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.

MOTION FOR REARGUMENT OR LEAVE TO APPEAL

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by Permission of the Court
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New York County Clerk's Index No. 653118/14

SUPREME COURT OF THE STATE OF NEW YORK
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.	Index No. 653118/14 (New York County) Appellate Case No.: 2021-03036 **DEFENDANT-RESPONDENT'S NOTICE OF MOTION FOR REARGUMENT OR LEAVE TO APPEAL**

PLEASE TAKE NOTICE that upon the accompanying Affirmation of Anton Metlitsky, dated April 11, 2022, the exhibits thereto, the accompanying memorandum of law, and upon all other prior pleadings and proceedings herein, Defendant-Respondent Kesha Rose Sebert will move this Court, at the Courthouse thereof, located at 27 Madison Avenue, New York, New York 10010, on Monday, April 25, 2022 at 10:00 a.m., or as soon thereafter as counsel can be heard:

(1) for an Order, pursuant to § 1250.16(d)(2) of the Rules of this Court, granting reargument concerning this appeal, reversing this Court's March 10, 2022 Decision and Order, and, upon reargument, entering a substitute Decision and Order that affirms all portions of the June 30, 2021 Decision and Order of the Supreme Court, New York County;

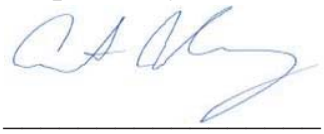
(2) alternatively, for an Order, pursuant to § 1250.16(d)(3) of the Rules of this Court, granting Defendant-Respondent permission to appeal to the Court of Appeals from this Court's March 10, 2022 Decision and Order, which does not finally determine this action, upon the grounds that the March 10, 2022 Decision and Order presents a conflict with prior decisions of the Court of Appeals, involves a conflict among the Departments of the Appellate Division, and concerns issues of substantial public importance; and

(3) for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that, under CPLR 2214(b), answering papers, if any, are required to be served upon the undersigned at least two days before the return date of this motion.

Dated: April 11, 2022
New York, New York

Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK
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.	Index No. 653118/14 (New York County) Appellate Case No.: 2021-03036

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

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PRELIMINARY STATEMENT

The purely legal question presented in this appeal is whether the November 2020 amendments to New York's so-called "anti-SLAPP" law—i.e., the law intended to prevent Strategic Lawsuits Against Public Participation—apply retroactively to cases pending at the time those amendments became effective. Until the panel's decision here, every court to have considered that question—nearly 20 decisions in all, including one recently affirmed by the Third Department—had held that they do. The panel held that they do not. That decision warrants reargument, or in the alternative, leave to appeal to the Court of Appeals, for several reasons.

First, the panel's decision appears to have read the Court of Appeals' recent decision in *Matter of Regina Metropolitan Co. v. New York State Division of Housing & Community Renewal*, 35 N.Y.3d 332 (2020), as fundamentally altering this State's approach to retroactivity.

The Court of Appeals has held repeatedly that most statutes are presumptively prospective, but that there is an exception to that rule for remedial legislation, which is presumptively retroactive. The panel correctly recognized that the 2020 amendments to the anti-SLAPP law were remedial: the law as originally enacted in 1992 did not actually fulfill its purpose of providing "the utmost protection for the free exercise of speech," and eliminating "the threat of personal

damages and litigation costs" from being "used as a means of harassing, intimidating or punishing" such speech, L. 1992, Ch. 767, § 1, and the 2020 Act was intended to "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law," Ex. 6, Sponsor Mem. of Sen. Hoylman, L. 2020, Ch. 250 (July 22, 2020) ("Hoylman Sponsor Mem.").

Under established precedent, then, that indisputably remedial purpose should have resulted in a presumption favoring retroactive application of the anti-SLAPP law. But the panel appears to have held that after *Regina*, the presumption against retroactivity applies even for remedial statutes. That reading of *Regina* is dubious at best—that case did not include any discussion of the proper retroactivity analysis for remedial legislation, and certainly did not purport to alter decades of Court of Appeals precedent on that question—and it is contrary to at least two decisions in other Appellate Departments construing *Regina*. The panel's novel interpretation of Court of Appeals precedent, and the resulting inter-Department conflict, itself suffices to warrant Court of Appeals review.

Second, the panel overlooked or declined to consider three aspects of the 2020 Act that Court of Appeals precedent requires courts to consider in evaluating retroactivity: the drafting history, the plain text, and the retroactivity factors set forth in *Matter of Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117 (2001). Each points unambiguously in favor of retroactivity, and the panel's decision to not consider

them creates a direct inconsistency with Court of Appeals precedent that likewise warrants reargument or leave to appeal.

a. Drafting history. An early version of the 2020 bill would have rendered its amendments expressly prospective—it provided that the act "shall take effect immediately and shall apply to actions commenced on or after such date." Ex. 2, N.Y. Senate Bill S52 (Jan. 9, 2019), § 3; Ex. 3, N.Y. Assembly Bill A5991 (Feb. 26, 2019), § 3. But the Legislature excised that provision. The Bill Jacket makes clear that parties subsequently lobbied the Governor to send the bill back to the Legislature to restore the deleted non-retroactivity clause, explaining that without it, the statute would have retroactive effect. Yet the Governor ignored that advice and signed the bill. Court of Appeals precedent—including *Majewski v. Broadalbin-Perth Central School District*, 91 N.Y.2d 577 (1998), which the panel's decision cites repeatedly—deems exactly that sort of drafting history decisive. Yet the panel's decision makes no mention of it, instead declaring (incorrectly) that there is no evidence of the Legislature's intent for the 2020 anti-SLAPP amendments to apply to pending cases.

b. Statutory text. The panel ignored several aspects of the text that compel the conclusion that the 2020 Act applies to pending cases. The most obvious is § 70-a, which requires attorneys' fees for baseless litigation that the plaintiff "commenced or continued." Thus, cases that were "continued" by plaintiffs

(including Dr. Luke) after the 2020 Act became effective are by its terms covered by the amended statute. It is difficult to see how those words could even plausibly be read to exclude pending cases—so difficult, in fact, that Dr. Luke himself argued to the trial court that this very language compelled reading § 70-a retroactively before changing his mind on appeal. The panel did not consider this language despite established Court of Appeals precedent deeming the statutory language crucial to the retroactivity analysis.

c. *Gleason* factors. Even in the absence of the sort of drafting history and statutory text that exists here, the Court of Appeals in *Gleason* requires courts to consider three factors in analyzing the retroactivity of remedial statutes: whether the legislation suggests a "sense of urgency" on the part of the Legislature, whether it was designed to override an unintended judicial interpretation, and whether the enactment "reaffirms a legislative judgment about what the law in question should be." The panel did not consider the second or third of these factors, even though each unambiguously points in favor of retroactivity. And while the panel did consider the Legislature's direction that the 2020 Act "shall take effect immediately," the panel held that this language does not clearly convey the sort of "sense of urgency" that suggests retroactive application, contrary to numerous precedents, including recent decisions of this Court and the Second Department.

Third, immediate Court of Appeals review is also warranted because the question presented is of substantial public importance—the whole point of the 2020 Act was to protect defamation defendants from being harassed through litigation, without consequence, for speaking on matters of public concern. The question whether those protections apply to the numerous defendants who were already being harassed by such litigation when the Act became effective is self-evidently important. And that is especially so because the public policy reflected in the 2020 Act counsels against granting plaintiffs free reign to prosecute harassing lawsuits in response to the exercise of free speech, full stop—it would be incongruous for a statute whose purpose is providing the "utmost protection" for free speech to provide none of that protection to current defendants. Whether the Legislature really intended that bizarre approach to speech protection is a question the Court of Appeals should have the opportunity to review.

Yet if leave to appeal is not granted now, then that Court's ability to resolve the question will effectively be lost. After all, the question presented concerns the law's application to cases pending in November 2020, and while there are many such cases, there will be fewer and fewer as time goes on. If the Court of Appeals does not consider the retroactivity of the 2020 Act now, the benefits of that Act will be forever lost to defendants facing SLAPP suits that happened to be filed before November 2020 but continued after that date. That will be so, moreover,

even if and when the defendants ultimately win their defamation cases. One of the main goals of the 2020 Act was to grant defendants strong financial remedies that compensate them for having been forced to spend years of their lives and all their resources opposing these harassing lawsuits. The Court of Appeals should be allowed to determine whether defendants (like Kesha) subject to years of such retaliatory litigation are entitled to the remedies the Legislature says defendants subject to SLAPP suits deserve.

This Court should allow the Court of Appeals to decide whether the 2020 Act's benefits were intended to reach such defendants. If reargument is not granted, the motion for leave to appeal should be.

QUESTIONS OF LAW TO BE REVIEWED BY THE COURT OF APPEALS

If the motion for reargument is denied, the Court should certify for review to the Court of Appeals the following question of law:

Whether the November 2020 amendments to N.Y. Civil Rights Law §§ 70-a and 76-a apply to cases pending at the time the amendments became effective.

TIMELINESS

The Court issued its decision and order ("Op."), attached as Exhibit 1 to the accompanying Affirmation of Anton Metlitsky, on March 10, 2022. This motion for reargument or, in the alternative, leave to appeal, is timely because it is made within 30 days of the service of the order with notice of entry on April 11, 2022,

not counting weekends. 22 NYCRR § 1250.16(d)(1); CPLR § 5513(b); N.Y. Gen. Constr. Law § 25-a(1).

JURISDICTION

The Court may consider a motion for reargument or, in the alternative, leave to appeal under CPLR § 2221. This Court has authority to grant permission to appeal to the Court of Appeals under CPLR § 5602(b).

NATURE OF THE CASE

1. Dr. Luke brought this lawsuit against Kesha to hold her liable in defamation for stating publicly that he drugged and sexually assaulted her shortly after signing her to his record label in 2005. The parties do not dispute that New York's anti-SLAPP law applies to lawsuits like this one. And for good reason: That law applies to any "action involving public petition and participation"—that is, "a claim based upon" statements made "in connection with an issue of public interest," N.Y. Civil Rights Law § 76-a(1)(a)(1), and there is no dispute that this suit fits comfortably within that definition.

The only issue in this appeal is whether New York's current anti-SLAPP law applies to cases filed before its November 10, 2020 effective date, but that remained pending after that date. Dr. Luke filed this lawsuit in 2014, and it remains pending in the trial court, with trial scheduled for February 2023. Multiple aspects of the anti-SLAPP law confirm that it applies to suits—like this one—that

were pending on the law's effective date.

2. The 2020 Act broadened the substantive and remedial scope of the anti-SLAPP law.

a. The prior version of the law defined actions "involving public petition and participation" as actions "brought by a public applicant or permittee" relating to "efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." CRL § 76-a(2) (1992). As the Senate sponsor of the 2020 amendments, Senator Hoylman, explained, that statute was construed narrowly and mostly limited to real-estate permits. *See* Ex. 6 (Hoylman Sponsor Mem.). Section 76-a, "as drafted, and as narrowly interpreted by the courts," thus "failed to accomplish" the Legislature's "objective" in enacting the original anti-SLAPP law: "to provide 'the utmost protection for the free exercise of speech, petition, and association rights.'" *Id.* (quoting L. 1992, Ch. 767, § 1); *accord* Sponsor Mem. Of Assemblywoman Weinstein ("Weinstein Sponsor Mem.") (together with the Hoylman Sponsor Memorandum, the "Sponsor Memoranda"), *in* Ex. 7, Bill Jacket, L. 2020, Ch. 250 ("Bill Jacket").

Accordingly, the 2020 Act expanded the law to "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law." Ex. 6; Ex. 7 (Sponsor Memoranda). Specifically, the Legislature revised the definition of an "action involving public petition and participation" so that the anti-

SLAPP law now applies to claims based on:

> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

CRL § 76-a(1)(a). The amended provision further instructs: "'Public interest' shall be construed broadly, and shall mean any subject other than a purely private matter." CRL § 76-a(1)(d).

b. The Legislature also amended the anti-SLAPP law to strengthen § 70-a, the "principal remedy" it "provided to victims of SLAPP suits." Ex. 6 (Hoylman Sponsor Mem.). Section 70-a authorizes a defendant "in an action involving public petition and participation," as defined in § 76-a, to "maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees," from the plaintiff who initiated the SLAPP suit. CRL § 70-a(1). By broadening § 76-a, as discussed above, the Legislature thus broadened § 70-a, too.

But the Legislature also amended § 70-a directly. The prior version provided that "costs and attorney's fees may be recovered" by a SLAPP defendant "upon a demonstration" that the action was "commenced or continued without a

substantial basis in fact and law." CRL § 70-a(1)(a) (1992). But New York courts "failed to use their discretionary power to award costs and attorney's fees," so the law's "principal remedy" was "almost never actually imposed." Ex. 6; Ex. 7 (Sponsor Memoranda). The Legislature thus eliminated that judicial discretion: now, "costs and attorney's fees shall be recovered upon" the same demonstration. CRL § 70-a(1)(a). The Legislature left intact other provisions that permit compensatory damages upon an additional showing that the SLAPP suit "was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech," and punitive damages if the SLAPP suit is "commenced or continued for the sole purpose of" such harassment. *Id.* § 70-a(1)(b), (c).

These amendments, Assemblywoman Weinstein explained, were necessary to protect "against the threat—and financial reality—of abusive litigation" and "discourage SLAPP lawsuits—which attempt to chill free speech by definition." Ex. 7 (Weinstein Sponsor Mem.). As Senator Hoylman confirmed, the amendments ensure that "survivors of sexual abuse"—among others—will not be "dragged through the courts on retaliatory legal challenges solely intended to silence them." Ex. 5, Press Release, N.Y. State Legislature, *Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech* (July 22, 2020) ("Legislature Press Release").

The Legislature directed that the amendments "shall take effect immediately." Ex. 4, L. 2020, Ch. 250, § 4.

c. After the Legislature sent the bill to the Governor, a large number of stakeholders commented on the bill's merits, mostly favorably. *See generally* Ex. 7 (Bill Jacket). Most notable here, though, is a comment dealing specifically with the question of the proposed amendments' application to pending cases. A previous version of the bill had included language specifically providing that it would not apply to pending cases, but that provision was deleted during the amendment process. Ex. 2 (N.Y. Senate Bill S52 (Jan. 9, 2019)), § 3; Ex. 3 (N.Y. Assembly Bill A5991 (Feb. 26, 2019)), § 3. The obvious implication of that deletion was that the new provisions would apply to pending cases.

That is how the Rent Stabilization Association understood the deletion. Troubled by the prospect that the new amendments would apply to pending cases, the Association wrote to the Governor:

> Our concerns are premised upon the applicability of the legislation to already pending proceedings … This legislation, as initially introduced, expressly provided by its own terms that it applied only to newly-commenced cases. However, during the legislation process, it was amended to provide otherwise. It is this provision … which we urge should be amended and restored to its original terms so that it is clear and unambiguous that it shall only apply to cases commenced on and after the date of enactment.

Letter of Rent Stabilization Ass'n to Gov. Cuomo (Nov. 4, 2020), *in* Ex. 7 (Bill

Jacket). The Rent Stabilization Association thus asked the Governor to require the Legislature to reinstate the original nonretroactivity language as a "condition of signature." *Id.* Yet the Legislature never added such an amendment, and the Governor imposed no such condition on his signature. The Governor instead signed the Act into law on November 10, 2020, and it took immediate effect per the Legislature's instruction. Ex. 4 (L. 2020, Ch. 250).

3. On April 6, 2021, Kesha moved for a ruling that the current version of CRL § 76-a applies to Dr. Luke's pending defamation claims and for leave to assert a counterclaim against Dr. Luke under the newly amended CRL § 70-a. R-63-64. The trial court granted the motion on June 30, 2021.

The court concluded that the anti-SLAPP legislation is "clearly remedial" and must be "applied retroactively in order to give effect to its beneficial purpose." R-60-61 at 52:22-53:1. Further, the court explained, all indicia of retroactivity are present here: the "legislative history" establishes "that the amended statute was intended to conform with the original intent of the provision"; the Legislature evinced a "sense of urgency"; "the statute was designed to rewrite … an unintended interpretation"; and "the enactment reaffirms legislative judgment about what the law was intended to have always been." R-60 at 52:12-23. Dr. Luke, moreover, had failed to establish that "retroactive application would affect his due process rights." R-61 at 53:2-3. Given the 2020 Act's "important

purpose," the court concluded, "it should apply to pending cases." *Id.* at 53:10-11.

The court likewise granted Kesha leave to amend to assert her counterclaim. Emphasizing that "[l]eave is freely given," the court held that Kesha's proposed counterclaim was "not futile" and that allowing Kesha to assert a counterclaim for "a determination by the jury" would not prejudice Dr. Luke. *Id.* at 53:12-18.

4. On March 10, 2022, a panel of this Court reversed. The panel agreed with the trial court that the November 2020 anti-SLAPP amendments were "remedial" and noted that the Legislature intended them to "take effect immediately." Op. 3. The panel also acknowledged that the "Court of Appeals has stated, in general terms, that 'ameliorative or remedial legislation' should be given 'retroactive effect,'" Op. 2 (quoting *Matter of Marino S.*, 100 N.Y.2d 361, 370-71 (2003)), and that this Court itself has as recently as two years ago applied that precedent to find legislation retroactive "based on the remedial nature of the statute," *id.* (citing *Matter of Jaquan L.*, 179 A.D.3d 457 (1st Dep't 2020)). But the panel then concluded that the Court of Appeals' decision in *Matter of Regina Metropolitan Co. v. New York State Division of Housing & Community Renewal*, 35 N.Y.3d 332 (2020), implicitly altered the rule that remedial legislation should generally be given retroactive effect, Op. 2, and noted prior Court of Appeals precedent stating that simply labeling a statute "remedial" does not automatically result in retroactive application, *id.* (citing *Majewski v. Broadalbin-Perth Cent.*

Sch. Dist., 91 N.Y.2d 577, 584 (1998)). The panel also said the Legislature's directive that the November 2020 amendments have immediate effect "may evince a 'sense of urgency,'" but is nevertheless "at best 'equivocal' in an analysis of retroactivity." *Id.* at 2-3 (quoting *Majewski*, 91 N.Y.2d at 583).

"In light of the above principles," the panel concluded that the "fact that the amended statute is remedial, and that the Legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments." Op. 3. In reaching that conclusion, the Court did not consider, among other points raised in Kesha's appellate brief: (i) the effect of the Legislature's decision expressly to remove a provision that would have rendered the amendments prospective only, and the Legislature's and Governor's subsequent refusal to reinstate this prospective-only provision despite interest groups' calls to do so, Kesha Br. 19-22; or (ii) the statute's express language, including § 70-a's application to plaintiffs who "commenced or continued" SLAPP litigation, Kesha Br. 39-40, 46-49—language that even Dr. Luke recognized in the trial court required application of the as-amended law to pending cases before switching his position on appeal, *see* Kesha Br. 44-45.

ARGUMENT

Other than the panel's decision, every one of the many courts to have considered the question has held that the November 2020 anti-SLAPP amendments apply to cases pending on the amendments' effective date,[1] including one decision recently affirmed by the Third Department, *see Reus v. ETC Hous. Corp.*, 148 N.Y.S.3d 663 (N.Y. Sup. Ct. 2021), *aff'd*, -- N.Y.S.3d --, 2022 WL 617904 (3d Dep't Mar. 3, 2022). The existence of this broad disagreement over a novel legal question of such obvious public importance itself warrants Court of Appeals review. *See* 22 NYCRR § 500.22(b)(4) (issue merits review by Court of Appeals where it is "novel or of public importance"). But reargument or leave to appeal is also warranted because, as explained in detail below, the panel's decision departs

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[1] *See* R-59-61 at 51:25-53:21; *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.*, 144 N.Y.S.3d 529 (N.Y. Sup. Ct. 2021); *Veritas v. N.Y. Times Co.*, 2021 WL 2395290 (N.Y. Sup. Ct. Mar. 18, 2021); *Kurland & Assocs., P.C. v. Glassdoor, Inc.*, 2021 WL 1135187 (N.Y. Sup. Ct. Mar. 22, 2021); *Sweigert v. Goodman*, 2021 WL 1578097 (S.D.N.Y. Apr. 22, 2021); *Massa Constr., Inc. v. Meany*, No. 126837/2020 (N.Y. Sup. Ct. May 10, 2021) (at R-364); *Reilly v. Crane Tech Sols., LLC*, 2021 WL 2580281 (N.Y. Sup. Ct. June 23, 2021); *Cisneros v. Cook*, 2021 WL 2889924 (N.Y. Sup. Ct. July 7, 2021); *Griffith v. Daily Beast*, 2021 WL 2940950 (N.Y. Sup. Ct. July 13, 2021); *Ctr. 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., Inc.*, 2021 WL 3605621 (S.D.N.Y. Aug. 11, 2021); *Goldman v. Reddington*, 2021 WL 4099462 (E.D.N.Y. Sept. 9, 2021); *Shahidullah v. Shankar*, 2022 WL 286935 (D. Md. Jan. 31, 2022); *Great Wall Med. P.C. v. Levine*, 2022 WL 869725 (N.Y. Sup. Ct. Mar. 8, 2022); *Kesner v. Buhl*, 2022 WL 718840 (S.D.N.Y. Mar. 10, 2022); *Novagold Res., Inc. v. J Cap. Rsch. USA LLC*, 2022 WL 900604 (E.D.N.Y. Mar. 28, 2022).

in several crucial respects from the retroactivity analysis mandated by the Court of Appeals and adopted by this and other Appellate Departments. *See* 22 NYCRR § 500.22(b)(4) (issue merits review by Court of Appeals where it "present[s] a conflict with prior decisions of [the Court of Appeals], or involve[s] a conflict among the departments of the Appellate Division").

What's more, the scope of New York's anti-SLAPP law—including its application to pending cases—is self-evidently a question of substantial public importance. And if the panel's decision is not reviewed immediately, the decision will become effectively unreviewable. By its nature, the question presented applies only to pending cases, which will soon be brought to conclusion. If this Court grants leave to appeal and the Court of Appeals ultimately affirms, then the legal landscape will remain unchanged. But if this Court does not grant leave to appeal, then even if the Court of Appeals would ultimately have disagreed with the panel's decision, it would not matter—the benefits of the anti-SLAPP statute will be lost to the many defendants in pending cases that it was meant to protect. This Court should allow the Court of Appeals to have the final word on the legal question of substantial public importance presented here.

I. REARGUMENT OR LEAVE TO APPEAL IS WARRANTED BECAUSE THE PANEL'S RETROACTIVITY ANALYSIS IS INCONSISTENT WITH COURT OF APPEALS PRECEDENT, AS WELL AS THE PRECEDENT OF THIS AND OTHER APPELLATE DEPARTMENTS.

Reargument, or in the alternative, leave to appeal to the Court of Appeals, is warranted because the panel's decision fundamentally alters in several crucial respects the established method under which questions of retroactivity are analyzed in New York. First, the Court of Appeals has repeatedly held that courts should presume that the Legislature intended remedial statutes like the 2020 amendments to have retroactive effect, but this Court appears to have concluded that the Court of Appeals' decision in *Regina* alters that analysis—a novel construction of that decision that finds no support in *Regina* itself and conflicts with other Departments' understanding. Second, the Court of Appeals has directed that while a statute's remedial nature may not be dispositive of the retroactivity analysis, courts must consider the statute's legislative history and its language, among other factors, in determining whether the Legislature intended retroactive effect. Yet the panel failed to consider critical drafting history expressing the Legislature's clear intent for retroactive application. It ignored the plain language of the statute, including § 70-a's express application to all cases that were "commenced or continued" without factual or legal basis—language that explicitly provides for application to pending cases, as Dr. Luke himself admitted below. It also

considered only one of the three retroactivity factors set forth in *Matter of Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117 (2001), and created a conflict among the Appellate Departments as to the one factor it did consider. The substantial tension between Court of Appeals precedent and the panel decision requires reargument, or in the alternative, leave to appeal.

A. The Panel's Novel Construction Of *Regina* As Having Fundamentally Altered Retroactivity Analysis Finds No Support In That Decision, And Conflicts With Other Decisions Of The Court Of Appeals And Appellate Departments

The Court of Appeals' approach to determining whether legislation has retroactive effect has been established for decades. Where the "Legislature's preference" is not "explicitly stated or clearly indicated," (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." *Gleason*, 96 N.Y.2d at 122; *accord, e.g.*, *Majewski*, 91 N.Y.2d at 584; *Matter of Jaquan L.*, 179 A.D.3d 457, 459 (1st Dep't 2020). That 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 whole point of the distinction the Court of Appeals has drawn is that remedial legislation is not presumptively prospective. This Court so recognized as recently as two years ago, explaining that 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 459; *see also Matter of Town of Greece*, 147 A.D.3d 1382, 1383 (4th Dep't 2017) (statutes are generally presumed non-retroactive, but "an exception is generally made for so-called remedial legislation or statutes dealing with procedural matters" (quotations omitted)).

The panel's decision here fundamentally alters that established doctrinal landscape. Kesha's appellate brief explained at length that the 2020 amendments were remedial, Kesha Br. 14-19, and the panel (like the trial court) readily acknowledged "the amended statute is remedial." Op. at 3. Yet the panel 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.'" Op. at 2 (quoting *Regina*, 35 N.Y.3d at 365). But *Regina* did no such thing. The quote the panel highlighted was actually a parenthetical from a "see also" citation describing one aspect of the U.S. Supreme Court's holding in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at the end of a lengthy

paragraph describing that case and other U.S. Supreme Court precedent. *See Regina*, 35 N.Y.3d at 365.

The Court of Appeals did not, through that parenthetical description of a different case, purport to alter the general principle of New York law that remedial statutes are not presumptively prospective. Indeed, the word "remedial" appears nowhere else in the *Regina* majority opinion. And it would be extraordinary if the Court of Appeals, through a stray parenthetical, altered a fundamental principle of law that had been repeated over and over again in that Court's own opinions, including opinions that were decided after *Landgraf*. *See, e.g.*, *Gleason*, 96 N.Y.2d at 122 (decided seven years after *Landgraf*); *Majewski*, 91 N.Y.2d at 584 (decided four years after *Landgraf*).

Certainly, other Appellate Departments have not read *Regina* that way. For example, the Second Department in *People v. Dyshawn B.*, 196 A.D.3d 638 (2d Dep't 2021), cited *Regina* but also explained that "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *Id.* at 639 (quotation omitted). What's more, the Second Department held that the statute in that case applied retroactively because of its remedial purpose, and because "the Legislature conveyed 'a sense of urgency' in correcting these problems by providing that the amendments would take effect immediately." *Id.* at 640 (quoting *Gleason*, 96 N.Y.2d at 122). The panel here agreed that the 2020 anti-

SLAPP amendments exhibited exactly those two characteristics, Op. 3, and yet came out exactly the opposite way. *See infra* at 31; 22 NYCRR § 500.22(b)(4) (issue merits review by Court of Appeals where it "involve[s] a conflict among the departments of the Appellate Division").

Or take the Third Department's decision in *People v. Duggins*, 192 A.D.3d 191 (3d Dep't 2021). The court there held that the legislation at issue was not retroactive, but not because it believed *Regina* worked an unstated sea change in retroactivity jurisprudence. *Duggins* generally 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). When the Third Department held that the statute at issue was not retroactive, the court did not conclude that the statute was remedial, and it was highly relevant that the statute did not take immediate effect. *Id.* at 196. Again, the panel here found that the 2020 amendments to the anti-SLAPP law exhibited the opposite characteristics—the amendments were remedial and took effect immediately—but the panel concluded they were non-retroactive anyway.

The panel's decision, in short, substantially alters retroactivity analysis in this State based on a highly contested reading of a recent Court of Appeals

precedent. That reading is incorrect, and reargument should be granted. But at the very least, the panel should allow the Court of Appeals to clarify the scope of its own precedent and the proper approach to the retroactivity of remedial legislation. And that is especially so when the panel's construction and application of *Regina* conflicts with the views of at least two other Appellate Divisions.

B. The Panel's Decision Also Ignores Crucial Drafting History Demonstrating Retroactive Effect, Textual Indications Of Application To Pending Cases, And The Legislature's Evident Purpose Immediately To Correct Defects In Prior Legislation

Even setting aside the panel's contested reading of *Regina*, its opinion ignored or overlooked the direction of the Court of Appeals in several additional respects. Had the panel followed Court of Appeals precedent, it would have had no choice but to conclude that the 2020 Act applied to pending cases. The panel's departure from Court of Appeals precedent—and its inconsistency with the precedent of other Appellate Departments—is an additional reason for leave to appeal, if not reargument.

1. *The Panel Opinion Failed To Recognize Drafting History Confirming The Statute's Retroactive Application*

As Kesha explained in her appellate brief, the 2020 Act's drafting history is determinative of its retroactive application. Kesha Br. 19-22.

The original draft bill, as introduced in both the Senate and Assembly, provided that the amendments would apply only to actions commenced after the

Act's effective date: "This act shall take effect immediately and shall apply to actions commenced on or after such date." Ex. 2 (N.Y. Senate Bill S52 (Jan. 9, 2019)), § 3; Ex. 3 (N.Y. Assembly Bill A5991 (Feb. 26, 2019)), § 3. In other words, the original proposal would have been, by its terms, prospective only. But the Legislature deleted that prospective-only language from the final bill, instead instructing only that "this act shall take effect immediately." Ex. 4 (L. 2020, Ch. 250), § 4. The Legislature thus explicitly considered making the anti-SLAPP amendments apply only prospectively, and expressly amended the bill to eliminate that limitation.

The panel ignored this drafting history entirely, but it conclusively resolves this case. "It is well settled 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). As this Court has recognized, 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, 166 (1st Dep't 1984).

That principle applies fully in the retroactivity context. Indeed, the Court of Appeals' decision in *Majewski*, which the panel's decision cites multiple times, is directly on point and compels retroactivity here. In *Majewski*, the Court of

Appeals 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 omitted). That language would have required retroactive effect, but did not "appear in the enacted version." *Id.* 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*.

Exactly the same analysis applies here, but leads to the opposite result: 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.

Indeed, if anything, the inference to be drawn from the deleted language is even stronger here than in *Majewski*. There is no indication in *Majewski* that there was any serious debate or even public awareness of the deleted language. But here, stakeholders implored the Governor to require the Legislature to reinstate the original nonretroactivity language as a "condition of signature." Letter of Rent Stabilization Ass'n to Gov. Cuomo (Nov. 4, 2020), *in* Ex. 7 (Bill Jacket). The Rent Stabilization Association was concerned about "the applicability of the

legislation to already pending proceedings," and insisted that the Governor send the 2020 Act back to the Legislature to reinstate the deleted prospective-only language. *Id.* But the Legislature did not re-insert the prospective-only limitation, and the Governor signed the bill into law.

The Court of Appeals has noted the significance to retroactivity analysis when, as here, "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). The Legislature's deliberate refusal to include prospective-only language in the final Act confirms that the Legislature intended the 2020 amendments to be retroactive. That should have ended the analysis. Certainly, it should have been part of the analysis. The fact that it was not contradicts Court of Appeals precedent, and requires reargument or, at the very least, leave to appeal.

2. *The Panel's Decision Overlooked Statutory Text Requiring Application Of The 2020 Act To Pending Cases*

The panel also failed to consider the anti-SLAPP statute's express terms, which confirm that it applies to cases pending at the time the 2020 Act became law.

a. Most obviously, the statute's counterclaim provision, § 70-a, expressly applies to pending cases. Each of its provisions expressly allows recovery from a person who has "commenced or continued" a SLAPP suit. Specifically, § 70-a(1)

allows a defendant "to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that (a) costs and attorney's fees shall be recovered upon a demonstration … that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law …." CRL § 70-a(a). Subsections (b) and (c), which provide for compensatory and punitive damages, use identical "commenced or continued" language. *Id.* § 70-a(1)(b)-(c). Dr. Luke has undoubtedly "continued" this action long after § 70-a became effective on November 10, 2020, and will try his claims to a jury in February 2023. So the "commenced or continued" language applies squarely to this case and others like it.

Indeed, Dr. Luke affirmatively argued to the trial court that this very language required the retroactive application of § 70-a. *See, e.g.*, Dkt. 2317 at 15 ("By contrast, … Section 70-a(1) of the Civil Rights Law … was clearly drafted to have retroactive effect."); R-26 at 18:2-9 (arguing the Legislature should have included "clear expression" of "retroactivity" in § 76-a as it did "for 70-a"). Dr. Luke changed his mind on appeal, but he was right the first time—because § 70-a applies to all cases "continued" by the plaintiff, it applies to pending cases like this one. *See, e.g.*, *Reus*, 148 N.Y.S.3d at 669 n.1 (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").

The panel did not consider this language, despite the Court of Appeals' direction 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. That misapplication of Court of Appeals precedent—not to mention the statutory language—requires reargument or leave to appeal.

b. Section 76-a's language also compels the conclusion that its actual-malice standard applies to pending cases, or at least to pending cases that have not yet been reduced to judgment. That provision, by its terms, makes recovery of damages the critical moment in time: "In an action involving public petition and participation, damages may only be recovered if the plaintiff" proves actual malice. CRL § 76-a(2). The trial (and, thus, the attempted recovery of damages) has not yet occurred in this case, yet that is the point at which the statute directs its actual-malice provision to apply. The question, in other words, is what law—current or past—should apply at the point when Dr. Luke's attempt to recover damages in the forthcoming jury trial. The plain text of the statute answers that question—current law should apply in cases (like this one) that will be reduced to judgment after the 2020 Act's effective date.

Becker v. Huss Co., 43 N.Y.2d 527 (1978), is directly on point. There, unlike here, "the act and its history [we]re inconclusive," so the Court of Appeals declined to "infer[] that the amendment was intended to be as retroactive" as other

remedial statutes—i.e., applicable "to prior judgments or settlements." *Id.* at 541-42. But the Legislature had directed (as with the anti-SLAPP amendments) that the amended statute "be effective immediately," demonstrating its intent to "affect[] as many cases as practicable." *Id.* at 542. And "because the amendment state[d] that the application for apportionment is to be upon 'recovery,'" the Court of Appeals reasoned, "it makes sense that the critical point be the date of judgment or settlement." *Id.* Accordingly, the Court ruled, "the amendment should apply to a judgment or settlement effected after June 10, 1975, even if the injury occurred or the third-party action was brought before that date." *Id.*

As in *Becker*, the combination of the "effective immediately" language and "recovery of damages" trigger mean that § 76-a applies to pending defamation cases like this one where no judgment has yet issued. The panel opinion's failure to consider this argument again puts its decision in conflict with directly on-point Court of Appeals precedent.

3. *The Panel Opinion Applied Only One Of The Three* Gleason *Factors, And Applied That Factor In A Manner That Conflicts With* Gleason *And Decisions Of This And Another Appellate Department*

For the reasons just explained, the text and history of the anti-SLAPP amendments demonstrate their retroactive application. But in the absence of such text and history, the Court of Appeals in *Gleason* directed courts to consider three factors in determining whether remedial legislation was 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. The panel considered only the first of these factors even though they all counsel in favor of retroactivity. And even as to that factor, the panel's decision is inconsistent with *Gleason*, as well as with a prior decision of this Court and decisions of other Departments.

a. When the Legislature "convey[s] a sense of urgency" in enacting a statute, that urgency supports retroactive application. *Gleason*, 96 N.Y.2d at 122.

Here, the Legislature "conveyed a sense of urgency," as the trial court correctly found, by directing that the anti-SLAPP amendments "shall take effect immediately." Ex. 4 (L. 2020, Ch. 250), § 4. Both the Court of Appeals and this Court have repeatedly held that this exact phrase conveys a sense of urgency and supports a finding 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.'"); *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.").

The panel noted the Legislature's determination that the anti-SLAPP amendments "take effect immediately," but held, citing *Majewski*, that "the meaning of that phrase is, at best, 'equivocal' in an analysis of retroactivity." Op. at 2-3. But in *Majewski*, the meaning of "take effect immediately" was "equivocal" because other provisions in the statute there at issue expressly stated whether they applied retroactively or prospectively, so the effective date was not especially probative of the relevant provision's retroactive effect. 91 N.Y.2d at 583-84. Absent that kind of confounding factor, the Court of Appeals has held that the phrase "take effect immediately" (or materially identical language) was strong evidence of retroactive intent. *See, e.g.*, *Gleason*, 96 N.Y.2d at 122; *Brothers*, 95 N.Y.2d at 299; *Asman*, 64 N.Y.2d at 991. So too has this Court—the *Jaquan L.* Court had no trouble construing "shall take effect immediately" to mean that "the amendment [at issue there] indicates a sense of urgency," supporting "the conclusion that the amendment should be applied retroactively." 179 A.D.3d at 460-61. The panel cited *Jaquan L.* but did not explain why the same language clearly evinced an intent to give a statute retroactive effect two years ago, but was "equivocal" as to that question today.

Other Appellate Departments have likewise read that phrase as strongly suggesting retroactive effect. *Dyshawn B.*, discussed above, is the latest example. In that case, the only reasons the statute at issue was found to apply retroactively were (i) the statute was remedial, and (ii) the Legislature directed that it "take immediate effect." 196 A.D.3d at 640-41. If this case had arisen in the Second Department, it would have come out the other way.

Only the Court of Appeals can resolve this dispute among the Appellate Departments, and bring clarity to the consequence of immediate-effect provisions in remedial legislation. If the Court does not grant reargument, it should grant leave to appeal.

b. The panel did not even consider the other two *Gleason* factors, yet they both unambiguously favor retroactive application.

There is no question that the 2020 Act "was designed to rewrite an unintended judicial interpretation." *Gleason*, 96 N.Y.2d at 122. Both sponsors of the 2020 amendments noted that § 76-a, not only "as drafted" but also "as narrowly interpreted by the courts … failed to accomplish" the Legislature's objectives. Ex. 6; Ex. 7 (Sponsor Memoranda). Assemblywoman Weinstein explained that "the courts ha[d] construed the [original] law quite narrowly." Letter from Assemblywoman Weinstein to Gov. Cuomo (Sept. 23, 2020) ("Weinstein Letter"), *in* Ex. 7 (Bill Jacket). The legislative press release, issued after the Senate and

Assembly passed the 2020 Act, explained that the Act was necessary because the 1992 "law has been narrowly interpreted by the courts." Ex. 5 (Legislature Press Release). The New York State Law Revision Commission lamented that the 1992 statute "ha[d] been strictly construed by the courts" in urging the Governor to sign the 2020 legislation. Letter from N.Y. State Law Revision Comm'n to Gov. Cuomo (Oct. 23, 2020), *in* Ex. 7 (Bill Jacket). And the New York City Bar complained that "courts have held that the [1992] statute must be narrowly construed, making it useless in all but the most limited circumstances." Letter from N.Y. City Bar to Gov. Cuomo (Oct. 15, 2020), *in* Ex. 7 (Bill Jacket). This factor favors retroactive application, and the Court of Appeals in *Gleason* directed courts in this State to consider it, yet this Court failed to do so.

So too with whether "the enactment itself reaffirms a legislative judgment about what the law in question should be," *Gleason*, 96 N.Y.2d at 122—there's no question it does. The 1992 anti-SLAPP law made clear that the Legislature enacted the law to secure "the utmost protection for the free exercise of speech." L. 1992, Ch. 767, § 1. But that law fell short—allowing a "rising tide" of SLAPP lawsuits, Ex. 7 (Weinstein Letter), including "many frivolous lawsuits … filed each year that are calculated solely to silence free speech and public participation," Ex. 7 (Weinstein Sponsor Mem.), by "journalists, consumer advocates, survivors of sexual abuse and others," Ex. 5 (Legislature Press Release). So 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." The Legislature thus reaffirmed in 2020 its earlier judgment about what the anti-SLAPP statute was "always meant to do": shield victims from suits that stifle free speech. *See Gleason*, 96 N.Y.2d at 122. Indeed, it would be odd for the Legislature to have intended that litigation defendants against whom claims were filed after November 2020 receive the utmost protection for speech and from harassment, but that current defendants against whom claims were filed before that remain exposed to harassing assaults on the exercise of their free speech. Again, the panel's decision unaccountably ignores this factor despite the Court of Appeals' direction to consider it.

In short, the 2020 Act's drafting history, its text, and the *Gleason* factors make unmistakably clear that the 2020 Act applies to pending cases. It is no surprise that the nearly twenty courts that have considered that question before the panel's decision all concluded that the 2020 Act applies retroactively. The Court should grant reargument because the panel's opinion overlooked crucial text, history, and other important retroactivity factors. But if it does not, it should grant leave so that the Court of Appeals can clarify the proper approach to retroactivity analysis, and determine whether the 2020 Act applies to pending cases.

II. IF THE COURT DOES NOT GRANT REARGUMENT, THEN LEAVE TO APPEAL IS WARRANTED BECAUSE THE QUESTION PRESENTED IS OF SUBSTANTIAL PUBLIC IMPORTANCE, AND THE COURT OF APPEALS WILL BE ABLE TO ANSWER IT ONLY IF LEAVE TO APPEAL IS GRANTED NOW

There is no question that the scope of the anti-SLAPP law poses a question of great public importance. Whether that statute applies retroactively to pending cases is no exception.

As explained, the 2020 Act was enacted because before it, New York's "broken system" "led to journalists, … survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them"—with no consequences for the deep-pocketed perpetrators. Ex. 5 (Legislature Press Release). The 2020 Act was intended to do what the original one failed to do—secure "the utmost protection for the free exercise of speech, petition, and association rights" and to eliminate "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.

According to the panel, though, the Legislature intended the "utmost protection of speech, petition, and association rights"—and to eliminate "the threat of personal damages and litigation costs" for harassing lawsuits—only for litigants against whom speech-based lawsuits are filed after November 2020. On the panel's view, the Legislature intended for defendants against whom SLAPP suits

were filed before November 2020 to continue to be subject to speech-stultifying harassment without recourse.

That view is dubious on the merits for the reasons already explained, which is why every other court has rejected it. But right or wrong, the question is self-evidently important. After all, the Legislature has already concluded that amendments to the prior law were needed because they did not provide sufficient protection for expressive activity or against harassing lawsuits, including for journalists and survivors of sex abuse. The consequence of the panel's decision is that a substantial number of journalists, sex abuse survivors, and others—including but certainly not limited to Kesha, *see supra* at n.1 (setting forth the numerous pending cases that have considered the question presented here)—will continue to be underprotected in precisely the way the Legislature believed categorically unacceptable. Whether that result is what the Legislature intended is undoubtedly a question of "novel or of public importance," 22 NYCRR § 500.22(b)(4), and the Court of Appeals should be allowed to provide a definitive answer.

If leave to appeal is not granted now, moreover, the Court of Appeals will effectively be deprived of that opportunity. There are many cases that fall under the amended anti-SLAPP law that were pending when that law was enacted, but as time passes, those cases will conclude. If the Court of Appeals would reverse the panel's decision but is not given the chance to consider it in time, then 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 strengthened remedies that promise SLAPP defendants compensation for the enormous expense and emotional toll of having to defend against these speech-targeting lawsuits. If the Court of Appeals affirms, in contrast, there will be no harm done—to the contrary, the status quo in this Department will remain while the rule for this statute will be clarified throughout the State.

There is thus no downside to granting leave to appeal, but a significant downside to denying leave—depriving a substantial number of defendants free-speech protections granted by the Legislature, and depriving the Court of Appeals of any practical ability to weigh in on this question of tremendous public importance. And, of course, granting leave to appeal will also give the Court of Appeals the opportunity to clarify more broadly the proper approach to retroactivity analysis in the context of remedial statutes—an area of law that, as the panel's decision demonstrates, is in substantial need of clarification.

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.

CONCLUSION

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

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SUPREME COURT OF THE STATE OF NEW YORK
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, et al., Defendant-Respondent.	Index No. 653118/14 (New York County) Appellate Case No.: 2021-03036 **AFFIRMATION OF ANTON METLITSKY IN SUPPORT OF DEFENDANT-RESPONDENT'S MOTION FOR REARGUMENT OR LEAVE TO APPEAL**

ANTON METLITSKY**,** an attorney duly admitted to practice before this Court, affirms as follows under the penalty of perjury under CPLR § 2106:

1. I am an attorney duly admitted and in good standing to practice in the Courts of the State of New York. I am a partner at the law firm O'Melveny & Myers LLP, with an office located at 7 Times Square, New York, New York 10036. O'Melveny is counsel to Defendant-Respondent Kesha Rose Sebert ("Kesha"). I submit this affirmation in connection with Kesha's Motion for Reargument or Leave to Appeal. I make this affirmation to place before the Court documents necessary to its determination of the motion.

2. Attached as Exhibit 1 is a true and accurate copy of the Decision and Order of the Appellate Division, First Department, dated March 10, 2022 (with

notice of entry on the same date), which reversed the trial court's Decision and Order dated June 30, 2021.

3. Attached as Exhibit 2 is a true and accurate copy of 2019 N.Y. Senate Bill S52 (Jan. 9, 2019), *available at* https://legislation.nysenate.gov/pdf/bills/2019/s52.

4. Attached as Exhibit 3 is a true and accurate copy of 2019 N.Y. Assembly Bill A5991 (Feb. 26, 2019), *available at* https://legislation.nysenate.gov/pdf/bills/2019/a5991.

5. Attached as Exhibit 4 is a true and accurate copy of L. 2020, Ch. 250, *public version available at* https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a.

6. Attached as Exhibit 5 is a true and accurate copy of Press Release, N.Y. State Legislature, *Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech* (July 22, 2020), *available at* https://nyassembly.gov/Press/files/20200722a.php.

7. Attached as Exhibit 6 is a true and accurate copy of Sponsor Memorandum of Senator Hoylman, L. 2020, Ch. 250 (rev. July 22, 2020), *available at* https://www.nysenate.gov/legislation/bills/2019/s52.

8. Attached as Exhibit 7 is a true and accurate copy of Bill Jacket, L. 2020, Ch. 250.

Dated: April 11, 2022
New York, New York

Respectfully submitted,

ANTON METLITSKY

EXHIBIT 1

SUPREME COURT FOR THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC, Plaintiffs, -against- KESHA ROSE SEBERT p/k/a KESHA, Defendant.	New York County Clerk's Index No. 653118/2014

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order entered in the office of the Clerk of the Appellate Division, First Department, on March 10, 2022.

DATED: New York, New York
March 10, 2022

MITCHELL SILBERBERG & KNUPP LLP

By: /s/ Jeffrey M. Movit

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To: Clerk
New York County Supreme Court, Commercial Division

To: O'Melveny & Myers LLP
Leah Godesky, Esq.
Times Square Tower
7 Times Square
New York, New York 10036
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Daniel M. Petrocelli, Esq.
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Los Angeles, California 90067
Telephone: (310) 553-6700

Attorneys for Kesha Rose Sebert p/k/a Kesha

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., Mazzarelli, González, Shulman, Rodriguez, JJ.

15495 & M-0497

LUKASZ GOTTWALD professionally known as DR. LUKE, et al.,
Plaintiffs-Appellants,

-against-

KESHA ROSE SEBERT professionally known as KESHA,
Defendant-Respondent,

PEBE SEBERT et al.,
Defendants.

SAMUEL D. ISALY
Amicus Curiae.

Index No. 653118/14
Case No. 2021-03036

Mitchell Silberberg & Knupp LLP, New York (Christine Lepera of counsel), for appellants.

O'Melveny & Myers LLP, New York (Leah Godesky of counsel), for respondent.

Carter Ledyard & Milburn LLP, New York (Alan S. Lewis and John J. Walsh of counsel), for Samuel D. Isaly, amicus curiae.

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about June 30, 2021, which granted defendant's motion for a ruling that Civil Rights Law § 76-a applies to plaintiffs' defamation claims against her and for leave to assert a counterclaim against plaintiffs under Civil Rights Law § 70-a, unanimously reversed, on the law, without costs, and the motion denied.

Contrary to the decision of the motion court and in other nonbinding decisions (*see e.g. Palin v New York Times Co.*, 510 F Supp 3d 21 [SD NY 2020]), there is

insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (*see* Civil Rights Law § 70 *et seq*.) to apply retroactively to pending claims such as the defamation claims asserted by plaintiffs in this action.

The Court of Appeals has stated, in general terms, that "ameliorative or remedial legislation" should be given "retroactive effect in order to effectuate its beneficial purpose" (*Matter of Marino S.*, 100 NY2d 361, 370-371 [2003], *cert denied* 540 US 1059 [2003]), and this Court, in limited circumstances, has found the requisite legislative intent to apply a statute retroactively based on the remedial nature of the statute (*see e.g. Matter of Jaquan L. [Pearl L.]*, 179 AD3d 457 [1st Dept 2020] [retroactive application of amendment that acts remedially to expand existing benefits to a class of persons arbitrarily denied those benefits by the original legislation]). Nevertheless, in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]), the Court of Appeals noted that the United States Supreme Court had previously limited "the continued utility of the tenet that new 'remedial' statutes apply presumptively to pending cases" (35 NY3d at 365), and it has otherwise noted that "[c]lassifying a statute as remedial does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998] [internal quotation marks omitted]). In addition, where, as here, the fact that the legislature has provided that amendments shall "take effect immediately," even though that may evince a "sense of urgency," the meaning of that phrase is, at best, "equivocal"

in an analysis of retroactivity (*Majewski*, 91 NY2d at 583; *see Aguaiza v Vantage Props., LLC*, 69 AD3d 422 [1st Dept 2010]).

In light of the above principles and the factual evidence that the amendments to New York's anti-SLAPP law were intended to better advance the purposes of the legislation by correcting the narrow scope of the prior anti-SLAPP law, we find that the presumption of prospective application of the amendments has not been defeated. The legislature acted to broaden the scope of the law almost 30 years after the law was originally enacted, purportedly to advance an underlying remedial purpose that was not adequately addressed in the original legislative language. The legislature did not specify that the new legislation was to be applied retroactively. The fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments.

Given the conclusion that the 2020 amendments expanding the scope of Civil Rights Law § 76-a do not apply retroactively to cover plaintiffs' pending defamation claims, the motion seeking a ruling to that effect and for leave to assert a Civil Rights

Law § 70-a counterclaim premised on plaintiffs' claims being subject to the anti-SLAPP law must be denied in both respects.

M-0497 – *Lukasz Gottwald v Kesha Rose Sebert*

Motion of nonparty Samuel D. Isaly for leave to file brief as amicus curiae, granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 10, 2022

Susanna Molina Rojas
Clerk of the Court

EXHIBIT 2

STATE OF NEW YORK

52

2019-2020 Regular Sessions

IN SENATE

(Prefiled)

January 9, 2019

Introduced by Sen. HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil rights law, in relation to actions involving public petition and participation

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 1 of section 70-a of the civil rights law, as added by chapter 767 of the laws of 1992, is amended to read as follows:

(a) costs and attorney's fees [may] shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;

§ 2. Subdivision 1 of section 76-a of the civil rights law, as added by chapter 767 of the laws of 1992, is amended to read as follows:

1. For purposes of this section:

(a) An "action involving public petition and participation" is [an action,] a claim[, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission] based upon:

(1) any communication in a place open to the public or a public forum in connection with an issue of public concern; or

(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD04075-01-9

public concern, or in furtherance of the exercise of the constitutional right of petition.

(b) ["Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission] "Claim" includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

[(d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.]

§ 3. This act shall take effect immediately and shall apply to actions commenced on or after such date.

EXHIBIT 3

A5991-A Weinstein Same as S 52-A HOYLMAN
Civil Rights Law
TITLE....Requires awarding of costs and attorney fees in frivolous action involving public petition and participation
02/26/19 referred to judiciary
05/30/19 reported referred to codes
06/04/19 reported referred to rules
06/11/19 reported
06/11/19 rules report cal.143
06/11/19 ordered to third reading rules cal.143
01/08/20 ordered to third reading cal.226
04/02/20 amended on third reading (t) 5991a
07/21/20 passed assembly
07/21/20 delivered to senate
07/21/20 REFERRED TO RULES
07/22/20 SUBSTITUTED FOR S52A
07/22/20 3RD READING CAL.757
07/22/20 PASSED SENATE
07/22/20 RETURNED TO ASSEMBLY
10/30/20 delivered to governor
11/10/20 signed chap.250

STATE OF NEW YORK

5991

2019-2020 Regular Sessions

IN ASSEMBLY

February 26, 2019

Introduced by M. of A. WEINSTEIN, SEAWRIGHT, ABINANTI, LUPARDO, SIMOTAS, TAYLOR -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil rights law, in relation to actions involving public petition and participation

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 1 of section 70-a of the civil rights law, as added by chapter 767 of the laws of 1992, is amended to read as follows:

(a) costs and attorney's fees [~~may~~] **shall** be recovered upon a demonstration**, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules,** that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;

§ 2. Subdivision 1 of section 76-a of the civil rights law, as added by chapter 767 of the laws of 1992, is amended to read as follows:

1. For purposes of this section:

(a) An "action involving public petition and participation" is [~~an action,~~] **a** claim[~~, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission~~] **based upon:**

(1) any communication in a place open to the public or a public forum in connection with an issue of public concern; or

(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD04075-01-9

(b) [~~"Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission~~] "Claim" includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

[~~(d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.~~]

§ 3. This act shall take effect immediately and shall apply to actions commenced on or after such date.

EXHIBIT 4

2020 Sess. Law News of N.Y. Ch. 250 (A. 5991-A) (McKINNEY'S)

McKINNEY'S 2020 SESSION LAW NEWS OF NEW YORK

243rd LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

CHAPTER 250
A. 5991–A

Approved and effective November 10, 2020

AN ACT to amend the civil rights law, in relation to actions involving public petition and participation; and to amend the civil practice law and rules, in relation to stay of proceedings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 1 of section 70–a of the civil rights law, as added by chapter 767 of the laws of 1992, is amended to read as follows:

<< NY CIV RTS § 70–a >>

(a) costs and attorney's fees ~~may~~ **shall** be recovered upon a demonstration**, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules,** that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;

§ 2. Subdivision 1 of section 76–a of the civil rights law, as added by chapter 767 of the laws of 1992, is amended to read as follows:

<< NY CIV RTS § 76–a >>

1. For purposes of this section:

(a) An "action involving public petition and participation" is ~~an action,~~ **a** claim~~, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission~~ **based upon:**

(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or

(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

(b) ~~"Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest,~~

~~connection or affiliation with such person that is materially related to such application or permission~~ **"Claim" includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief**.

(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

~~(d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.~~ **(d) "Public interest" shall be construed broadly, and shall mean any subject other than a purely private matter.**

§ 3. Subdivision (g) of rule 3211 of the civil practice law and rules, as added by chapter 767 of the laws of 1992, is amended to read as follows:

<< NY CPLR Rule 3211 >>

(g) ~~Standards~~ **Stay of proceedings and standards** for motions to dismiss in certain cases involving public petition and participation. **1.** A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, "complaint" includes "cross-complaint" and "petition", "plaintiff" includes "cross-complainant" and "petitioner", and "defendant" includes "cross-defendant" and "respondent."

§ 4. This act shall take effect immediately.

End of Document

EXHIBIT 5

NEW YORK STATE LEGISLATURE

FOR IMMEDIATE RELEASE:
July 22, 2020

Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech

Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie today announced the Senate and Assembly have passed legislation that offers legal protection to any individual or entity sued for exercising their free speech rights. A "Strategic Lawsuit Against Public Participation," often referred to as a "SLAPP", is a tactic often employed by powerful interests that involves initiating a frivolous lawsuit intended to silence free speech and public participation in our democratic process.

"New Yorkers' voices must not be silenced by powerful interests and the super wealthy," **Majority Leader Stewart-Cousins** said. "SLAPP lawsuits that are employed to discourage free speech threaten our democracy and work against the people of New York. I applaud Senator Hoylman for his work in championing this bill and protecting the free speech of ALL New Yorkers."

"SLAPP's have the dangerous potential to censor the type of free speech that is fundamental to a free and democratic society," said **Speaker Heastie**. "This legislation will discourage these types of lawsuits and protect the people and institutions that we depend on to be an informed public. I would also like to thank Assemblymember Weinstein for her longtime tireless commitment to protecting free speech for all New Yorkers."

Senate bill sponsor Senator Brad Hoylman, said, "For decades, Donald Trump, his billionaire friends, large corporations and other powerful forces have abused our legal system by attempting to harass, intimidate and impoverish their critics with strategic lawsuits against public participation, or 'SLAPP' suits. This broken system has led to journalists, consumer advocates, survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them. Today, New York's Democratic Majority 'SLAPPs back' with our new legislation (S.52A/A.5991A) that expands anti-SLAPP protections, thereby strengthening First Amendment rights in New York State, the media capital of the world. I'm thrilled to see this legislation pass the Senate today thanks to the leadership of Senate Majority Leader Andrea Stewart-Cousins and alongside my Assembly colleague Helene Weinstein."

"The dangerous message that these lawsuits send is that criticism will cost you," said **Assembly bill sponsor Helene Weinstein**. "Recent experience has shown that there are an increasing number of deep pocketed individuals who have outrageously used New York's court system as a means to harass New Yorkers who have publicly disagreed with them. These lawsuits are started not because they have any chance of ultimate success – they don't – but to make sure that others don't speak out publicly, for fear of being sued. It is clear that the best remedy for this problem is to require those who bring these lawsuits to pay the legal fees and costs of those who they have wrongfully sued, along with an expedited means for the courts to toss these cases into the dustbin of history. I wish to express my appreciation to Speaker Heastie for his leadership and support on this important issue, and I also wish to express my thanks to Senator Hoylman for so skillfully guiding the bill through the Senate."

Today's legislation will broaden New York's existing anti-SLAPP statute by revising the definition of an "action involving public petition and participation" to include a broader definition matters in the "public interest." Current law has been narrowly interpreted by the courts and typically limited to cases initiated by an individual or business

entity that is embroiled in controversies over a public application or permit. Under this bill, if a defendant's speech or activity falls under the protection of the statute, judges will have the ability to dispose of these meritless claims quickly (S.52A/A.5991-A).

Too often, these SLAPP lawsuits are used to chill free speech, by threatening an individual or entity with liability for personal damages, as well as having to hire a lawyer themselves. These types of threats often incentivize self-censorship and thus stifle free speech. In addition to making dismissal of SLAPP suits less difficult and prolonged, today's legislation would also require that victims of SLAPP lawsuits receive an award of costs and attorney's fees, thus strongly discouraging those who attempt to chill free speech.

New York State Assembly
[Welcome Page] [Press Releases]

EXHIBIT 6

S52A (ACTIVE) - SPONSOR MEMO

BILL NUMBER: S52a REVISED 07/22/2020

SPONSOR: HOYLMAN

TITLE OF BILL:

An act to amend the civil rights law, in relation to actions involving public petition and participation; and to amend the civil practice law and rules, in relation to stay of proceedings

PURPOSE OF BILL:

The purpose of this bill is to extend the protection of New York's current law regarding Strategic Lawsuits Against Public Participation ("SLAPP suits"). The amendment will protect citizens' exercise of the rights of free speech and petition about matters of public interest.

SUMMARY OF PROVISIONS OF BILL:

Section 1 of the bill would amend section 70-a of the Civil Rights Laws to provide that costs and attorney's fees "shall be recovered upon a demonstration that a SLAPP suit was commenced or continued without a

substantial basis in fact or law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law."

Section 2 of the bill would amend section 76-a of the Civil Rights Law to define an "action involving public petition and participation" to include a claim related to:

i. Any communication in a place open to the public or a public forum in connection with an issue of public interest; or ii. Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition. The bill also specifies that "public interest" should be broadly construed.

Section 3 of the bill contains a stay of discovery and pending hearings or motions once a motion to dismiss a SLAPP action has been made pursuant to CPLR 3211 (a)(7).

Section 4 specifies that the act shall take effect immediately.

JUSTIFICATION:

Section 76-a of the Civil Rights Law was originally enacted by the Legislature to provide "the utmost protection for the free exercise or speech, petition, and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." L. 1992 Ch. 767. However, as drafted, and as narrowly interpreted by the courts, the application of Section 76-a has failed to accomplish that objective. In practice, the current statute has been strictly limited to cases initiated by persons or business entities that are embroiled in controversies over a public application or permit, usually in a real estate development situation. 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. This is done by broadly widening the ambit of the law to include matters

of "public interest", which is to be broadly construed, e.g. anything other than a "purely private matter".

Additionally, the principal remedy currently provided to victims of SLAPP suits in New York is almost never actually imposed. The courts have failed to use their discretionary power to award costs and attorney's fees to a defendant found to have been victimized by actions intended only to chill free speech. By an award of costs and fees, the Legislature had originally intended to address "threat of personal damages and litigation costs . . . as a means of harassing, intimidating, or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs." L. 1992 Ch. 767. This amendment to Section 70-A of the Civil Rights Law makes clear that a court "shall" impose an award of costs and fees, but only if the court fords that the case has been initiated or pursued in bad faith. Together, the two amendments will protect citizens by encouraging only meritorious litigation.

LEGISLATIVE HISTORY:

2018:A.1413/S.68- A.Judi(ECS)/S.Codes
2018:Similar to:A.5292/S.2183- A.Cal/S.Codes
2017:Similar to:A.5292/S.2183- PA /S.Codes
2015-16: A.258/S.1638 -PA/S. Codes
2014: A.856/S.7280 - PA/S. Rules
2013: A.856 - PA
2012: A.10594 - A. Judi

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None.

EFFECTIVE DATE:
Immediately.

EXHIBIT 7

JN

CHAPTER 250

LAWS OF 2020

SENATE BILL _____ ASSEMBLY BILL 5991A

STATE OF NEW YORK

5991--A
Cal. No. 226

2019-2020 Regular Sessions

IN ASSEMBLY

February 26, 2019

Introduced by M. of A. WEINSTEIN, SEAWRIGHT, ABINANTI, LUPARDO, SIMOTAS, TAYLOR, STECK -- read once and referred to the Committee on Judiciary -- ordered to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the civil rights law, in relation to actions involving public petition and participation; and to amend the civil practice law and rules, in relation to stay of proceedings

S52A/Hoylman

DATE RECEIVED BY GOVERNOR:
OCT 30 2020

ACTION MUST BE TAKEN BY:
NOV 1 2020

DATE GOVERNOR'S ACTION TAKEN:
NOV 10 2020

A5991A C250

DIVISION OF THE BUDGET BILL MEMORANDUM

Session Year 2020

SENATE:
No. S52-A

Sponsor: HOYLMAN

Law: Various

ASSEMBLY:
No. A5991-A

Primary Sponsor: Weinstein

Sections: Various

Division of the Budget recommendation on the above bill:

APPROVE: __ **NO OBJECTION:** X

1. Subject and Purpose:

This bill would require the awarding of costs and attorney fees to individuals upon a demonstration that a strategic lawsuit against public participation (SLAPP) was commenced or continued without a substantial basis. The legislation would also expand the definition of actions involving public petition and participation and would require the court to place a stay on discovery and pending hearings or motions once a motion to dismiss a SLAPP action has been made.

2. Budget Implications:

This bill would have no impact on State finances.

3. Recommendation:

This legislation would extend the protection of New York's current law regarding SLAPP suits. The Office of Court Administration (OCA) has no position on the bill. The bill would have no impact on State finances. Accordingly, the Division of the Budget has no objection.

Validation: Document ID: 1600291574171-37523-35712
Robert Mujica, Director of the Budget
By Poole, Stuart
Date: 09/16/2020 05:26PM

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001
WWW.DOS.NY.GOV

ANDREW M. CUOMO
GOVERNOR

ROSSANA ROSADO
SECRETARY OF STATE

MEMORANDUM

To: Honorable Kumiki Gibson
Counsel to the Governor

From: David Gonzalez, Esq.
Legislative Counsel

Date: July 31, 2020

Subject: A.5991-A (M. of A. Weinstein)
Recommendation: No comment

The Department of State has no comment on the above referenced bill.

If you have any questions or comments regarding our position on the bill, or if we can otherwise assist you, please feel free to contact me at (518) 474-6740.

DG/mel

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

CHAIR
WAYS & MEANS COMMITTEE

COMMITTEE
Rules

HELENE E. WEINSTEIN
Assemblywoman 41ST District
Kings County

September 23, 2020

Governor Andrew Cuomo
State Capitol – 2nd Floor
Albany, New York 12224

RE: A.5991-A/S.52-A

Dear Governor Cuomo:

I write as Assembly sponsor of A.5991-A/S.52-A, which has passed both houses and is awaiting transmittal to your office for consideration.

This bill updates and modernizes New York's Anti-SLAPP law (Strategic Lawsuits Against Public Participation, Ch. 767, L.1992) by expanding the breadth of the law and also putting teeth into it so as to deter these lawsuits from being brought.

In recent years, we have seen a growth – in New York and nationwide – in these types of lawsuits, which are brought with one goal in mind: to stifle the free expression of ideas and/or criticism. These lawsuits are not brought to vindicate any particular right - instead, they are brought so as to cause those sued to incur significant litigation costs, and to deter others from speaking out for fear of being similarly sued.

Unfortunately, New York's anti-SLAPP law has proven inadequate to stem the rising tide of these lawsuits, due to its limited scope and also due an important procedural aspect, both of which I shall discuss below.

The bill protects free speech and the free discussion of ideas in two important ways:

First and most importantly, the bill expands the type of speech that is protected by New York's anti-SLAPP law. Given that the statute is in derogation of the common law, the courts have construed the law quite narrowly, e.g. *Hariri v. Amper*, 51 AD 3d 146, 151 (1st Dept 2008). Thus, the current statute has been strictly limited to cases initiated by persons or business entities that are embroiled in controversies over a *public application or permit*, typically in a real estate development situation. Meanwhile, many SLAPP lawsuits are filed each year that are calculated solely to silence free speech and public participation, which do not specifically arise in the context of the public "permit" process. By broadening the definition of an "action involving public petition and participation," this amendment to Section 76-a of the Civil Rights Law will better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law in 1992. This is done in the

bill by broadly widening the ambit of the law to include matters of "public interest", which is to be broadly construed, e.g. anything other than a "purely private matter".

Second, the bill *requires* – rather than merely *allows* - an award of attorney's fees if the Court finds that the lawsuit was brought to silence free speech. Specifically, the Appellate Division, Second Department has noted the non-mandatory aspect of the anti-SLAPP law as concerns the awarding of attorney's fees, and found no abuse of discretion in the lower court's failure to award same, a high standard to overcome to be sure. *Matter of West Branch Conservation Ass'n, Inc. v. Planning Board of the Town of Clarkstown*, 222 AD 2d 513 (2nd Dept 1995).

I should also note that the enactment of mandatory attorney's fees in SLAPP actions for New York would be consistent with statutes enacted in a growing number of states, e.g. California, Nevada, Florida, Louisiana, and Texas, to name but a few.

Finally, I wish to respectfully note that for many years I have fought numerous efforts made to "bar the courthouse door" or otherwise chill or make it more difficult for New York's citizens to seek judicial intervention. I remain committed to my view that free access to the courts must remain sacrosanct. This bill, however, deals with a very tiny but growing subclass of civil litigation, where lawsuits are not brought to win on the merits, but are brought to harass, injure, and deter free speech and expression by the defendant and others.

It is therefore respectfully hoped that these important changes to New York's anti-SLAPP law will meet with your approval and be enacted into law. I thank you for your consideration.

Sincerely,

Helene E. Weinstein

Helene E. Weinstein, Chair
Assembly Ways and Means Committee

cc: Elizabeth Garvey, Esq.
Denise Gagnon

C250

NEW YORK STATE LAW REVISION COMMISSION
ALBANY LAW SCHOOL
80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208
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October 23, 2020

Honorable Kumiki Gibson
Counsel to the Governor
Executive Chamber
The Capitol
Albany, New York 12224

Re: S. 52-A and A. 5991-A – An Act to amend to amend the civil rights law, in relation to actions involving public petition and participation; and to amend the civil practice law and rules, in relation to stay of proceedings

Dear Ms. Gibson:

The Commission urges the Governor to sign S.52-A which amends the civil rights law and the civil practice law and rules to broaden New York's rules regarding S.L.A.P.P. ("Strategic Law Suits Against Public Participation") law suits, in a manner similar to S.L.A.P.P. statutes in other states. S.L.A.P.P litigation, which is brought against individuals who have exercised their First Amendment rights to speak out on a topic, is designed to deter critical comment, is retaliatory in nature, and is an abuse of the court system. New York's current anti- S.L.A.P.P. statute, Civil Rights Law §76-a, which has been strictly construed by the courts, as a practical matter has been limited to controversies over public applications or permits. However, others who exercise their First Amendment rights regarding matters of public interest are likewise targeted with expensive and time-consuming cases. Such litigation frequently cannot withstand judicial scrutiny – but that is not its purpose. Moreover, even though the statute gives the court discretion to award costs and attorneys' fees, defendants rarely see these awards. S.52-A addresses these short comings by expanding the definition of actions subject to the statute to include matters of "public interest", a term that is to be broadly construed, and by providing for a mandatory award of costs and attorneys' fees in cases brought in bad faith.

S.L.A.P.P litigation is an abuse of an overburdened court system. It is often used as an act of vindictive intimidation. For example, Home Owner Associations through their corporate and association boards have used such litigation to target shareholders and homeowners who dare complain about the HOA's policies and actions. The HOAs sue using corporate funds (i.e. shareholder funds) to intimidate anyone who challenges them. By doing so they waste judicial time and assets and abuse processes of justice.

S. 52-A and A. 5991-A addresses situations such as these and should be signed into law. I would be pleased to discuss any questions you have.

Sincerely,

John A. Cirando
Member of the Commission

VIACOMCBS

Memo

To: NEW YORK LEGISLATURE

From: ViacomCBS

Date: JULY 16, 2020

Re: S.52-A (HOYLMAN) / A.5991-A (WEINSTEIN) AMENDMENTS TO ANTI-SLAPP STATUTE

ViacomCBS, Inc. ("ViacomCBS") strongly supports the above referenced bills, which would update and strengthen New York's current anti-SLAPP statute, Civ. Rts. L. §70-a, to further protect the First Amendment rights of its residents and businesses, including our broadcast and cable new divisions (e.g. CBS News), our film and television productions and networks (e.g. Paramount Pictures, CBS, Showtime, Comedy Central, BET, MTV, Nickelodeon) and our publishing house (Simon & Schuster).

Anti-SLAPP statutes enhance the protection of the First Amendment by providing a mechanism for the early, quick, and efficient resolution of lawsuits that attack the exercise of free speech rights. The effort to strengthen New York's statute is part of a nationwide push to prevent the silencing of speakers through the aggressive use of meritless lawsuits targeting free speech. This growing trend, the by-product of our increasingly polarized political landscape, threatens our industry, not just from those who would attempt to harass and extort, but more importantly, from those who seek to silence controversial ideas or suppress facts they deem harmful to their interests.

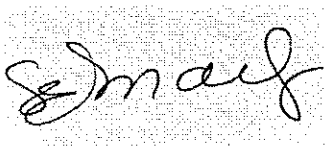
New York is a major center of film and television production, as well as the home to our headquarters. To maintain and grow production in New York, the state's anti-SLAPP law needs to be brought near to the level of protection afforded in other competing jurisdictions. The expense involved in defending against lawsuits targeting MPA members' speech is significant. As other states take action to enact or strengthen their own anti-SLAPP statutes in recent years, New York risks losing its edge as a place to produce new content.

Approximately 30 states have enacted anti-SLAPP statutes over the last 25 years. Traditionally blue states like California, Connecticut, and Oregon, as well as traditionally red states like Texas, Georgia, and Tennessee, all have anti-SLAPP statutes that are stronger than New York's current law, or indeed even the one that is proposed. Protecting the First Amendment is truly a bipartisan issue, and anti-SLAPP statutes typically attract support from across the political spectrum. Earlier this week, the Uniform Law Commission approved a model anti-SLAPP act, the Uniform Public Expression Protection Act" ("UPEPA"); New York's ULC delegation joined those of 48 other states and the District of Columbia in voting in favor of this strong model act.

Neither New York's existing anti-SLAPP statute (enacted in 1992) nor the proposed amendments in the pending legislation alter substantive New York tort law in the slightest. Rather, the anti-SLAPP statute simply provides a mechanism for the quick and efficient resolution of lawsuits that implicate defendants' First Amendment rights on public issues. If a plaintiff has a valid claim arising from events that occurred, he or she will be able to pursue such a claim regardless of the existence, or scope, of the anti-SLAPP law. The anti-SLAPP law only affects the manner in which those claims are litigated in the courts.

For the reasons explained above, the ViacomCBS supports the updating and strengthening of New York's anti-SLAPP statute as expressed in the above referenced legislation and urges the Senate and Assembly to enact these bills forthwith.

Sincerely,



Kira Alvarez
Vice President, Government Relations

NYCLU
ACLU of New York

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2019 – 2020 Legislative Memorandum

Subject: Strengthening New York's Anti-SLAPP Statute

Bill(s): A.5991-A (Weinstein) / S.52-A (Hoylman)

The New York Civil Liberties Union (NYCLU) strongly supports A.5991-A (Weinstein) / S.52-A (Hoylman), which would strengthen an existing law that deters SLAPPs – frivolous lawsuits intended to punish First Amendment-protected speech.

What's a SLAPP?

Imagine the following scenario: a journalist publishes truthful, accurate information suggesting an elected official is unfit for office. The report damages the official's public image, but instead of responding on the merits, the official – who is wealthy and powerful – sues the journalist for defamation and invasion of privacy. The official *knows the journalist's information is true and his lawsuit baseless*, but that doesn't matter, because he also knows the journalist doesn't have the money or time to defend the suit and call the official's bluff. The journalist knows this too, and so, faced with financial ruin simply for telling the truth, she retracts her report and issues a public apology to the official, who then withdraws a lawsuit he knows he would have lost if he'd gone forward. The journalist is wrongfully silenced and chastened, the public is denied valuable information, and the official remains convinced that the "truth" is whatever he can afford.

That sort of lawsuit is called a "SLAPP," or Strategic Lawsuit Against Public Participation. Usually filed by a famous figure or public official against outspoken critic, a SLAPP isn't meant to be won; it's just meant to be so ruinously expensive and time-consuming to defend that the victim agrees to self-censor if the suit is dropped. SLAPPs are one of the many ways powerful figures use the legal system to punish critics, silence journalists and whistleblowers, and stifle the flow of information and opinions protected by the First Amendment. And as social media has amplified the public's capacity to speak truth to power, SLAPPs have grown commonplace.

Because SLAPPs threaten free speech, a free press, open government, and an informed national debate, many states – roughly 30 – have adopted "anti-SLAPP" laws that allow courts to quickly dismiss SLAPPs *and* punish those who file them. New York has one, but it's narrow and out-of-date, applying only in the context of government permitting and licensing. It offers nothing to journalists, whistleblowers, authors, publishers, artists, critics, and commentators who nowadays suffer litigation as the price of telling the truth.

A.5991-A / S.52-A would change that. It would make New York's anti-SLAPP law applicable to *any* lawsuit arising out of First Amendment-protected communication on issues of public concern, aligning New York's speech and press protections with those of California, Texas, Louisiana, Nevada, Oregon, Colorado, and other states that recognize the threat SLAPPs pose to the exercise of First Amendment rights. The NYCLU strongly supports this bill, and urges you to do the same.

Details: Why New York's Anti-SLAPP is Broken, and How this Bill Fixes It

Broad Protections for All Truthful Speech on Public Issues

A good anti-SLAPP law protects *all* speech on issues of public concern – not just speech in certain contexts, forms of media, or legal proceedings – and applies to *any* lawsuit arising out of *any* protected communication. It also defines "public concern" broadly, ensuring that anything the public deserves to know is fully protected.

New York's current anti-SLAPP law, however, is far too narrow. It applies only to lawsuits brought by a "public applicant or permittee," against a defendant who "report[s] on, comment[s] on, rule[s] on, challenge[s] or oppose[s] such application or permission."[1] Essentially, it affords anti-SLAPP protection to just a tiny class of people who speak out about someone who has applied for a permit, zoning change, lease, license, certificate, or government entitlement, *or* for government permission to do something. The law does nothing for the much larger class of outspoken individuals who regularly suffer SLAPPs: journalists, authors, publishers, commentators, broadcasters, filmmakers, artists, humorists, and ordinary speakers who are sued into silence for speaking about issues of public importance *outside* the government permitting context.

This bill would expand New York's anti-SLAPP protections to "any communication in a place open to the public or a public forum in connection with an issue of public concern" and "any other lawful conduct in furtherance of the exercise

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1 N.Y. Civ. Rights Law § 76-a(1)(a)

of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition" – the same level of protection afforded by California law, widely considered the best anti-SLAPP law in the country. California's courts have construed that broad definition to cover almost any subject of public concern, wherever discussed, and New York's courts would be on sure footing to do the same.

Speedy, Efficient Resolution that Keeps Defendant's Costs Down

A well-constructed anti-SLAPP law allows the court to quickly identify and weed out SLAPPS. The defendant brings the alleged SLAPP to the court's attention, the court puts the entire suit on hold, and after very limited discovery, requires the plaintiff demonstrate that the suit has enough merit to go forward. The court evaluates the plaintiff's argument and issues a ruling in a matter of months, not years, efficiently dismissing SLAPPs and keeping defendants' costs down, while – just as importantly – allowing genuinely aggrieved plaintiffs their day in court.

New York's current anti-SLAPP law neither stays the lawsuit nor meaningfully accelerates the review process. But both features are critical, as *the whole point of a SLAPP is to make the lawsuit too expensive for the defendant to fight long enough for the court to see the case for what it is.* This bill fixes those critical flaws by providing for both a stay and expedited review.

Attorney Fee Awards to Deter SLAPP Filers

Lastly, an effective anti-SLAPP law *requires* a plaintiff whose SLAPP is dismissed to pay the defendant's attorney fees. This is a crucial deterrent, as SLAPP plaintiffs almost always have greater resources than the defendants they harass and intimidate, and usually don't care how much they spend as long as it costs the defendant too much to win. A mandatory fee-shifting provision eliminates that incentive altogether.

New York's current anti-SLAPP law has a fee-shifting provision, but it makes a fee award optional, whereas most anti-SLAPP laws make such an award mandatory. The bill would make the award mandatory.

***

For the above reasons, the NYCLU urges lawmakers to support and pass this legislation.

TO: **Senator Brad Hoylman**
Assemblymember Helene Weinstein
DATE: **July 15, 2020**
RE: **Memorandum in Support of S.52-A/A.5991-A**

WarnerMedia respectfully submits this memorandum in support of S.52-A/A.5991-A, which will update New York's Law regarding Strategic Lawsuits Against Public Participation ("SLAPP") so that it further deters frivolous litigation designed to suppress freedom of speech. In addition, WarnerMedia encourages the legislature to take the additional and crucially important step of requiring that *any* prevailing party on an anti-SLAPP motion be awarded attorneys' fees.

WarnerMedia is a New York-based company, with a proud tradition of producing and distributing award-winning and critically-acclaimed television programs and films through its operating divisions which include CNN, HBO, and Warner Bros., among others. WarnerMedia businesses have a significant footprint in New York. For example, HBO is based in New York and has produced and filmed many of its award-winning television programs and films in the State. Warner Bros. production and post-production expenditures in New York for 2019 films and the 2019-2020 television season were $670 million. Similarly, some of CNN's most iconic programs are based in its state-of-the-art New York studio, including Cuomo Prime Time and Anderson Cooper 360.

The unfortunate reality of today's world is that punitive litigation designed to chill constitutionally protected speech has become just another strategy for government officials, public figures, and just about anyone else who does not like what the news media says about them. Currently, CNN is defending a libel lawsuit brought by Donald J. Trump for President, Inc. over an Op-Ed posted on CNN.com and a separate lawsuit brought by Congressman Devin Nunes arising from CNN's reporting relating to the impeachment of President Trump. A few years ago, HBO's "Last Week Tonight with John Oliver" faced a similarly meritless lawsuit after it published a segment focusing on safety issues in the coal industry. The plaintiffs in that lawsuit have filed over a dozen lawsuits throughout the United States, each of which either has been dismissed, like the case against HBO, or dropped prior to having to discovery commencing. These litigants are not seeking to redress a wrong; they are seeking to dissuade others from publishing anything negative or critical, for fear of having to incur the substantial expense of defending a lawsuit. Winning even a frivolous claim can be very expensive.

Section 76-a of the Civil Rights Law, as it currently stands, makes New York far less protective of free speech than 30 other states, ranging from Georgia to California, which have robust anti-SLAPP laws. This legislation widens the scope of existing law to include all matters of "public interest", a crucial step to ensuring the work of journalists and filmmakers falls within the scope of the statute's protection.

Stephanie S. Abrutyn, Senior Vice President and Chief Counsel, Litigation and Public Policy, WarnerMedia,
stephanie.abrutyn@hbo.com
(212) 512-5610

In addition, existing law does not do enough to protect speakers from having to incur significant expense to defend meritless claims. The stay of discovery and pending hearings or motions once a motion to dismiss a SLAPP action has been made pursuant to CPLR 3211 (a)(7) will help prevent litigants from driving up costs through endless discovery requests and proceedings in a meritless case. Historically, courts also have failed to use their discretionary power to award costs and attorney's fees to a defendant found to have been victimized by a frivolous lawsuit intended only to chill free speech. These amendments to Section 70-A of the Civil Rights Law makes clear that a court shall impose an award of costs and fees if the court finds that the case has been initiated or pursued in bad faith.

For these reasons, WarnerMedia believes S.52-A/A.5991-A is an improvement over current law and supports the bills. However, we encourage the legislature to go further, and provide – like California and other states – that a prevailing party in an anti-SLAPP motion is entitled to attorneys' fees in all cases. Just today, the Uniform Public Expression Protection Act ("UPEPA") was approved at the annual meeting of the Uniform Law Commission. That model anti-SLAPP law contains mandatory fee shifting, precisely because nothing short of a mandatory fee award will *both* discourage punitive lawsuits designed to discourage speech *and* encourage robust and accurate reporting on issues of utmost public importance. Without it, New York will continue to be an outlier that provides less protection for speech than other states.

Sincerely,

Stephanie S. Abrutyn

Stephanie S. Abrutyn

NEW YORK NEWS PUBLISHERS ASSOCIATION, INC.

50 Colvin Avenue, Suite 102 ● Albany, New York 12206 ● 518-449-1667 ● Fax: 518-449-5053 ● www.nynpa.com

Diane Kennedy
President

Memorandum in Support
S.52-A/A.5991-A
Protection of actions involving public petition and participation

The New York News Publishers Association strongly supports S.52-A/A.5991-A and urges the Legislature to pass this important legislation at its earliest opportunity.

Although the Assembly has approved this legislation several times in recent years, current events render this legislation both timely and extremely urgent. The Trump Campaign is using its vast stockpile of cash to bring frivolous litigation against news organizations (https://www.theatlantic.com/ideas/archive/2020/03/true-danger-trump-campaigns-libel-lawsuits/607753/), newspapers (https://www.nytimes.com/2020/02/26/business/media/trump-new-york-times-lawsuit.html), supporters of Democratic candidates for office and broadcasters who agree to air ads critical of President Trump (https://deadline.com/2020/04/coronavirus-donald-trump-priorities-usa-1202906890/) in an attempt to stifle perceived criticism. The Campaign's lawyers know the lawsuits will eventually be dismissed, but they are willing to essentially set money on fire to harass anyone who speaks or writes unfavorably about their candidate. The Trump family is engaging in similar legal actions to block publication by Simon & Schuster of a book detailing the President's unsavory past (https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/83680-trump-family-sues-to-block-publication-of-tell-all-memoir.html).

There is no reason to believe these punitive actions will cease as November 3 draws closer, and we are concerned about additional legal costs imposed on newspapers, book publishers and news organizations at a time when COVID-19 has sharply eroded revenues. At this time in the history of our country, we need journalists and authors more than we ever have, and we can't afford to allow the Trump Campaign and the Trump family to divert our resources to meritless court cases. Because New York State is the heart of the country's book, magazine and newspaper publishing, it is urgent that our state government step up now to protect our right to the most robust possible discussion of current events.

The proposed legislation would update New York's Law regarding Strategic Lawsuits Against Public Participation to deter frivolous litigation designed to suppress freedom of speech. New York lags behind 30 other states, ranging from Texas to California, which protect the rights of their citizens to be free from punitive litigation brought by wealthy interests who can afford to abuse the court system to deter the exchange of ideas.

When originally enacted more than 25 years ago, Section 76-a of the Civil Rights Law was designed to protect citizens who speak out on issues of public interest from punitive lawsuits brought by those who wish to

silence opposition or criticism. However, the existing statute only protects speech regarding a "public applicant or permittee," limiting its protections to disputes over real estate developments, zoning and similar matters. Non-profit organizations, journalists, small business owners, political candidates, teachers, public officials and individual citizens have been the targets of costly litigation that falls outside the narrow scope of the current law. Only about a dozen cases have been found to fall within its scope.

This legislation clarifies and extends the intent of the law by broadly widening the scope to include matters of "public interest." Section 2 of the bill would amend section 76-a of the Civil Rights Law to define an "action involving public petition and participation" to include a claim related to:

> i. Any communication in a place open to the public or a public forum in connection with an issue of public interest; or ii. Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition. The bill also specifies that "public interest" should be broadly construed.

Additionally, the principal remedy currently provided to victims of SLAPP suits in New York is almost never actually imposed. The courts have failed to use their discretionary power to award costs and attorney's fees to a defendant found to have been victimized by a frivolous lawsuit intended only to chill free speech. This amendment to Section 70-A of the Civil Rights Law makes clear that a court "shall" impose an award of costs and fees, but only if the court finds that the case has been initiated or pursued in bad faith. A mandatory award of attorney's fees is necessary to discourage SLAPP lawsuits - which attempt to chill free speech by definition - from being instituted.

Section 3 of the bill contains a stay of discovery and pending hearings or motions once a motion to dismiss a SLAPP action has been made pursuant to CPLR 3211 (a)(7). A stay of the SLAPP action is necessary while a motion to dismiss is pending in order to prevent other means in which the SLAPP plaintiff attempts to cause harm or injury to the SLAPP defendant. For example, this is often done by attempting to tie the defendant up in litigation, including discovery, and/or by forcing the defendant to have to advance legal fees and costs to their counsel for otherwise unnecessary proceedings.

We believe this legislation will support the robust public dialogue that is key to the effective operation of a democratic society and urge its swift passage.

Sincerely,

Diane Kennedy
President

October 12, 2020

Dear Governor Cuomo,

This summer, the New York Legislature sent a powerful message to opponents of free speech by passing a robust expansion to the state's Anti-SLAPP law. Senate Bill S.52A and its Assembly counterpart (A.5991-A) passed with overwhelming bipartisan support: 57 to 3 in the Senate and 116 to 26 in the Assembly.

New York's Anti-SLAPP statute, originally enacted nearly thirty years ago, has failed to protect those who need it most: journalists, writers, academics, publishers, news organizations, film and television producers, candidates for political office, and ordinary citizens. S.52A/A.5991-A expands the statute to cover the full breadth of lawful expression, signaling that New York is **the** leader in safeguarding free speech on matters of public concern.

As book publishers, we are committed to truthful inquiry and reasoned criticism. Therefore, we unreservedly support the legislation and encourage your office to review it expeditiously. Your signature is urgently needed in light of the recent influx of meritless lawsuits designed to chill the speech of our authors. Without the protection of Anti-SLAPP, this phenomenon will likely intensify as we enter a volatile, high-stakes election season.

Truth matters, but freedom of speech isn't free if the powerful can punish criticism in our courts. For all the reasons cited in the attached materials, we respectfully urge you to sign S.52A/A.5991-A into law immediately.

Respectfully,

Association of American Publishers

Hachette Book Group

HarperCollins Publishers

Macmillan Publishers

Penguin Random House

Simon & Schuster

W.W. Norton & Company, Inc.

Wiley

July 17, 2020

To: **Governor Cuomo and Members of the New York State Legislature**

The First Amendment of the United States Constitution guarantees Freedom of Speech. Yet when the powerful file baseless lawsuits to punish critics, speech is not free. Rather, a toll must be paid to share information of public concern. Journalists, writers, academics, publishers, news organizations, film and television producers, candidates for political office, and ordinary citizens must have the freedom to speak truthfully on matters of importance to our society, without fear of retaliation.

SLAPP lawsuits are an intolerable form of private censorship. It is more critical than ever that New York, the media capitol of the world, provide robust protection against meritless claims designed to chill speech.

We join the New York State Bar Association Committee on Media Law in endorsing the Anti-SLAPP legislation put forward by Assemblywoman Weinstein and Senator Hoylman, for the reasons cited in their enclosed memorandum.

Respectfully,

Advance Publications, Inc.

A+E Networks

American Booksellers for Free Expression

Association of American Publishers

The Authors Guild

BuzzFeed Inc.

Cornell Law School First Amendment Clinic

Daily News, L.P.

Dow Jones & Company

Gannett Co.

Hachette Book Group

HarperCollins Publishers

Macmillan Publishers

Miller Korzenik Sommers Rayman LLP Media Law Resource Center

National Press Photographers Association

NBCUniversal Media

News Corp

New York Civil Liberties Union

New York News Publishers Association

New York State Broadcasters Association, Inc.

NYP Holdings, Inc.

Penguin Random House

Radio Television Digital News Association

Simon & Schuster

Triangle House Literary

The Tully Center for Free Speech at Syracuse University

Victor Kovner

W.W. Norton & Company, Inc.

New York State Bar Association
Committee on Media Law

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Memorandum in Support of A.5991-A/S.52-A (Weinstein/ Hoylman)

The New York State Bar Association Media Law Committee, which consists primarily of lawyers specializing in First Amendment and media law and litigation, strongly endorses S.52-A/A.5991-A, which would update and strengthen New York's current anti-SLAPP statute.

Strategic lawsuits against public participation ("SLAPP" suits) are baseless lawsuits that seek to silence those who exercise their First Amendment rights. The objective of a SLAPP suit is not to defend one's reputation, but rather to harass. The message they send is that even truthful speech about a powerful individual comes at the expense of a lawsuit. Anti-SLAPP legislation is therefore urgently needed to protect the free press, including magazines, book publishers, newspapers, websites, and film and television producers, as well as all citizens who seek to be heard, from those who otherwise would use the legal system to attempt to silence them.

It is important to note that passage of the bill would not upset or undermine New York's tort regime. Rather, it would help ensure that all New York citizens and businesses - especially media companies, which play a critical role in informing the citizenry - are free to exercise their free speech rights without risk of incurring substantial legal fees to defend meritless lawsuits, while respecting the ability of those who have been harmed to seek redress in the courts.

In general, anti-SLAPP laws allow judges to consider relevant information at the earliest possible threshold in a case involving the exercise of free speech. That way, all of those involved – the judicial system, defendants, and plaintiffs – avoid spending substantial time and resources litigating a case that will ultimately be dismissed. However, in no way do anti-SLAPP statutes diminish the rights of truly aggrieved parties. Nothing in the bill would preclude any claim that has a reasonable basis in fact and law – or even a reasonable argument for extending, modifying, or reversing the law.

In recent years, our Committee has observed a dramatic expansion of SLAPP suits filed against reporters, filmmakers, candidates for political office, and even individuals commenting on social media. For example, after numerous cease and desist letters were sent to stations across the country, the Trump Campaign took the unprecedented step of suing a local television station for airing an advertisement critical of the President's Coronavirus response[1].

New Yorkers face unprecedented threats from those who want to silence people who present information that does not fit a specific narrative or viewpoint. Every time a powerful individual threatens a lawsuit, New Yorkers must put a literal price on their First Amendment rights. For such plaintiffs, spending hundreds of thousands of dollars to punish negative reporting or commentary is a mere line in a budget. Not so for the defendant. Depositions and

[1] *See* https://deadline.com/2020/04/coronavirus-donald-trump-priorities-usa-1202906890/

court appearances will keep them out of work, and funds that would have gone to reporters, editors, and producers are instead spent in defense of a lawsuit.

The pending bill would improve New York's existing anti-SLAPP statute by expanding the scope of the statute to cover claims involving "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, or in furtherance of the exercise of the constitutional right of petition." This language will help ensure that New York's anti-SLAPP statute will apply to the types of meritless claims that target the First Amendment-protected speech that all New Yorkers have a Constitutional right to engage in.

The bill further provides for a stay of proceedings once a defendant files an anti-SLAPP motion. This is essential to protect defendants from costly and time-consuming discovery, hearings, and briefing while the motion is under consideration.

By expanding the coverage of the law to those who need it most, the bill would discourage the filing of SLAPP lawsuits. First, it would provide a quick resolution to meritless cases, preventing a plaintiff from dragging out the suit to maximize the time and expense for a defendant. Second, by allowing defendants to recover their legal fees when prevailing against claims that have no substantial basis in fact or law, New Yorkers would no longer have to pay a devastating price to defend against meritless claims that attack free expression

New York has a long and proud tradition of protecting free speech rights. It is the media capital of the world – home to the publishing industry, a number of the largest daily newspapers in the United States – including *The New York Times* and *The Wall Street Journal*, as well as many national television and cable news organizations. It also is the fastest-growing technology hub in the United States.[2] More recently, New York has become home to a growing number of film and television productions, which provide significant economic benefits to the state.[3]

Approximately 30 states across the political spectrum have enacted anti-SLAPP statutes in the past 25 years. Many of those states, from California, Nevada, and Oregon, to Texas, Georgia, and Oklahoma, have anti-SLAPP statutes that are considerably stronger than New York's current law. The relatively modest proposed changes to the existing statute would bring New York law more in line with other states, and provide improved protection for the free speech rights of all New Yorkers, including entertainment companies and the news media.

The Committee urges you to support this important legislation.

Very truly yours,

Daniel R. Novack, Esq.
Sandra S. Baron, Esq.
Co-Chairs, NYSBA Committee on Media Law

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[2] *See* http://www1.nyc.gov/site/internationalbusiness/industries/technology-and-media-industry.page.

[3] *See* http://www.nysfilm.com/.

MILLER KORZENIK SOMMERS RAYMAN LLP
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August 26, 2020

The Honorable Andrew M. Cuomo
Governor of the State of New York
New York State Capitol Building
Executive Chamber
Albany, NY 12224

Re: Please Sign the New NY Anti-SLAPP Law: *Protect the Press from the Recent Tide of Alt-Right Litigation and Legal Threats – These Intimidation and Publicity Stunts Ultimately Fail as Cases; but They Succeed in their Abusive Goals by Silencing Critics and Punishing Those Who Refuse to Be Silenced with the Burdensome Costs of Defense*

Dear Governor Cuomo:

The law of libel and the 1st Amendment have not changed. But the atmosphere in our country and the propaganda now directed against the free press has indeed changed in a new and dark way.

The Alt-Right and right wing, energized by our President, have now deployed litigation and legal threat to restrict the way that the press writes about them.

I have for many years acted as counsel for *New York* Magazine and many other news organizations based in New York. I have also taught Media Law at Cardozo Law School for over 20 years. I write in my personal capacity on the basis of that experience. Threatened or filed libel actions have always been a source of concern. But now noticeably more of the legal threats and actions come from two distinct sources: 1) Alt-right and right-wing groups (including QAnon associated candidates) who do not like our writing unfavorably about them; and 2) Russian related money interests that do not like our identifying their connections with Russia or with the Trump campaign.

The bulk of these new libel claims are political. It should not be so; and the law should impose sanctions on those who sue to gain unjustified political advantage.

Look at some of the most recent examples of such intimidation tactics:

- ***Laura Loomer,*** Republican candidate for Congress in Florida and right-wing fanatic, sued *New York* Magazine in Florida for calling her "Alt-right" in a brief story about her de-listing from Twitter. The article even quoted her view of the term. Still she sued and *New York* must defend. *New York* will prevail, but must

bear the cost of that needless defense. And Loomer benefits from the publicity and intimidation that the announcement of such litigation affords her.

- ***Marjorie Taylor Greene,*** candidate for Congress in Georgia and advocate of the conspiracy theories of QAnon, is presently threatening another one of my news clients who are trying to cover that alarming subject of public concern.

- ***Congressman Devin Nunes*** sued *Esquire* magazine and its writer Ryan Lizza (not clients of mine) for libel over an article about his family farm in Iowa. Nunes just lost, as he should have, over an article that was an expression of clear and obvious opinion and non-defamatory statements. But he gained the publicity that initiating the litigation gave him, and he was able to impose significant costs on *Esquire* which had to defend itself against Nunes' baseless action.

- My clients are regularly threatened with libel suits when they write about or even approach such news subjects. The very existence of an Anti-SLAPP Law will surely chasten their aggressive intimidation tactics. Our Anti-SLAPP may well be applicable in the courts of other states in which New York news publishers are sued. And it will encourage other jurisdictions to follow New York's example.

Who are among the most notorious new crop of libel plaintiffs' lawyers? Lawyers who take on litigation against the press on behalf of Trump, Trump associates and candidates supported by him: Charles Harder, Larry Klayman, Steven Biss, Lin Wood and a growing list of others.

As President Obama observed this Wednesday night: "The free press is not the enemy." But that is what our current President has made us out to be. That is where the dark legal clouds that hover over us now come from. This Anti-SLAPP Law can lift away some of that darkness.

Do we need this new Anti-SLAPP law (***S52A and A5991***) to counter the emerging threat and abuse of process? Absolutely.

Respectfully,

David S. Korzenik

cc: Kumiki Gibson, Counsel to the Governor
Beth Garvey, Special Counsel and Senior Advisor to the Governor

NEW YORK CITY BAR

COMMUNICATIONS & MEDIA LAW COMMITTEE

MATTHEW L. SCHAFER
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October 15, 2020

Hon. Andrew M. Cuomo
Governor of the State of New York
Executive Chamber Capitol Building
Albany, New York 12224

Re: A.5991-A (AM Weinstein) / S.52-A (Sen. Hoylman) – related to amendments to the Civil Rights Law's anti-SLAPP statute; SUPPORT

Dear Governor Cuomo:

On behalf of the New York City Bar Association's Communications and Media Law Committee and Civil Rights Committee, we are writing to urge you to sign into law the amendments to the New York anti-SLAPP law, which would bolster protections for individuals and news organizations from "strategic lawsuits against public participation" (SLAPPs). Specifically, the amendments broaden the application of the existing anti-SLAPP statute and make its fee shifting provision mandatory, in line with the laws of several other states. This bill (A.5991-A/S.52-A) is sponsored by Assembly Member Weinstein and Senator Hoylman; it passed the Senate by a vote of 57 to 3 and the Assembly by a vote of 116 to 26.

New York has a "consistent tradition . . . of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events.'"[1] New Yorkers' commitment to the freedom of the press can be traced to the Province of New York and the trial of printer John Peter Zenger. Zenger ended up on the wrong side of the royal governor because of his paper's attacks on the administration. Despite being charged with criminal libel, a New York

[1] *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 529 (1988).

jury acquitted him after his counsel, Andrew Hamilton, implored them that the question regarding freedom of the press was "not of small nor private concern."[2]

Rather, Hamilton said, "It is the cause of liberty." As he told the jury, "I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery will bless and honor you, as men who have baffled the attempt of tyranny; and . . . laid a noble foundation for securing to ourselves . . . the liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth."[3]

In recent years, however, New York has failed to live up to this tradition. As attacks on the press have ratcheted up, frivolous litigation brought by well-heeled plaintiffs has followed.[4] The purpose of these kinds of lawsuits is not to remedy any real harm. Rather, the purpose is to exact financial retribution through retaliatory litigation costs incurred in defending against these kinds of lawsuits, now commonly called SLAPP suits. As Senator Hoylman wrote, "This broken system has led to journalists, consumer advocates, survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them."[5]

While New York has an anti-SLAPP statute, originally adopted in 1992, it is toothless against these assaults. That statute, as it currently stands, is limited to cases brought by "a public applicant or permittee" and that are "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."[6] Worse, courts have held that the statute must be narrowly construed, making it useless in all but the most limited circumstances.[7]

The amendments to the statute address this problem in four principal (although not exhaustive) ways:

- First, they broaden the application of the statute by making it applicable to any "claim" relating to public petition and participation—as opposed to "a claim . . . brought by a public applicant or permittee."

---

[2] LIVINGSTON RUTHERFORD, JOHN PETER ZENGER, HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS 240 (1904) (cleaned up).

[3] *Id.*

[4] *See, e.g.*, Joshua A. Geltzer & Neal K. Katyal, *The True Danger of the Trump Campaign's Defamation Lawsuits*, THE ATLANTIC (Mar. 11, 2020), https://www.theatlantic.com/ideas/archive/2020/03/true-danger-trump-campaigns-libel-lawsuits/607753; William Cummings, *Rep. Devin Nunes files $435 million defamation lawsuit against CNN*, USATODAY (Dec. 4, 2019), https://www.usatoday.com/story/news/politics/2019/12/04/devin-nunes-files-435-million-defamation-lawsuit-against-cnn/2606359001/ (all websites last visited Oct. 14, 2020).

[5] *Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech*, N.Y. STATE LEGISLATURE (July 22, 2020), https://nyassembly.gov/Press/files/20200722a.php.

[6] N.Y. Civ. Rights Law § 76-a(1).

[7] *See, e.g.*, *Hariri v. Amper*, 51 A.D.3d 146, 151 (1st Dept. 2008) ("we find that the anti-SLAPP law is in derogation of the common law and must be strictly construed."); *Harfenes v. Sea Gate Assn.*, 167 Misc.2d 647 (Sup. Ct., N.Y. Cnty. 1995) (finding that the statute should be "construed narrowly").

- Second, they expansively define an action involving public petition and participation as one based on "(1) any communication in a place open to the public or a public forum in connection with an issue of public concern; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition."

- Third, they stay discovery pending resolution of a motion to dismiss, thus relieving defendants subject to SLAPP suits of the ominous threat of incurring substantial litigation costs during discovery.

- Fourth, they make the award of fees mandatory, as opposed to discretionary, where it is shown that a claim "was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." Consistent with the intent of the Legislature to broaden the application of the statute, the Committee understands this provision as requiring an award of fees upon the granting of a motion to dismiss pursuant to CPLR 3211.

These amendments would bring New York into line with other jurisdictions, including Texas and California, that provide broad protections to defendants sued in strategic lawsuits against public participation. The media capital of the world should be leading—not following—other states in strengthening protections of our most cherished rights of freedom of speech and of the press.

For these reasons, we urge you to sign the anti-SLAPP amendments into law. Thank you for your consideration.

Respectfully,

Matthew L. Schafer /s/

Matthew L. Schafer
Chair, Communications and Media Law Committee

Zoey Chenitz /s/

Zoey Chenitz
Co-Chair, Civil Rights Committee

Kevin Jason /s/

Kevin Jason
Co-Chair, Civil Rights Committee

REPORTERS COMMITTEE
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By email

November 5, 2020

The Honorable Andrew M. Cuomo
Governor, State of New York
NYS State Capitol Building
Albany, NY 12224

Re: Support for A. 5991-A (Weinstein)

Dear Governor Cuomo:

The Reporters Committee for Freedom of the Press respectfully writes to urge you to sign A. 5991-A, which would significantly improve protections in New York for journalists and others facing frivolous "Strategic Lawsuits Against Public Participation," or SLAPPs.

Briefly, A. 5991-A would extend the current anti-SLAPP law to deter claims based on speech or lawful conduct in furtherance of the right to free speech on matters of public interest; provide for a stay of discovery and other proceedings upon the filing of a motion to dismiss a SLAPP suit; and change the current permissive fee-shifting to mandatory fee-shifting, an important deterrent against lawsuits designed to chill news reporting. For additional detail on why this provision would promote the rights of the press and public in New York State, please see the attached letter submitted on July 20, 2020, to leadership in the New York State Senate and Assembly endorsing the bill.

The Reporters Committee thanks you for your attention to this matter. Please do not hesitate to contact Gabe Rottman at the Reporters Committee with any questions at grottman@rcfp.org.

Sincerely,

Gabe Rottman
Director of the Technology and Press Freedom Project
Reporters Committee for Freedom of the Press

ATTACHMENT

REPORTERS COMMITTEE
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By email

July 20, 2020

The Honorable Jamaal T. Bailey
Chair, Standing Committee on Codes
New York State Senate
Legislative Office Building, Room 609
Albany, NY 12247

The Honorable Andrew J. Lanza
Ranking Member, Standing Committee on Codes
New York State Senate
Legislative Office Building, Room 606
Albany, NY 12247

The Honorable Brad Hoylman
Chair, Standing Committee on Judiciary
New York State Senate
Legislative Office Building, Room 606
Albany, NY 12247

The Honorable Helene Weinstein
Chair, Standing Committee on Ways and Means
New York State Assembly
Legislative Office Building, Room 923
Albany, NY 12248

Re: Support for S. 52-A (Hoylman) / A. 5991-A (Weinstein)

Dear Chairman Bailey, Ranking Member Lanza, Chairman Hoylman, and Chairwoman Weinstein:

The Reporters Committee for Freedom of the Press strongly supports A. 5991-A (Weinstein) and S. 52-A (Hoylman), which would significantly improve protections in New York for journalists and others facing frivolous "Strategic Litigation Against Public Participation," or SLAPP, lawsuits. SLAPP suits—brought by plaintiffs as an effort to suppress protected speech, not in an expectation of succeeding on the merits—significantly restrict the free flow of newsworthy information to the public.

The Reporters Committee was 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.

Effective anti-SLAPP laws allow defendants who have been sued for speech on matters of public interest to dismiss the case early, before incurring significant legal fees, and require those who bring SLAPP suits to pay fees and costs, which serves to deter unmeritorious cases. New York's current law is unduly narrow. It only covers speech regarding a "public applicant or permittee," which removes journalists from its scope.

The bills under consideration—A. 5991-A and S. 52-A—would extend the law to statements on matters of "public interest" more broadly, made in places open to the public, public forums, or in furtherance of the exercise of free speech or the right to petition. Section 2 also confirms that "public interest" should be construed broadly.

The legislation would also crucially provide for a stay of discovery and other proceedings upon the filing of a motion to dismiss a SLAPP suit, and it would then expedite consideration of the anti-SLAPP claim. This is essential for defendants, including media defendants, as SLAPP suits often seek to burden the defendants with litigation costs as part of the effort to suppress public participation.

Finally, the legislation changes the current permissive fee-shifting in existing law, where a court "may" award fees and costs to a successful defendant, to the approach used in the most effective anti-SLAPP laws, where fees and costs "shall" be awarded if the defendant prevails in establishing that the action was, in fact, a SLAPP. The mandatory fee-shifting is an important deterrent for SLAPPs, and is the approach taken in states with the most effective anti-SLAPP laws, such as California.

Unmeritorious SLAPP suits continue to proliferate in New York and around the country. For instance, late last month, the Reporters Committee, joined by the Association of American Publishers, and PEN America filed an amicus brief in New York Supreme Court in opposition to a lawsuit filed by Robert Trump, President Trump's brother, seeking to block publication of a book by niece Mary Trump on the president.[1] Earlier, in May, the Reporters Committee joined a brief filed by the NCTA – The Internet and Television Association seeking dismissal of a consumer protection claim against Fox News based on its reporting around COVID-19, in which the plaintiff argued that cable news providers are undeserving of First Amendment protections at all.[2]

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[1] Amicus Curiae Brief of the Reporters Committee for Freedom of the Press, the Association of American Publishers, Inc., and PEN American Center, Inc. in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, Trump v. Trump, No. 2020-51585 (N.Y. Sup. Ct. filed June 30, 2020), https://www.rcfp.org/mary-trump-book-prior-restraint/.

[2] *See* Gabe Rottman, *Fox News Lawsuit Would Strip First Amendment Protection from Cable News and the Internet*, Reporters Comm. for Freedom of the Press (May 18, 2020), https://www.rcfp.org/fox-news-washlite-lawsuit-analysis/.

We thank the New York Assembly and Senate for your attention to this important issue, and urge you to pass S. 52-A and A. 5991-A. Please do not hesitate to contact me at grottman@rcfp.org with any questions.

Sincerely,

Gabe Rottman
Director of the Technology and Press Freedom Project
Reporters Committee for Freedom of the Press

cc: Members of the Standing Committee on Codes

July 20, 2020

The Honorable Jamaal T. Bailey
Chair, Standing Committee on Codes
New York State Senate Legislative Office Building, Room 609
Albany, NY 12247

The Honorable Andrew J. Lanza
Ranking Member, Standing Committee on Codes
New York State Senate Legislative Office Building, Room 606
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We thank the New York Assembly and Senate for your attention to this important issue, and urge you to pass S. 52-A and A. 5991-A. Please do not hesitate to contact me at grottman@rcfp.org with any questions.

Sincerely,
Gabe Rottman
Director of the Technology and Press Freedom Project
Reporters Committee for Freedom of the Press

cc: Members of the Standing Committee on Codes

C250

New York State Bar Association
Committee on Media Law

DANIEL NOVACK, ESQ. – *Co-Chair*
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Letter in Support of S.52-A & A.5991 (Hoylman/Weinstein)

Dear Governor Cuomo, Senator Hoylman, and Assemblywoman Weinstein,

The New York State Bar Association Media Law Committee congratulates you on the historic enactment of Anti-SLAPP protection via Senate and Assembly Bills S.52-A/A.5991-A. In passing this important legislation, the legislature has expanded New York's Anti-SLAPP statute to cover those who need it.

Now, **all** New Yorkers exercising their First Amendment rights will have the benefit of the heightened "substantial basis" pleading standard, which requires plaintiffs to offer compelling evidence in support of their claims. *See, e.g. 161 Ludlow Food, LLC v L.E.S. Dwellers, Inc.*, 2018 N.Y. Misc. LEXIS 3466 (holding that despite the fact that plaintiff's allegations would ordinarily survive a Motion to Dismiss, they nonetheless "have not met their heavy burden to survive the motion to dismiss pursuant to CPLR § 3211[g].") This provides critical protection from powerful individuals who file baseless claims designed to threaten, harass, and stifle any scrutiny or criticism.

Not only will meritless claims be dismissed faster; they will also be further disincentivized by the change from a discretionary to mandatory attorneys' fees standard. This will ensure a level playing field between the powerful and powerless by requiring SLAPP plaintiffs to cover defendant's legal expenses in the event of a dismissal. In making this change, both the dismissal and fee decisions will now turn on the same "substantial basis" standard, which will serve to streamline the court's analysis of SLAPP suits.

Lastly, the introduction of an immediate stay of discovery during the pendency of a Motion to Dismiss will prevent wasted time, expense, and judicial resources.

In enacting this law, New York honors a proud tradition of free speech rights. No longer can any state claim a greater commitment to protecting dissent. This is welcome news to those New Yorkers who are already fighting SLAPP lawsuits. They can finally even the odds.

The Committee thanks you for your support of First Amendment rights.

Very truly yours,

Daniel Novack, Esq.
Jacquelyn Schell, Esq.
Co-Chairs, NYSBA Committee on Media Law

November 5, 2020

The Honorable Andrew M. Cuomo
Governor, State of New York
NYS State Capitol Building
Albany, NY 12224

Re: Support for A. 5991-A (Weinstein)

Dear Governor Cuomo:

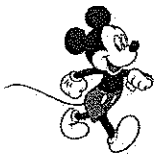
The Reporters Committee for Freedom of the Press respectfully writes to urge you to sign A. 5991-A, which would significantly improve protections in New York for journalists and others facing frivolous ?Strategic Lawsuits Against Public Participation,? or SLAPPs.

Briefly, A. 5991-A would extend the current anti-SLAPP law to deter claims based on speech or lawful conduct in furtherance of the right to free speech on matters of public interest; provide for a stay of discovery and other proceedings upon the filing of a motion to dismiss a SLAPP suit; and change the current permissive fee-shifting to mandatory fee-shifting, an important deterrent against lawsuits designed to chill news reporting. For additional detail on why this provision would promote the rights of the press and public in New York State, please see the attached letter submitted on July 20, 2020, to leadership in the New York State Senate and Assembly endorsing the bill.

The Reporters Committee thanks you for your attention to this matter. Please do not hesitate to contact Gabe Rottman at the Reporters Committee with any questions at grottman@rcfp.org.

Sincerely,

Gabe Rottman
Director of the Technology and Press Freedom Project
Reporters Committee for Freedom of the Press



The Walt Disney Company

To: Members of the New York State Senate and New York State Assembly

From: The Walt Disney Company

Date: July 20, 2020

Subject: Memorandum in Support of S.52-A/A.5991- A

The Walt Disney Company ("TWDC") respectfully submits this memorandum in support of S.52-A/A.5991-A, which will update and strengthen this state's anti-SLAPP statute, Civil Rights Law §70-a, so that New York joins other states with modern, robust statutes that broadly protect speech of public interest, including that of journalists and filmmakers, from punitive and harassing lawsuits.

Through its news, motion picture and television subsidiaries, TWDC has significant business interests in New York. For example, ABC News is based in New York and produces such acclaimed national news programs as *World News with David Muir*, *Good Morning America, This Week, 20/20* and *Nightline,* and provides local news to New Yorkers though its award-winning owned station WABC-TV. ESPN covers sports in New York that are undoubtedly of keen public interest. Motion picture and television productions not only film in New York, but also memorably depict New York and New Yorkers as, for example, in Marvel's *The Avengers.* Stephen Spielberg recently completed his motion picture version of *West Side Story* on location in various sites, including Harlem, the Flatlands and Brooklyn.

Content-producing news, motion picture and television businesses working in New York need a robust anti-SLAPP statute to protect them from meritless and expensive lawsuits meant to silence speech on matters of public interest, especially in today's highly-polarized environment. For example, there recently have been attempts to punish the reporting of ABC News journalists reporting on political affairs and other matters of public interest. Our reporters are subject to lawsuits aimed at stopping investigations and unfavorable facts from coming to light, or at punishing the publication of critical facts that may be unpopular with some. These lawsuits often are not filed for the purpose of resolving the merits of a defamation or other alleged claim, but to intimidate and silence speech that a plaintiff does not like.

Right now in New York, such meritless suits might very well proceed to time-consuming discovery, wasting the resources and time of courts and defendants. The amended anti-SLAPP would nip many of these harassing lawsuits in the bud, staying discovery and other proceedings upon a motion to dismiss and providing for an

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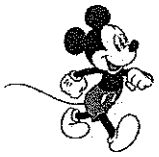

The Walt Disney Company

effective threshold disposition for all matters of "public interest." In fact, S.52-A/A.5991-A would properly expand the scope of New York's anti-SLAPP statute to include the speech of journalists and filmmakers. If a court finds that a litigant's suit has potential merit, it will proceed. If not, the defendant will be spared from being the victim of a punitive lawsuit intended to mire it in time-consuming, expensive and needless litigation. Strong anti-SLAPP laws that require the early and efficient dismissal of lawsuits targeting free speech are available in states like California, Texas, Georgia, Tennessee and Connecticut, all of which compete with New York for motion picture and television projects. It is time for the media capital of the world to adopt similar protections. Indeed, S.52-A/A.5991-A is wholly consistent with New York's other free speech protections, including its robust journalist's Shield Law (Civil Rights Law § 79-h), and the court-created exception for newsworthy publications in right of publicity cases where a matter of public interest is stake (Civil Rights Law §§ 50-51).

We also believe New York's anti-SLAPP protections will be strengthened consistent with these in-state and out-of-state laws by a provision requiring that a court "shall" award attorney's fees to a prevailing anti-SLAPP party. This is because a mandatory award of fees and costs to a prevailing party is a strong and real deterrent to meritless lawsuits targeting free speech on matters of public interest. For the same reason, the New York statute should be strengthened by making the award of fees automatic for all prevailing anti-SLAPP defendants, a goal that requires removal of the cause that currently only permits fee-shifting in cases "commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law."

TWDC respectfully thanks you for your time and thoughtfulness, and hopes you will consider its recommendations on this important free speech issue.

Sincerely,

Lisa Pitney
Vice President, Government Relations
The Walt Disney Company

500 South Buena Vista Street, Burbank, CA 91521-1151
Tel 818.560.1719 Fax 818.846.8406

MOTION PICTURE ASSOCIATION

MOTION PICTURE ASSOCIATION, INC.
1600 Eye St. NW, Washington DC 20006
(202) 293-1966

Vans Stevenson
Senior Vice President, State Government Affairs

VIA EMAIL ONLY
The Honorable Andrew M. Cuomo
Governor of New York State
State Capitol Building
Albany, New York 12224

Nov. 3, 2020

Re: Anti-SLAPP Bill (S.52-A / A.5991-A)

Dear Governor Cuomo:

On behalf of the Motion Picture Association, Inc. ("MPA") and our member studios,[1] I respectfully urge you to sign S.52-A / A.5991-A (the "Bill"), which amends and strengthens New York's existing anti-SLAPP statute.

Anti-SLAPP statutes, which now exist in 32 states and the District of Columbia, provide a powerful tool for those who are unjustly sued for the exercise of their free speech rights on public issues. The MPA's members, as well as their affiliated news organizations, are frequent users of such statutes, which help ensure that their First Amendment rights to entertain and inform the public are not chilled by meritless lawsuits.

As you know, New York is a major center of film and television production, as well as the home to the headquarters of many prominent news organizations. However, its existing anti-SLAPP statute, found at Civil Rights Law section 70-a, is too narrow to protect the free speech rights of our members and other New York companies that engage in constitutionally protected speech. The Bill that awaits your signature significantly broadens the scope of section 70-a, strengthening protections for free expression in New York, and helping to maintain the Empire State's status as the media capital of the world. And the Bill will benefit not just the MPA's members and similar companies, but any New York citizens who speak out on public issues.

[1] The MPA's members are the six major American producers and distributors of film, television and streaming entertainment: Netflix Studios LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

New York deserves a modern, strong anti-SLAPP statute. We thus respectfully request that you sign the Bill without delay.

Very truly yours,

Vans Stevenson

C250

RSA

RENT STABILIZATION ASSOCIATION • 123 William Street • New York, NY 10038

Joseph Strasburg
President

212-214-9222
212-732-0617

November 4, 2020

The Honorable Andrew M. Cuomo
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Dear Governor Cuomo:

On behalf of the 25,000 members of RSA who own or manage approximately one million apartments in the City of New York, I am writing to urge that S.52-A/A.5991-A be amended as a condition of signature.

This legislation amends both the Civil Rights Law and the Civil Practice Law and Rules in relation to actions arising from "strategic lawsuits against public participation," commonly known as SLAPP lawsuits. The existing provisions of the Civil Rights Law protect persons who participate in matters relating to the public interest from retaliatory lawsuits. Among its provisions, the legislation would mandate the payment to such persons of the costs and attorneys' fees they incur in the course of their defense where the lawsuit "was commenced or continued without a substantial basis in fact and law." Further, the CPLR amendments would expand upon existing provisions of law relating to stays of pending proceedings when a motion to dismiss is made by such persons in accordance with the provisions of the Civil Rights Law.

We have no qualms or concerns regarding the applicability of the substance of such legislation to litigation commenced on or after the date of its enactment. Rather, our concerns are premised upon the applicability of the legislation to already pending proceedings and the inequitable and, potentially, unconstitutional application of the legislation to such pending proceedings. In fact, the legislation, as initially introduced, expressly provided by its own terms that it applied only to newly-commenced cases. However, during the legislative process, it was amended to provide otherwise. It is this provision- and this provision only- which we urge should be amended and restored to its original terms so that it is clear and unambiguous that it shall only apply to cases commenced on and after the date of enactment.

Recent case law supports our view. Less than one year ago, in December, 2019, the Court of Appeals invalidated an analogous retroactive scheme in *Regina Metropolitan v. DHCR*. In *Regina*, the Court considered the applicability of newly-enacted legislation, known as the Housing Stability and Tenant Protection Act, to matters then pending at the agency and in the courts. In *Regina*, too, adverse substantive and financial consequences arose from the retroactivity. In addressing the constitutional challenge to the retroactive provision, the Court, in an exhaustive 31-page majority decision, analyzed whether the presumption against retroactive application of statutes was rebutted

and, if so, whether doing so "comports with fundamental notions of substantial justice embodied in the Due Process Clause."

The Court of Appeals, in ruling solely on the issue of retroactivity and not opining whatsoever on the remainder of the law, ruled that "Because such application of these amendments to past conduct would not comport with our retroactivity jurisprudence or the requirements of due process, we resolve these claims pursuant to the law [then] in effect...."

Based upon the foregoing, we urge that the foregoing legislation be returned to the Legislature for amendment as a condition of signature.

Sincerely,

Joseph Strasburg

C250

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

CHAIR
WAYS & MEANS COMMITTEE

COMMITTEE
Rules

RECEIVED
COUNSEL'S OFFICE
SEP 25 2020

HELENE E. WEINSTEIN
Assemblywoman 41ST District
Kings County

September 23, 2020

Governor Andrew Cuomo
State Capitol – 2nd Floor
Albany, New York 12224

RE: A.5991-A/S.52-A

Dear Governor Cuomo:

I write as Assembly sponsor of A.5991-A/S.52-A, which has passed both houses and is awaiting transmittal to your office for consideration.

This bill updates and modernizes New York's Anti-SLAPP law (Strategic Lawsuits Against Public Participation, Ch. 767, L.1992) by expanding the breadth of the law and also putting teeth into it so as to deter these lawsuits from being brought.

In recent years, we have seen a growth – in New York and nationwide – in these types of lawsuits, which are brought with one goal in mind: to stifle the free expression of ideas and/or criticism. These lawsuits are not brought to vindicate any particular right - instead, they are brought so as to cause those sued to incur significant litigation costs, and to deter others from speaking out for fear of being similarly sued.

Unfortunately, New York's anti-SLAPP law has proven inadequate to stem the rising tide of these lawsuits, due to its limited scope and also due an important procedural aspect, both of which I shall discuss below.

The bill protects free speech and the free discussion of ideas in two important ways:

First and most importantly, the bill expands the type of speech that is protected by New York's anti-SLAPP law. Given that the statute is in derogation of the common law, the courts have construed the law quite narrowly, e.g. *Hariri v. Amper*, 51 AD 3d 146, 151 (1st Dept 2008). Thus, the current statute has been strictly limited to cases initiated by persons or business entities that are embroiled in controversies over a *public application or permit*, typically in a real estate development situation. Meanwhile, many SLAPP lawsuits are filed each year that are calculated solely to silence free speech and public participation, which do not specifically arise in the context of the public "permit" process. By broadening the definition of an "action involving public petition and participation," this amendment to Section 76-a of the Civil Rights Law will better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law in 1992. This is done in the

bill by broadly widening the ambit of the law to include matters of "public interest", which is to be broadly construed, e.g. anything other than a "purely private matter".

Second, the bill *requires* – rather than merely *allows* - an award of attorney's fees if the Court finds that the lawsuit was brought to silence free speech. Specifically, the Appellate Division, Second Department has noted the non-mandatory aspect of the anti-SLAPP law as concerns the awarding of attorney's fees, and found no abuse of discretion in the lower court's failure to award same, a high standard to overcome to be sure. *Matter of West Branch Conservation Ass'n, Inc. v. Planning Board of the Town of Clarkstown*, 222 AD 2d 513 (2nd Dept 1995).

I should also note that the enactment of mandatory attorney's fees in SLAPP actions for New York would be consistent with statutes enacted in a growing number of states, e.g. California, Nevada, Florida, Louisiana, and Texas, to name but a few.

Finally, I wish to respectfully note that for many years I have fought numerous efforts made to "bar the courthouse door" or otherwise chill or make it more difficult for New York's citizens to seek judicial intervention. I remain committed to my view that free access to the courts must remain sacrosanct. This bill, however, deals with a very tiny but growing subclass of civil litigation, where lawsuits are not brought to win on the merits, but are brought to harass, injure, and deter free speech and expression by the defendant and others.

It is therefore respectfully hoped that these important changes to New York's anti-SLAPP law will meet with your approval and be enacted into law. I thank you for your consideration.

Sincerely,

Helene E. Weinstein

Helene E. Weinstein, Chair
Assembly Ways and Means Committee

cc: Elizabeth Garvey, Esq.
Denise Gagnon

C250

entertainment® software association

SUBMITTED VIA ELECTONIC MAIL

The Honorable Andrew M. Cuomo
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

November 4, 2020

RE: New York Assembly Bill 5991-A

Dear Governor Cuomo:

The Entertainment Software Association ("ESA") supports New York Assembly Bill 5991-A and respectfully requests that you act favorably by enacting it into law. The bill would revise and strengthen New York's current anti-SLAPP statute, Civ. Rts. L. §70-a. Importantly, it would further protect the First Amendment rights of New York residents and businesses, including ESA's members with headquarters in the state of New York. Nearly a decade ago, in *Brown v. Entertainment Merchants Association & Entertainment Software Association* (2011), the U.S. Supreme Court confirmed that video games are protected speech. We have a vested interest in the legislation on your desk as much as the motion picture, news, and publishing industries that also support the bill.

ESA is the national organization whose members publish computer and video games for video game consoles, personal computers, handheld and mobile devices, and the internet. ESA represents the major game platform providers and almost all of the major video game publishers in the United States. ESA's member companies are leaders in bringing creative and innovative software, products, and services into American homes. These companies support more than 428,000 jobs across the country with compensation that averages $121,459, more than double the national average. New York alone is home to 141 video game companies, 29 higher education programs in game design, and 8 collegiate varsity esports teams. In 2019, the New York based companies employed almost workers 5,000 and contributed $976 million directly to the state's economy.

Since the creation of the first electronic game in the 1950s, video games have evolved into complex works that play like interactive movies. Many video games have multi-dimensional characters, complex storylines, and carefully crafted dialogue, with some works featuring well-known public figures both famous and infamous. Whether fact-based, fictional, or somewhere in between, many of today's video games refer to or incorporate real-life historical and cultural

icons to create realistic interactive environments that facilitate expression, enhance verisimilitude, and enrich the user experience.

The First Amendment of the U.S. Constitution is fundamental to the continued vitality of the video game industry. Free speech protections for video game developers and publishers sustain the industry's groundbreaking experiences in interactive entertainment. The Supreme Court has said that "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)."

Despite the protections afforded by the First Amendment, our members have increasingly been targeted by overzealous plaintiffs who believe that they, without evidence, have been incorrectly portrayed in video games. Because of these legal actions and because the costs of a successful defense can be the same or greater than what the damage awards would have been, publishers tend to become self-censors unless they are assured freedom from frivolous lawsuits.

To maintain a vibrant free market for video game creators that employ thousands of New Yorkers, producers and distributors of video games need legal protections that mitigate expensive litigation that chills free speech.

For the past 25 years, one of our principal goals has been to protect the industry from the burden and expense of lawsuits that target the exercise of their First Amendment rights. ESA has supported legislation that would allow a defendant to argue that a Plaintiff's claim is deficient on First Amendment and other grounds, and to permit the introduction of countervailing evidence at the motion to dismiss stage, the inclusion of which would help defendants avoid legal expenses related to discovery later in the litigation.

We strongly support anti-SLAPP statutes that enhance the protection of the First Amendment by providing a mechanism for the early, quick, and efficient resolution of lawsuits that attack the exercise of free speech rights. We are hopeful that a new anti-SLAPP law will end these types of lawsuits in the state, with the money saved from litigation costs re-invested in other ways that benefit our industry's talented New York workforce.

For the reasons explained above, ESA respectfully urges you to sign this important piece of legislation.

Sincerely,

Tara C. F. Ryan
Entertainment Software Association
Vice President, State Government Affairs

07/22/20 A5991-A Senate Vote Aye: 57 Nay: 3

07/21/20 A5991-A Assembly Vote Yes: 116 No : 26

Go to Top of Page

Floor Votes:

07/22/20 A5991-A Senate Vote Aye: 57 Nay: 3

Aye	Addabbo	**Aye**	Akshar	**Nay**	Amedore	**Aye**	Bailey
Aye	Benjamin	**Aye**	Biaggi	**Aye**	Borrello	**Aye**	Boyle
Aye	Breslin	**Aye**	Brooks	**Aye**	Carlucci	**Aye**	Comrie
Aye	Felder	**Aye**	Funke	**Aye**	Gallivan	**Aye**	Gaughran
Aye	Gianaris	**Aye**	Gounardes	**Aye**	Griffo	**Aye**	Harckham
Aye	Helming	**Aye**	Hoylman	**Aye**	Jackson	**Aye**	Jordan
Aye	Kaminsky	**Aye**	Kaplan	**Aye**	Kavanagh	**Aye**	Kennedy
Aye	Krueger	**Aye**	Lanza	**Aye**	LaValle	**Aye**	Little
Aye	Liu	**Aye**	Martinez	**Aye**	May	**Aye**	Mayer
Aye	Metzger	**Aye**	Montgomery	**Aye**	Myrie	**Nay**	O'Mara
Nay	Ortt	**Aye**	Parker	**Aye**	Persaud	**Aye**	Ramos
Aye	Ranzenhofer	**Aye**	Ritchie	**Aye**	Rivera	**Aye**	Robach
Aye	Salazar	**Aye**	Sanders	**Aye**	Savino	**Aye**	Sepulveda
Aye	Serino	**Aye**	Serrano	**Aye**	Seward	**Aye**	Skoufis
Aye	Stavisky	**Aye**	Stewart-Cousins	**Aye**	Tedisco	**Aye**	Thomas

Go to Top of Page

Floor Votes:

07/21/20 A5991-A Assembly Vote Yes: 116 No : 26

Yes	Abbate	**Yes**	Abinanti	**Yes**	Arroyo	**No**	Ashby
Yes	Aubry	**Yes**	Barclay	**Yes**	Barnwell	**Yes**	Barrett
Yes	Barron	**Yes**	Benedetto	**Yes**	Bichotte	**Yes**	Blake
Yes	Blankenbush	**Yes**	Brabenec	**Yes**	Braunstein	**Yes**	Bronson
Yes	Buchwald	**Yes**	Burke	**Yes**	Buttenschon	**No**	Byrne
Yes	Byrnes	**Yes**	Cahill	**Yes**	Carroll	**Yes**	Colton
Yes	Cook	**No**	Crouch	**Yes**	Cruz	**Yes**	Cusick
Yes	Cymbrowitz	**Yes**	Darling	**Yes**	Davila	**Yes**	De La Rosa
Yes	DenDekker	**No**	DeStefano	**Yes**	Dickens	**Yes**	Dilan
Yes	Dinowitz	**No**	DiPietro	**Yes**	D'Urso	**Yes**	Eichenstein
Yes	Englebright	**Yes**	Epstein	**Yes**	Fahy	**Yes**	Fall
Yes	Fernandez	**ER**	Finch	**No**	Fitzpatrick	**No**	Friend
Yes	Frontus	**Yes**	Galef	**Yes**	Garbarino	**No**	Giglio
Yes	Glick	**No**	Goodell	**Yes**	Gottfried	**Yes**	Griffin
Yes	Gunther A	**No**	Hawley	**Yes**	Hevesi	**Yes**	Hunter

Yes	Hyndman	**Yes**	Jacobson	**Yes**	Jaffee	**Yes**	Jean-Pierre
No	Johns	**Yes**	Jones	**Yes**	Joyner	**Yes**	Kim
No	Kolb	**No**	Lalor	**Yes**	Lavine	**No**	Lawrence
Yes	Lentol	**Yes**	Lifton	**No**	LiPetri	**Yes**	Lupardo
Yes	Magnarelli	**No**	Malliotakis	**No**	Manktelow	**Yes**	McDonald
No	McDonough	**Yes**	McMahon	**Yes**	Mikulin	**No**	Miller B
Yes	Miller MG	**No**	Miller ML	**Yes**	Montesano	**Yes**	Morinello
Yes	Mosley	**Yes**	Niou	**Yes**	Nolan	**Yes**	Norris
Yes	O'Donnell	**Yes**	Ortiz	**Yes**	Otis	**No**	Palmesano
Yes	Palumbo	**Yes**	Paulin	**Yes**	Peoples-Stokes	**Yes**	Perry
Yes	Pheffer Amato	**Yes**	Pichardo	**Yes**	Pretlow	**Yes**	Quart
Yes	Ra	**Yes**	Ramos	**Yes**	Reilly	**Yes**	Reyes
ER	Richardson	**Yes**	Rivera	**Yes**	Rodriguez	**Yes**	Rosenthal D
Yes	Rosenthal L	**Yes**	Rozic	**Yes**	Ryan	**No**	Salka
Yes	Santabarbara	**Yes**	Sayegh	**ER**	Schimminger	**No**	Schmitt
Yes	Seawright	**Yes**	Simon	**Yes**	Simotas	**Yes**	Smith
Yes	Smullen	**Yes**	Solages	**No**	Stec	**Yes**	Steck
Yes	Stern	**Yes**	Stirpe	**No**	Tague	**Yes**	Taylor
Yes	Thiele	**Yes**	Vanel	**No**	Walczyk	**Yes**	Walker
Yes	Wallace	**Yes**	Walsh	**Yes**	Weinstein	**Yes**	Weprin
Yes	Williams	**Yes**	Woerner	**Yes**	Wright	**Yes**	Zebrowski K
Yes	Mr. Speaker						

STATE OF NEW YORK

5991--A

Cal. No. 226

2019-2020 Regular Sessions

IN ASSEMBLY

February 26, 2019

Introduced by M. of A. WEINSTEIN, SEAWRIGHT, ABINANTI, LUPARDO, SIMOTAS, TAYLOR, STECK -- read once and referred to the Committee on Judiciary -- ordered to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the civil rights law, in relation to actions involving public petition and participation; and to amend the civil practice law and rules, in relation to stay of proceedings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 1 of section 70-a of the civil rights law, as added by chapter 767 of the laws of 1992, is amended to read as follows:

(a) costs and attorney's fees [~~may~~] shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;

§ 2. Subdivision 1 of section 76-a of the civil rights law, as added by chapter 767 of the laws of 1992, is amended to read as follows:

1. For purposes of this section:

(a) An "action involving public petition and participation" is [~~an action,~~] a claim[~~, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission~~] based upon:

(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or

(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD04075-05-0

(b) [~~"Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission~~] "Claim" includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

[~~(d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.~~] (d) "Public interest" shall be construed broadly, and shall mean any subject other than a purely private matter.

§ 3. Subdivision (g) of rule 3211 of the civil practice law and rules, as added by chapter 767 of the laws of 1992, is amended to read as follows:

(g) [~~Standards~~] Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation. 1. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, "complaint" includes "cross-complaint" and "petition", "plaintiff" includes "cross-complainant" and "petitioner", and "defendant" includes "cross-defendant" and "respondent."

§ 4. This act shall take effect immediately.

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A5991A

SPONSOR: Weinstein

TITLE OF BILL:

An act to amend the civil rights law, in relation to actions involving public petition and participation; and to amend the civil practice law and rules, in relation to stay of proceedings

PURPOSE OF BILL:

The purpose of this bill is to extend the protection of New York's current law regarding Strategic Lawsuits Against Public Participation ("SLAPP suits"). The amendment will protect citizens' from frivolous litigation that is intended to silence their exercise of the rights of free speech and petition about matters of public interest.

SUMMARY OF PROVISIONS OF BILL:

Section 1 of the bill would amend section 70-a of the Civil Rights Laws to provide that costs and attorney's fees "shall be recovered upon a I demonstration that -la SLAPP suit was commenced or continued without a substantial basis in fact or law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law."

Section 2 of the bill would amend section 76-a of the Civil Rights Law to define an "action involving public petition and participation" to include a claim related to:

i. Any communication in a place open to the public or a public forum in connection with an issue of public interest; or

ii. Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

The bill also specifies that "public interest" should be broadly construed.

Section 3 of the bill contains a stay of discovery and pending hearings or motions once a motion to dismiss a SLAPP action has been made pursuant to CPLR 3211 (a) (7).

Section 4 specifies that the act shall take effect immediately.

JUSTIFICATION:

Section 76-a of the Civil Rights Law was originally enacted by the Legislature to provide "the utmost protection for the free exercise or

speech, petition, and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." L. 1992 Ch. 767. However, as drafted, and as narrowly interpreted by the courts, the application of Section 76-a has failed to accomplish that objective. In practice, the current statute has been strictly limited to cases initiated by persons or business entities that are embroiled in controversies over a public application or permit, usually in a real estate development situation. Meanwhile, many frivolous lawsuits are filed each year that are calculated solely to silence free speech and public participation, which do not specifically arise in the context of the public "permit" process. 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. This is done by broadly widening the ambit of the law to include matters of "public interest", which is to be broadly construed, e.g. anything other than a "purely private matter".

Additionally, the principal remedy currently provided to victims of SLAPP suits in New York is almost never actually imposed. The courts have failed to use their discretionary power to award costs and attorney's fees to a defendant found to have been victimized by a frivolous lawsuit intended only to chill free speech. By an award of costs and fees, the Legislature had originally intended to address "threat of personal damages and litigation costs . . . as a means of harassing, intimidating, or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs." L. 1992 Ch. 767. This amendment to Section 70-A of the Civil Rights Law makes clear that a court "shall" impose an award of costs and fees, but only if the court fords that the case has been initiated or pursued in bad faith. Together, the two amendments will protect citizens against the threat -- and financial reality -- of abusive litigation, but will not discourage meritorious litigation.

Further, a mandatory award of attorney's fees is necessary to discourage SLAPP lawsuits - which attempt to chill free speech by definition - from being instituted.

A stay of the SLAPP action is necessary while a motion to dismiss is pending in order to prevent other means in which the SLAP? plaintiff attempts to cause harm or injury to the SLAPP defendant. For example, this is often done by attempting to tie the defendant up in litigation, including discovery, and/or by forcing the defendant to have to advance legal fees and costs to their counsel for otherwise unnecessary proceedings.

LEGISLATIVE HISTORY:

2018:A.1413/S.68- A.Judi(ECS)/S.Codes
2018:Similar to:A.5292/S.2183- A.Cal/S.Codes
2017:Similar to:A.5292/S.2183- PA /S.Codes
2015-16: A.258/5.1638 -PA/S. Codes
2014: A.856/S.7280 - PA/S. Rules
2013: A.856 - PA
2012: A.10594 - A. Judi

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS: None.

EFFECTIVE DATE:
Immediately.