheless applied "the presumption of prospective application of the amendments," and held that the presumption "has not been defeated." *Id.* The panel derived that inverted standard from the Court of Appeals' recent decision in *Regina*, which the panel appears to have construed as "limit[ing] 'the continued utility of the tenet that new "remedial" statutes apply presumptively to pending cases.'" *Id*. at 2 (quoting *Regina*, 35 N.Y.3d at 365).

But *Regina* did no such thing. Other than one parenthetical after a "see also" cite describing a different case at the end of a string cite, the word "remedial" does not even appear in the majority's opinion. Thus, Dr. Luke is right that *Regina* did

not change the law—that opinion merely stands for the well-established proposition that as a general matter, there is a presumption against retroactivity. *Regina*, 35 N.Y.3d at 370. *Regina* did not take the further step of altering New York's previous rule that remedial legislation is (in this Court's own words) "an exception" to that presumption. *Jaquan L.*, 179 A.D.3d at 458-59. Yet that is what the panel held.

2. The panel's decision has resulted in a conflict among the Appellate Departments about the proper approach to the retroactivity of remedial legislation. Dr. Luke agrees that such a conflict warrants leave to appeal, and offers no answer to the irrefutable point that unlike the panel's decision, at least the Second and Third Departments have held since *Regina* that the presumption against retroactivity does not apply to remedial statutes.

In *People v. Duggins*, 192 A.D.3d 191 (3d Dep't 2021), the Third Department cited *Regina* for the proposition that statutes presumptively have prospective effect, 192 A.D.2d at 193, but in the very next sentence explained that, "as an exception to that general rule, remedial legislation or statutes governing procedural matters should be applied retroactively." *Id.* (quotation omitted). So too with the Second Department. *People v. Dyshawn B.*, 196 A.D.3d 638 (2d Dep't 2021), which cited *Regina*, acknowledged that "[a]mendments are presumed to have prospective application unless the Legislature's preference for retroactivity

is explicitly stated or clearly indicated," *id.* at 639 (quotation omitted), but went on to explain: "However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *Id.* (quotation omitted).

Yes, these cases also say that remedial statutes are not automatically retroactive, as Dr. Luke correctly points out. Opp. 17 n.7. But that misses the important point, which Dr. Luke does not acknowledge, let alone respond to: both the Second and Third Departments continue to recognize, just as this Court did up until two months ago, that remedial statutes are not presumed non-retroactive. Under the panel's decision, that is no longer the rule in this Department. That is a sea change in the law on a question of public importance, it is based on a contested reading of the Court of Appeals' own precedent, and it creates a conflict with this Court's prior precedent and other Appellate Departments to boot. These circumstances are tailor-made for leave to appeal to the Court of Appeals. *See 2305-07 Third Ave. LLC*, 142 A.D.3d at 75; 22 NYCRR § 500.22(b)(4)). If the Court does not grant reargument, it should grant Kesha's motion for leave to allow the Court of Appeals to clarify the proper approach to retroactivity in this State.

B. Reargument Or Leave To Appeal Is Also Warranted Because The Panel's Opinion Overlooked The Direction Of The Court Of Appeals In Several Crucial Respects

The panel's interpretation of *Regina* and the resulting decisional conflict suffices to support leave to appeal (if not reargument). But reargument or leave to

appeal is additionally warranted because the panel's opinion overlooks several crucial aspects of the 2020 Act's language and history that compel a finding of retroactivity under longstanding Court of Appeals precedent.

1. Perhaps most obviously, the panel decision overlooked the 2020 Act's dispositive drafting history. Dr. Luke acknowledges that an earlier version of the bill that became the 2020 Act included a prospective-only provision, and that the Legislature removed that provision. Opp. 27. Yet Dr. Luke has no explanation for why that drafting history does not provide definitive evidence of the Legislature's intent to apply the 2020 Act retroactively. After all, the Court of Appeals has explained that "legislative intent may be inferred from the omission of proposed substantive changes in the final legislative enactment." *In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 93 N.Y.2d 729, 738 (1999). This Court has similarly recognized that when a draft bill provision is "deleted from the version finally passed," that "development rather persuasively suggests … the Legislature's intent." *People v. Korkala*, 99 A.D.2d 161, 165-66 (1st Dep't 1984). Dr. Luke's apparent answer is that these cases did not concern retroactivity. Opp 28. That is true but irrelevant—retroactivity is itself a question of legislative intent, and the drafting history here "rather persuasively suggests" that the Legislature intended retroactive application.

In any event, the most important case is *Majewski*, which does concern retroactivity, and which is dispositive. The Court of Appeals there held that amendments to New York's Workers' Compensation Law were prospective because "the initial draft of the Act expressly provided that it would apply to 'lawsuits that have neither been settled nor reduced to judgment' by the date of its enactment." 91 N.Y.2d at 587 (quotations and alterations omitted). That language would have required retroactive effect, but did not "appear in the enacted version." *Id.* (quotations omitted). The Court found that omission to be powerful evidence that the Legislature did not intend for the statute to apply retroactively: "rejection of a specific statutory provision is a significant consideration when divining legislative intent." *Id* If (as in *Majewski*) the Legislature's deletion of language mandating retroactive application requires construing a statute as prospective-only, then the Legislature's deletion of prospective-only language (as in this case) requires reading the statute to apply retroactively. Dr. Luke does not even attempt a response, presumably because there is none.

And that is not all. Dr. Luke also fails to acknowledge that the drafting history includes not only the deletion of prospective-only language, but also communication from interested parties imploring the Governor to not sign the bill because without that language, the 2020 Act would apply retroactively to pending cases. Mot. 11-12, 24-25. In other words, "the apparent legislative intent to apply

the statute retroactively was recognized by those commenting on the proposed legislation; indeed, they objected to the bill because it was retroactive." *Duell v. Condon*, 84 N.Y.2d 773, 784 (1995). Dr. Luke's failure to respond to any of this is striking.

So, too, is the fact that the panel's opinion did not consider this crucial drafting history. That suffices to warrant rehearing. *See Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979) (rehearing "designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law"). Dr. Luke suggests that the panel did silently consider this drafting history. Opp. 14 n.5. Maybe so. But if the panel did consider the drafting history and nevertheless found it irrelevant, then its decision contradicts the precedent from the Court of Appeals and this Court just described. And that is an additional reason to grant leave to appeal to the Court of Appeals. *See* 22 NYCRR § 500.22(b)(4).

2. The panel also overlooked crucial statutory language that demonstrates the Legislature's intent to apply the 2020 Act to pending cases. To take just the most obvious example, § 70-a applies to pending cases by expressly allowing for recovery from person who has "commenced or continued" a SLAPP suit—and there is no question that Dr. Luke "continued" this case after November 2020, and "continues" it to this day. CRL § 70-a(1); *see* Mot. 25-26. Dr. Luke says that this

language has always been in the statute and was not added by the 2020 Act so it is not relevant to whether the 2020 Act applies retroactively. Opp. 20. To the contrary, the fact that the statute already applied § 70-a to all pending cases is a good reason why the Legislature would not have thought it necessary to clarify that point in the 2020 Act itself.

Indeed, even Dr. Luke acknowledges that "[o]f course § 70-a generally applies to currently pending cases." Opp. 21. But then he argues that it does not apply to this case because § 70-a incorporates § 76-a's definition of "public petition and participation," and the latter provision (according to Dr. Luke) does not apply retroactively. Opp. 21. It is not clear what Dr. Luke means by that. Section 70-a applies to this case and to Dr. Luke's current conduct because Dr. Luke has "continued" prosecuting his defamation case to this day. And there is no question what version of § 76-a applies today—obviously, it is the current version. It is as simple as that. *See, e.g.*, *Reus v. ETC Hous. Corp.*, 148 N.Y.S.3d 663, 669 n.1 (N.Y. Sup. Ct. 2021) (applying the 2020 amendments in part because "although this action was commenced prior to the November 2020 amendments, Plaintiffs have continued this action to date"), *aff'd*, 203 A.D.3d 1281 (3d Dep't 2022).

This point is so obvious that even Dr. Luke agreed with it in the trial court, Mot. 26, before he changed his mind on appeal. Certainly, the statute's plain text would seemingly warrant analysis by a court considering the statute's retroactivity.

Yet the panel did not even mention it. If the panel overlooked the statutory language, then reargument is appropriate. And if the panel did consider this and other relevant language (*see* Mot. 25-28) but decided it did not matter, then it failed to heed the Court of Appeals' directive that retroactive effect must be given to a statute when "the language expressly or by necessary implication requires it," *Majewski*, 91 N.Y.2d at 584, which would warrant leave to appeal.

3. The 2020 Act's text and drafting history suffice to demonstrate its retroactive application to pending cases. But in the absence of such direct evidence of retroactive intent, the Court of Appeals in *Gleason* considered three factors relevant to whether remedial legislation is intended to apply retroactively: whether the Legislature "conveyed a sense of urgency" in enacting the statute, whether the "statute was designed to rewrite an unintended judicial interpretation," and whether "the enactment itself reaffirms a legislative judgment about what the law in question should be." *Gleason*, 96 N.Y.2d at 122. As Kesha explained in her opening brief, the panel considered only the first of these factors, and held that the Legislature's directive that the anti-SLAPP amendments "shall take effect immediately," Ex. 4 (L. 2020, Ch. 250), § 4, was "at best, 'equivocal' in an analysis of retroactivity." Op. at 1 (quoting *Majewski*, 91 N.Y.2d at 583). The panel did not explain why this language is "equivocal" here but was not equivocal in the numerous cases that have found the same language to be strong evidence of

retroactivity. *See, e.g.*, *Gleason*, 96 N.Y.2d at 122 (Legislature "directed that the amendment was to take effect immediately, thus evincing 'a sense of urgency'"); *Brothers v. Florence*, 95 N.Y.2d 290, 299 (2000) ("[T]he law states that it is to take effect immediately. While this language is not alone determinative, it does 'evince a sense of urgency.'" (citation omitted)); *Asman v. Ambach*, 64 N.Y.2d 989, 991 (1985) (Legislature signaled retroactive effect "[b]y directing that [the relevant statute] shall take effect immediately"); *Jaquan L.*, 179 A.D.3d at 460 ("[T]he statute also states that the amendment 'shall take effect immediately,'" "indicat[ing] a sense of urgency."); *Dyshawn B.*, 196 A.D.3d at 640-41(statute is retroactive because it is "remedial" and the Legislature directed that it "take immediate effect").

Nor did the panel even consider the other two *Gleason* factors—whether the "statute was designed to rewrite an unintended judicial interpretation," and whether "the enactment itself reaffirms a legislative judgment about what the law in question should be," *Gleason*, 96 N.Y.2d at 122. The legislative history could not be more explicit as to both of these points, *see* Mot. 31-33, and the panel at the very least should have considered that history in its retroactivity analysis.

Dr. Luke contends that the *Gleason* factors are "non-exclusive," Opp. 18, but that does not mean courts should not consider them at all. And in any event, a look at the legislative history beyond the *Gleason* factors only confirms that the

2020 Act was meant to apply retroactively. Dr. Luke has no plausible explanation for how non-retroactive application of the 2020 Act could be consistent with that Act's purpose. All agree that the Legislature enacted the 2020 amendments to "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law," Ex. 6; Ex. 7 (Sponsor Memoranda); *accord* Ex. 7 (Weinstein Letter)—i.e., the "utmost protection for the free exercise of speech." It would be odd indeed if a statute enacted because a prior version "led to journalists, consumer advocates, survivors of sexual abuse and others [were] being dragged through the courts on retaliatory legal challenges solely intended to silence them," Ex. 5 (Legislature Press Release), would not apply to suits brought against journalists, consumer advocates, survivors of sexual abuse and others who were subject to retaliatory litigation before November 2020.[1] The panel's failure to consider this history provides an additional reason for either reargument or leave to appeal.

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[1] Dr. Luke strangely argues that the legislative history of the 2020 Act is concerned only with deterring future suits, which he believes shows that it was meant to apply on prospectively. Opp. 3-4. That is wrong. One of the main problems with the prior law was that "the principal remedy currently provided to victims of SLAPP suits in New York"—the ability of judges, in their discretion, to award costs and attorney fees for baseless SLAPP suits—"is almost never actually imposed," Ex. 6; Ex. 7 (Sponsor Memoranda)—which is why the Legislature made § 70-a mandatory. That purpose applies directly to pending suits. And indeed, there is no plausible explanation for why the Legislature would not want this mandatory remedy available to current victims of SLAPP suits.

C. The Question At Issue Is One Of Substantial Public Importance That Warrants Court Of Appeals Review

Leave to appeal to the Court of Appeals is also warranted when the question presented is "novel or of public importance." 22 NYCRR § 500.22(b)(4). The question presented here is of great public importance in two respects.

First, the precedent established by the panel's opinion is not limited to the 2020 Act. As explained earlier, after the panel's opinion, the law in the First Department is that the presumption against retroactivity that applies to non-remedial legislation now also applies to remedial legislation as well. That groundbreaking alteration of retroactivity law—which contradicts this Court's prior precedent and other Appellate Department's current precedent, *see supra* at 4-8—is obviously important, because it will affect this Court's retroactivity analysis of all remedial legislation going forward. Dr. Luke's opposition does not even acknowledge this reality. And if New York courts are to adopt a novel approach to retroactivity analysis, the Court of Appeals should be the one to say so.

Second, the question whether the 2020 Act itself applies retroactively is itself self-evidently important. That much is obvious from the large and varied choir of amici supporting Court of Appeals review in this case—including from the Act's Senate sponsor, some of the largest and most influential media organizations in New York and the nation, prominent gender-justice organizations, and other

SLAPP-suit defendants facing retaliation for their speech about sexual assault and harassment. Dr. Luke's response is that these amici "conflate the public importance of the statute, in general, with the issue of whether it should apply retroactively." Opp. 34 n.18. Kesha is confident, though, that Senator Hoylman, every major media organization in New York, the nation's largest gender-equity organizations, and current SLAPP-suit defendants can tell the difference between those two questions. The reason that all these amici were willing to commit their own time and resources to participating in this proceeding is that the question whether the 2020 Act applies retroactively is itself crucially important, because the panel's decision will deprive defendants who happened to be sued before November 2020 of the very protections the 2020 Act was meant to ensure: "the utmost protection for the free exercise of speech, petition, and association rights" and the elimination of "the threat of personal damages and litigation costs" from being "used as a means of harassing, intimidating or punishing" such free exercise. L. 1992, Ch. 767, § 1; *see also* Mot. 34-35.

Dr. Luke's main argument to the contrary is that the number of cases to which the retroactivity question matters is naturally limited. Opp. 34. But the retroactivity issue in fact applies to a large number of cases.[2] And while it is true

[2] Kesha has identified the following ongoing cases involving the retroactivity of the 2020 Act, although there are undoubtedly others that could not be identified through docket research: *Novagold Res., Inc. v. J Cap. Rsch. USA*

that the pool of cases to which the question presented here applies will not grow, that is a reason to grant leave to appeal now. If Kesha (like the nearly two dozen courts that had decided the question before the panel's opinion) is right that the statute is meant to apply retroactively to pending cases, then delaying Court of Appeals review would effectively deprive every SLAPP-suit victim sued before November 2020 of the remedies to which they are entitled. The defendants in all those cases will lose the free-speech protection (and protection against harassing suits) that the Legislature enacted the 2020 Act to provide—including the

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LLC, 2022 WL 900604 (E.D.N.Y. Mar. 28, 2022); *Zuckerbrot v. Lande*, 2022 WL 816807 (N.Y. Sup. Ct. Mar. 17, 2022); *Goldberg v. Urbach*, 2022 WL 1285452 (N.Y. Sup. Ct. Mar. 14, 2022); *Kesner v. Buhl*, 2022 WL 718840 (S.D.N.Y. Mar. 10, 2022); *Isaly v. Garde*, Index No. 160699/2018, Dkt. 125 (N.Y. Sup. Ct. Mar. 10, 2022); *Great Wall Med. P.C. v. Levine*, 2022 WL 869725 (N.Y. Sup. Ct. Mar. 8, 2022); *RCI Hosp. Holdings, Inc. v. White*, 2022 WL 376977 (N.Y. Sup. Ct. Feb. 8, 2022); *Cedeno v. Pacelli*, 2022 WL 456637 (N.Y. Sup. Ct. Feb. 7, 2022); *Harris v. Am. Acct. Ass'n*, 2021 WL 5505515 (N.D.N.Y. Nov. 24, 2021); *Parker v. Simmons*, 2021 WL 4891347 (N.Y. Sup. Ct. Oct. 15, 2021); *Gottwald v. Geragos*, Index No. 162075/2014, Dkt. 789 (N.Y. Sup. Ct. Sept. 27, 2021); *Goldman v. Reddington*, 2021 WL 4099462 (E.D.N.Y. Sept. 9, 2021); *Lindberg v. Dow Jones & Co.*, 2021 WL 3605621 (S.D.N.Y. Aug. 11, 2021); *Goldfarb v. Channel One Russia*, No. 1:18-cv-08128-JPC, Dkt. 117 (S.D.N.Y. Aug. 10, 2021); *Reeves v. Associated Newspapers, Ltd.*, Index No. 154855/2020, Dkt. 97 (N.Y. Sup. Ct. Aug. 4, 2021); *Griffith v. Daily Beast*, 2021 WL 2940950 (N.Y. Sup. Ct. July 13, 2021); *Cisneros v. Cook*, 2021 WL 2889924 (N.Y. Sup. Ct. July 7, 2021); *VIP Pet Grooming Studio, Inc. v. Sproule*, Index No. 612337/2020, Dkt. 38 (N.Y. Sup. Ct. May 20, 2021); *Massa Constr., Inc. v. Meaney*, Index No. 126837/2020, Dkt. 92 (N.Y. Sup. Ct. May 10, 2021); *Reus v. ETC Hous. Corp.*, 148 N.Y.S.3d 663 (N.Y. Sup. Ct. 2021); *Kurland & Assocs., P.C. v. Glassdoor, Inc.*, 2021 WL 1135187 (N.Y. Sup. Ct. Mar. 22, 2021); *Project Veritas v. N.Y. Times Co.*, 2021 WL 2395290 (N.Y. Sup. Ct. Mar. 18, 2021); *Coleman v. Grand*, 523 F. Supp. 3d 244 (E.D.N.Y. 2021); *Sackler v. Am. Broad. Cos.*, 144 N.Y.S.3d 529 (N.Y. Sup. Ct. 2021); *Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21 (S.D.N.Y. 2020).

strengthened remedies that promise SLAPP defendants compensation for the enormous expense and emotional toll of having to defend against these speech-targeting lawsuits. Perhaps the Court of Appeals would instead affirm the panel, in which case the status quo would not be disturbed. But if this Court does not provide the Court of Appeals the opportunity to consider the question presented now, it will effectively deprive that court the opportunity of ever considering it. Mot. 35-36.

If the Court does not grant reargument, then it should grant leave to appeal and allow the Court of Appeals definitively to resolve whether the 2020 amendments to the anti-SLAPP law apply to cases pending at the time the amendments took effect.[3]

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[3] Dr. Luke argues that there are other reasons, not reached by the panel, for why the 2020 Act would not apply to this case. Opp. 28-31. Dr. Luke is wrong, as Kesha explained at length in her merits brief before the panel. Kesha Merits Br. 28-38. But in any event, the panel did not reach these arguments, so they pose no impediment to reargument or leave to appeal of the one issue that the panel undoubtedly did resolve: the retroactivity of the 2020 Act.

CONCLUSION

The Court should grant reargument or, in the alternative, grant Kesha leave to appeal to the Court of Appeals.

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Respectfully submitted,

ANTON METLITSKY
LEAH GODESKY
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000

DANIEL M. PETROCELLI (of the bar of the State of California) by permission of the Court
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067
(310) 553-6700

Attorneys for Defendant-Respondent Kesha Rose Sebert