To Be Submitted By: SAMIR DEGER-SEN

APL-2021-00131
Appellate Division—First Department Appellate Case Nos.: 2020-01908, 2020-01910
New York County Clerk's Index No. 653118/14

Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Respondents,

—against—

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Appellant,

—and—

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim-Plaintiff-Appellant,

—against—

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

Counterclaim-Defendants-Respondents.

BRIEF FOR *AMICI CURIAE* THE NATIONAL WOMEN'S LAW CENTER AND 35 ADDITIONAL ORGANIZATIONS IN SUPPORT OF APPELLANT AND REVERSAL

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April 14, 2022

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STATUTES

REGULATIONS

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Women's Law Center ("NWLC") is a nonprofit legal organization dedicated to advancing and protecting the legal rights of women, girls, and all people to be free from sex discrimination. Since 1972, NWLC has worked to advance income security, workplace justice, educational opportunities, and reproductive rights and health for women and girls, with particular attention to the needs of low-income women and girls and those who face multiple and intersecting forms of discrimination. The NWLC Fund also houses and administers the TIME'S UP Legal Defense Fund.

NWLC has participated as counsel or *amicus curiae* in a range of cases to secure the equal treatment of women and girls under the law, including *Sagaille v. Carrega*, 194 A.D.3d 92 (1st Dep't 2021), where the First Department ordered the dismissal of a defamation claim predicated on a sexual assault survivor's statements reporting her assault to the police.

[1] No party's counsel contributed content to the brief or otherwise participated in the brief's preparation. No party or party's counsel contributed money intended to fund the brief's preparation or submission. No person or entity other than the movant or the movant's counsel contributed money intended to fund the brief's preparation or submission.

NWLC and thirty-five other organizations that share its commitment to protecting survivors of sexual abuse submit this brief in support of Appellant Kesha Rose Sebert ("Kesha") and reversal of the decision below.[2]

PRELIMINARY STATEMENT

The protections created by New York's absolute litigation, qualified pre-litigation, and fair-reporting privileges[3] are vitally important for survivors of sexual abuse.[4] Survivors already face a range of daunting barriers that deter the reporting of sexual abuse. The First Department's "sham" exception to the litigation-related privileges gravely exacerbates this problem by threatening years of defamation litigation—and ruinous damages—for those brave enough to come forward. The First Department's novel exception finds no home in this Court's precedent and is

[2] Additional *amici* are listed in the Addendum to this brief.

[3] This brief uses the phrase "litigation-related privileges" to refer collectively to the absolute litigation privilege, qualified pre-litigation privilege, and fair-reporting privilege.

[4] This brief uses the phrase "sexual abuse" to refer to all forms of sexual harassment, including sexual assault. Sexual assault refers to sexual contact or behavior that occurs without explicit consent of the victim, including attempted rape, fondling or unwanted sexual touching, forcing a victim to perform sexual acts such as oral sex or penetrating the perpetrator's body, and penetration of the victim's body, also known as rape. RAPE, ABUSE & INCEST NAT'L NETWORK ("RAINN"), *Sexual Assault*, https://www.rainn.org/articles/sexual-assault (last visited Apr. 12, 2022). Sexual harassment includes sexual assault, as well as unwelcome sexual advances, requests for sexual favors, and other verbal or physical misconduct of a sexual nature. *See* RAINN, *Sexual Harassment*, https://www.rainn.org/articles/sexual-harassment (last visited Apr. 12, 2022); *see also* 34 C.F.R. § 668.46.

fundamentally at odds with the core principles underpinning New York's privilege doctrine. These principles include promoting justice by ensuring that "fear of a civil action, whether successful or otherwise," will not deter a person from participating in the litigation process. *Toker v. Pollak*, 44 N.Y.2d 211, 219 (1978). This Court should firmly reject the First Department's effort to dramatically limit the protections that these established privileges provide to survivors of sexual abuse.

The survivor in this case, Kesha, alleges that Respondent Lukasz Gottwald (or "Dr. Luke"), her music producer, raped her. For years after the assault, Kesha's exclusive production agreement forced her to work with Dr. Luke and endure his verbal and emotional abuse. When Kesha filed a lawsuit against Dr. Luke alleging sexual assault and seeking release from her production agreement, Dr. Luke immediately responded by filing a defamation lawsuit against her. The statements that formed the basis of Dr. Luke's defamation claim were made in anticipation of litigation, in court documents, and in descriptions of the central allegations in Kesha's lawsuit. There is no dispute that those statements are within the core areas of speech protected under New York's litigation-related privileges.

Yet, the First Department refused to apply any one of these well-established privileges, because, in the court's view, there was a question of fact as to whether Kesha's suit was a "sham" intended "to pressure" Dr. Luke and his production company "into renegotiating [Kesha's] contracts or to release her from her

contracts." *Gottwald v. Sebert*, 193 A.D.3d 573, 580 (1st Dep't 2021). That holding, if affirmed by this Court, would have far-reaching and devastating consequences for survivors of sexual abuse.

A sexual abuse allegation, by its very nature, threatens the reputation of the alleged abuser. Any lawsuit brought by a survivor against their abuser is thus capable of being branded as "defamatory" and subject to a retaliatory defamation suit. And while truth is a complete defense to defamation, establishing such a defense might require years of emotionally and financially taxing litigation. A survivor would spend those years under the looming threat that she could be subject to life-ruining damages if she is disbelieved (as survivors often fear they will be, and, too often, are). Without the protections of existing litigation-related privileges, survivors will be even less likely to vindicate their legal rights—and hold their abusers to account.

Additionally, under the First Department's startlingly broad conception of a "sham," virtually any secondary objective to the litigation—like, as here, releasing a victim from her contract to work with her abuser—is enough to trigger the exception. Under that standard, almost any sexual abuse claim could be re-characterized as a "sham," and any survivor could be subjected to a defamation case for turning to the legal system for redress. That is grossly unfair and conflicts with

over a century of precedent that recognizes the vital need to protect statements made in the context of litigation.

Amici file this brief to highlight that: (1) survivors already face a host of barriers when seeking to come forward with sexual assault claims; (2) a "sham" exception to standard litigation-related privileges will create even more barriers to justice and accountability; and (3) the First Department's remarkably broad conception of what qualifies as a "sham" in this context means that the exception will swallow the rule in virtually any case involving sexual abuse, depriving survivors of protection afforded to all other litigants.

In short, because the First Department's "sham" exception to the litigation-related privileges contravenes settled principles of New York law and promises to make survivors of sexual abuse even more susceptible to retaliatory defamation lawsuits, it must be rejected. The decision below should be reversed.

ARGUMENT

I. FEAR OF RETALIATION DETERS SURVIVORS FROM REPORTING SEXUAL ABUSE

Kesha's experience with Dr. Luke is not an outlier. Sexual violence occurs at an alarming rate. Every 68 seconds, an individual in the United States experiences

sexual assault.[5] One in five women will be raped during her lifetime, while two in five women will suffer rape or another form of sexual violence.[6] Men also face the risk of sexual violence—an estimated one in 14 men will be raped, and one in four men will experience sexual assault during the course of their lives.[7]

Sexual abuse takes place in many workplaces and schools. As many as 85% of women have experienced sexual harassment at work.[8] About 56% of girls and 40% of boys in grades 7 through 12 experienced some form of sexual abuse at school during the 2010-11 school year,[9] while 26.4% of female undergraduate students and

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[5] RAINN, *About Sexual Assault*, https://www.rainn.org/about-sexual-assault (last visited Apr. 12, 2022).

[6] CDC, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF—UPDATED RELEASE 6, https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf; *see also Sagaille v. Carrega*, 194 A.D.3d 92, 93 (1st Dep't 2021 (recognizing these statistics).

[7] CDC, *supra* note 6, at 7; *see also Sagaille*, 194 A.D.3d, at 93.

[8] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at II.B (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

[9] *See* CATHERINE HILL & HOLLY KEARL, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 11 (2011), https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf.

6.8% of males experienced rape or sexual assault through physical force, violence, or incapacitation.[10]

While many people experience sexual abuse, relatively few survivors ever make a formal report.[11] In the workplace, only 6% to 13% of employees who are sexually harassed file a complaint with their employer.[12] The rate of reporting is even lower for students. One study found that half of students in seventh through twelfth grades who were sexually harassed did nothing in response to the harassment.[13] And another survey of girls between the ages of 14 to 18 indicated that, shockingly, only 2% of sexual assault victims reported the incident to a school principal or administrator.[14]

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[10] RAINN, *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence (last visited Apr. 12, 2022).

[11] *See Sagaille*, 194 A.D.3d, at 97 n.1 (quoting RACHEL E. MORGAN & BARBARA A. OUDEKERK, U.S. DEP'T JUST., BUREAU JUST. STAT., CRIMINAL VICTIMIZATION, 2018, at 8 (2019), https://bjs.ojp.gov/content/pub/pdf/cv18.pdf).

[12] *See Sagaille*, 194 A.D.3d, at 97 n.1 (citing U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 8, at II.C).

[13] *See* HILL & KEARL, *supra* note 9, at 27.

[14] KAYLA PATRICK & NEENA CHAUDHRY, NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 4 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_HarassmentViolence.pdf.

Survivors hesitate to alert authorities because they fear that reporting will have devastating personal and professional consequences, such as loss of employment, interpersonal conflict, diminished social acceptance, and other forms of retaliation.[15] These fears of retaliation are well-founded.[16] High schools and colleges that receive reports of sexual abuse perpetrated by another student often suggest that *the survivor* should drop courses, take a leave of absence, or leave school.[17] Similarly, more than 70% of survivors of workplace sexual harassment who sought legal assistance from the TIME'S UP Legal Defense Fund experienced some form of retaliation when they reported abuse.[18] The most common forms of retaliation experienced by these

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[15] *See* JASMINE TUCKER & JENNIFER MONDINO, NAT'L WOMEN'S L. CTR., COMING FORWARD: KEY TRENDS AND DATA FROM THE TIME'S UP LEGAL DEFENSE FUND 12 (2020), https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf ("More than seven in 10 people (72 percent) said they experienced some form of retaliation when they complained about harassment."); *see also* Shamus R. Khan et al., *"I Didn't Want to Be 'That Girl'": The Social Risks of Labelling, Telling, and Reporting Sexual Assault*, 5 SOCIO. SCI. 432, 432 (2018).

[16] According to a 2013 DOJ study, fear of retaliation was the most common reason for not reporting sexual assault to the police. *See* MICHAEL PLANTY ET AL., U.S. DEP'T JUST. BUREAU JUST. STAT., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 7 (2013), https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf.

[17] SARAH NESBITT & SAGE CARSON, KNOW YOUR IX, THE COST OF REPORTING: PERPETRATOR RETALIATION, INSTITUTIONAL BETRAYAL, AND STUDENT SURVIVOR PUSHOUT 4-6 (2021), https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf.

[18] TUCKER & MONDINO, *supra* note 15, at 12.

survivors include being fired from a job, receiving poor performance evaluations at work, and, as here, being sued for defamation.[19]

As the First Department has acknowledged, a defamation lawsuit "constitute[s] a form of retaliation against those with the courage to speak out."[20] And, since the #MeToo hashtag went viral in fall 2017, inspiring waves of survivors to come forward for the first time and seek to hold their abusers accountable, defamation lawsuits against survivors have increased at alarming rates. Based on a review of court documents and news reports, one publication identified "[a]t least 100 defamation lawsuits" filed from 2014 to 2020 against sexual assault survivors by their abusers.[21] Before October 2017, nearly 75% of these suits were filed by male college students and faculty who were reported for sexual assault or other

[19] *Id.* at 4.

[20] *Sagaille*, 194 A.D.3d, at 94.

[21] Madison Pauly, *She Said, He Sued*, MOTHER JONES (Mar. 2020), https://www.motherjones.com/crimejustice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault.

sexual harassment.[22] But, since then, defamation suits "have been filed at a faster rate, with three in four coming from nonstudents."[23]

For lawyers who work with survivors, these suits have become routine: A lawyer for the Victim Rights Center remarked that cases where sexual assault victims faced defamation lawsuits had risen from 5% of her caseload to *over half* of her caseload over the course of a few years.[24] Another attorney used to receive inquiries from survivors who feared retaliatory defamation suits twice a year, but, since fall 2017, he receives such inquiries every two weeks.[25]

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[22] *Id.*; UNITED EDUCATORS, NAT'L CTR. DOMESTIC & SEXUAL VIOLENCE, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* 18 (2015), http://www.ncdsv.org/ers_confronting-campus-sexual-assault_2015.pdf (stating that of the students accused of sexual assault who sued their educational institutions, 72% of those perpetrators also sued their accusers for defamation).

A more recent study indicates that 23% of surveyed student survivors were threatened with a defamation suit by an abuser, and 19% were warned by their school of the possibility of a defamation suit. NESBITT & CARSON, *supra* note 17, at 21.

[23] Pauly, *supra* note 21.

[24] *See* Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing For Defamation*, BUZZFEED NEWS (Dec. 5, 2017), https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing; *see also* Jamie R. Abrams, *The Increasing Complexity of Defamation Law in #MeToo Era Lawsuits*, LOUISVILLE BAR BRS. 22 (2021).

[25] Pauly, *supra* note 21.

Retaliatory defamation suits compound the already hefty costs survivors face after suffering sexual violence. Each time a survivor has to recount their story to the lawyers and the court, the survivor is forced to relive the abuse.[26] Repeated questioning throughout the litigation process often exacerbates the trauma, interfering with and slowing down the healing process.[27] Even without the scars from litigation, survivors of sexual abuse often suffer from impaired psychological well-being, including post-traumatic stress disorder, depression, and general stress and anxiety disorder, as well as physical and reproductive damage from sexual violence.[28]

In addition to these consequences, survivors must also contend with enormous economic costs. The lifetime cost of rape for each survivor (including medical care, lost work productivity, and other economic consequences) has been estimated to be

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[26] *See* Gary Fulcher, *Litigation-Induced Trauma Sensitisation—A Potential Negative Outcome of the Process of Litigation*, 11 PSYCHIATRY, PSYCH. & L. 79, 82 (2004).

[27] *See id.*

[28] *See* RAINN, *Victims of Sexual Violence: Statistics*, https://www.rainn.org/statistics/victims-sexual-violence (last visited Apr. 12, 2022) (reporting that 94% of women who are sexually assaulted experience PTSD within two weeks of the rape, and that 70% of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime (citations omitted)); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 8, at II.B.

$122,461, or a lifetime economic burden of *$3.1 trillion* for all rape survivors.[29] Sexual abuse in the workplace short of rape also imposes a steep financial toll. A survivor pushed out of a job by sexual abuse may lose hundreds of thousands of dollars in salary and benefits over the course of a lifetime.[30] A forced career change may also bring with it the costs of obtaining a new degree or credentials.[31]

Similarly, just defending against a defamation suit exacts a high financial toll,[32] especially since fee-shifting is not automatic for defamation claims. New York's Anti-SLAPP laws mandate fee-shifting only when a defamation action "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." N.Y. Civ. Rights. § 70-a(1)(a). But the lower court's reasoning in this case—rooted in stereotype-driven skepticism of sexual abuse claims—shows that survivors may have difficulty recovering fees even *after* fending off an abuser's retaliatory defamation claims. Even assuming they could eventually recover

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[29] *See* Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTATIVE MED. 691, 698 (2017), https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf.

[30] ARIANE HEGEWISCH ET AL., PAYING TODAY AND TOMORROW: CHARTING THE FINANCIAL COSTS OF WORKPLACE SEXUAL HARASSMENT 13-17 (2021).

[31] *Id.* at 30-31.

[32] *See* Kingkade, *supra* note 24.

litigation costs at the end of a defamation case, most women do not have the resources to litigate cases to their conclusion against deep-pocketed plaintiffs. Kesha, for example, has incurred *millions* of dollars in defense costs over the last decade. Such steep costs would be prohibitive for most victims of sexual assault. When faced with the prospect of defending an expensive defamation suit, many survivors may choose to retract their own sexual assault claims simply because they cannot afford to both pursue and defend them in court. The legal fees that arise from defending against a defamation claim only aggravate a survivor's economic burden in addition to all the other harms that accompany sexual abuse.

The use of defamation suits to deter sexual assault survivors from holding abusers accountable is just one example of how abusers use litigation as a means of maintaining power over their victims. In the context of domestic abuse, for example, many perpetrators misuse the court system to maintain power and control over their former or current partners, a method sometimes called "stalking by way of the courts."[33] In addition to the considerable amounts of money and time required to defend against legal action, the process of litigation can further traumatize victims

[33] *See* Jessica Klein, *How Domestic Abusers Weaponize the Courts*, ATLANTIC (July 18, 2019), https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/.

of abuse, even after they have managed to leave the situation, by forcing them to relive the trauma and return to a position of vulnerability vis-a-vis the perpetrator.[34]

The same oppressive aims can animate retaliatory defamation suits. Perpetrators file meritless defamation lawsuits both to intimidate and to keep their survivors coming back to face them in court—such lawsuits are often the only tool left for perpetrators seeking to maintain a hold over survivors' lives.[35] And for serial abusers, maintaining a defamation suit against one survivor sends a clear, threatening message to all other victims that they will face the same retaliatory response if they come forward. Thus, a defamation suit is a way for perpetrators of sexual violence to coerce survivors into withdrawing their claims or to deter them from coming forward in the first place.

II. THE "SHAM" EXCEPTION WILL ENCOURAGE RETALIATORY LAWSUITS AND DETER SURVIVORS FROM USING THE LEGAL SYSTEM TO HOLD THEIR ABUSERS ACCOUNTABLE

The First Department's "sham" exception to the litigation-related privileges upends settled principles of New York law. These privileges *should* shield a survivor who names or intends to name an abuser in litigation from a defamation suit. But under the First Department's "sham" exception, that protection is withdrawn whenever a survivor may have a secondary motive for pursuing claims

[34] *See* Fulcher, *supra* note 26, at 79. *See also id.*

[35] *See* Klein, *supra* note 33.

of sexual abuse—as Kesha did here in seeking "to pressure Gottwald into renegotiating her contracts or to release her from her contracts." *Gottwald v. Sebert*, 193 A.D.3d 573, 580 (1st Dep't 2021). Rather than honoring settled principles of law, the First Department's rule robs survivors of legal protections this Court has long recognized, while simultaneously equipping perpetrators with one more tool in their arsenal of abuse. If the First Department's unwarranted and harmful exception to the litigation-related privileges remains in place, retaliatory defamation suits will become increasingly common and inevitably further deter survivors from pursuing justice. And this will make it even easier for a range of sexual abuse to continue without consequences.

The risk of shouldering the costs of defending against a retaliatory defamation suit will further deter survivors from seeking legal redress. For example, one graduate student survivor explained that defending against a defamation case had cost her upwards of $20,000, with monthly bills sometimes reaching $6,000, an amount "more than twice her monthly income."[36] This burden of defending against defamation would be especially daunting for people who are out of work (possibly because their abuser fired them), work low-paid jobs, have student loan obligations,

[36] Kingkade, *supra* note 24.

or face other financial challenges.[37] The potential for a retaliatory defamation suit to deter someone who lives from paycheck-to-paycheck is especially damaging to efforts to hold abusers accountable because people with lower incomes experience higher rates of sexual assault.[38]

The First Department's so-called "sham" exception not only invites retaliatory defamation litigation, it practically ensures that such cases will be public and prolonged. Any sexual assault allegation in a lawsuit could be considered inherently injurious to the reported abuser's reputation. *See* Restatement (Second) of Torts § 571, cmt. g (stating that, among other allegations of criminal conduct, an allegation of rape is defamatory *per se*). Thus, if no privilege applies, the only remaining question will be whether the statement alleging the sexual assault is true. And that is generally a factual question for the jury to resolve.

In practice, therefore, a survivor who seeks to hold their abuser accountable will very likely be forced to defend themselves in front of a jury—seeing the legal process they sought to invoke turned against them—and they will also be unlikely

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[37] *See* TUCKER & MONDINO, *supra* note 15, at 20.

[38] Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 FIRST AMENDMENT L. REV. 441, 448 (2019) (citing RACHEL E. MORGAN & GRACE KENA, U.S. DEP'T JUST., BUREAU JUST. STAT., CRIMINAL VICTIMIZATION, 2016: REVISED, at 8 (2018), https://www.bjs.gov/content/pub/pdf/cv16re.pdf).

to recover their legal fees, even if they prevail.[39] Moreover, establishing "truth" as a defense to defamation will be a challenging and risky endeavor for a survivor. Sexual abuse typically occurs in private, outside of the presence of witnesses. And without any third-party testimony about the alleged abuse, the survivor's testimony becomes the only source of affirmative evidence that the abuse occurred. Some potential jurors continue to harbor false but entrenched stereotypes that women and girls lie about sexual abuse. And when the perpetrator is in a position of power, the very power that enabled (and perhaps encouraged) the abuse in the first place also works to insulate the abuser against challenges to their credibility. Survivors understand this reality, and it dissuades many from coming forward and risking a defamation trial before factfinders who could well be predisposed to believe harassers, not victims.[40] Common stereotypes against marginalized individuals—

[39] Litigating a sexual assault claim as a defamation defendant can be even more difficult than bringing a sexual assault claim as a plaintiff. A survivor who seeks to prove sexual assault as a plaintiff is more likely to have the assistance of counsel working for a contingent fee. And defending a defamation claim lacks the possibility of a damages recovery. Also, there is no guarantee of fee shifting for a successful defamation defense; a survivor seeking to recover costs and attorney's fees would have to show that the requirements of New York's new Anti-SLAPP statute are satisfied. *See* N.Y. Civ. Rights § 70-a(1)(a) (requiring a showing 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").

[40] *See* Deborah Tuerkheimer, *How U.S. Sexual-Harassment Law Encourages a Culture of Victim Blaming*, TIME (Oct. 5, 2021), https://time.com/6103760/sexual-

including women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers—held by many individuals and, thus, many jurors, may further discourage a survivor from pursuing legal action and risking a defamation verdict fueled by stereotypes and biases.[41] Judges and juries imbued with the prejudices and stereotypes that continue to permeate society could very well decide that it is the *abuser*—rather than the *victim*—whose life has been "ruined" and whose potential has been "lost."[42]

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harassment-law-victim-blaming/; Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 38-41 (2017) (describing prosecutors' perceptions of juror skepticism of sexual assault claims); *see also* Catherine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html (explaining that, based on review of decades of campus sexual abuse cases, "it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial").

[41] *See* Deborah Tuerkheimer, *The Deck Is Stacked Against Every Sexual Assault Victim in America. The Cosby Case Is No Different*, SLATE (June 18, 2017), https://slate.com/human-interest/2017/06/the-cosby-case-is-another-example-of-credibility-discounting-in-sexual-assault-cases.html (explaining that "police responses tend to be particularly defective in cases involving women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers"); Katherine M. Cole, *She's Crazy (To Think We'll Believe Her): Credibility Discounting of Women with Mental Illness in the Era of #MeToo*, 22 GEO. J. GENDER & L. 173, 186 (2020).

[42] *See* Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, ATLANTIC (June 17, 2016), https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/ (explaining that even though the jury believed the survivor's rape

Indeed, in defending the decision below, Dr. Luke affirmatively *embraces* these stereotypes. He asserts that the "sham" exception is somehow necessary to prevent victims from making false accusations to obtain settlements. *See* Respondents' Br. 3-5. To the contrary, in light of the range of negative consequences that frequently accompany coming forward with a claim,[43] there is no basis for the disturbingly widespread belief that making false sexual assault claims is an easy route to financial gain.[44]

In reality, false accusations of sexual assault are exceedingly rare.[45] While some reports indicate false reporting at rates of 2% to 8%, which is already low, even that rate is misleadingly high.[46] Some law enforcement officers may

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accusation, the judge "believed [the defendant's] side of the story, that the victim gave [the defendant] consent to have sexual contact with her").

[43] *See* Part I.A, *supra*.

[44] *See generally* Mindy E. Bergman, et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230 (2002).

[45] *See* KIMBERLY A. LONSWAY, ET AL., NAT'L SEXUAL VIOLENCE RESOURCE CTR., FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT 2 (2009), https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf (stating that methodologically rigorous "estimates for the percentage of false reports begin to converge around 2-8%").

[46] David Lisak et al., *False Allegations of Sexual Assault: an Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318, 1322 (2010).

improperly classify cases as false where they disbelieve certain survivors, including those who have mental illnesses; who cannot recall the details of the assault, perhaps because they were under the influence of alcohol or drugs; or who make inconsistent statements.[47] And law enforcement officers also inaccurately classify situations where rape cannot be "proven" as false reports.[48] Few studies consider these misleading classifications when estimating the rates of false reports.[49] Thus, the notion that survivors bringing sexual abuse claims are somehow uniquely untrustworthy and pose some special threat of fabricating their claims is itself false. But Dr. Luke's argument in this regard makes one thing plain: He all but concedes that defamation suits under the "sham" exception *are intended* to deter survivors from bringing claims against abusers.

The prevalence of baseless, harmful, and gendered stereotypes that question whether survivors are telling the truth about abuse means that a retaliatory defamation suit could result in a devastating verdict against a survivor. If an abuser persuades a jury to disbelieve a survivor, that same jury would have the power to return a crushing damages award. Indeed, defamation claims often give rise to

[47] LONSWAY, ET AL., *supra* note 45, at 3.

[48] Lisak et al., *supra* note 46, at 1321.

[49] *See* LONSWAY, ET AL., *supra* note 45, at 2-3; Lisak, *supra* note 46, at 1321-22.

massive verdicts, especially against survivors who might be perceived as unpopular by some segments of the community.[50] For abusers pursuing defamation litigation against survivors of sexual abuse, a trial will merely be the continuation of a smear campaign aimed at the survivor under the guise of proving the defamation claim.[51]

And even the *possibility* of expensive litigation culminating in a massive adverse jury verdict rendered against a survivor is a strong deterrent that would cause a survivor (with good reason) not to seek legal redress. This result is exactly what Dr. Luke, and similarly situated litigants, wants. Instead of allowing litigants to test the legal and factual merit of a survivor's assertions in open court, Dr. Luke seeks to entrench the First Department's "sham" exception and make ordinary litigation conduct a basis for a defamation suit—in the hope that victims will be too fearful to

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[50] Tom Jackman, *Jury orders blogger to pay $8.4 million to ex-Army colonel she accused of rape*, WASH. POST (Aug. 11, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/08/11/jury-orders-blogger-to-pay-8-4-million-to-ex-army-colonel-she-accused-of-rape/; *see also* Anemona Hartocollis, *Oberlin Helped Students Defame a Bakery, Jury Says. The Punishment $33 Million*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/us/oberlin-bakery-lawsuit.html (jury award of $11 million in compensatory damages and $33 million in punitive damages against college for defaming a bakery by "siding with" students protesting alleged racial profiling); Alexandra M. Gutierrez, *The Case For A Federal Defamation Regime*, 131 YALE L. J. F. 19, 30-33 (2021) (describing growing trend of massive jury verdicts against media defendants, particularly in state courts).

[51] *See generally* Melanie Randall, *Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming*, 22 CAN. J. WOMEN & L. 397 (2010).

pursue their case. To accept Dr. Luke's and the First Department's radical position would allow the specter of a retaliatory defamation suit and its attendant financial and emotional costs to loom over every survivor's decision as to whether to pursue legal action against the perpetrator of the abuse. That result is plainly unacceptable.

III. THE FIRST DEPARTMENT'S EXCEPTION IS PARTICULARLY HARMFUL BECAUSE OF ITS BROAD CONCEPTION OF WHAT CONSTITUTES "SHAM" LITIGATION

Any "sham" exception that diminishes the vital safeguards that the litigation-related privileges provide is cause for concern. The exception that the First Department manufactured below is *particularly* pernicious, however, because of its extraordinarily broad conception of what would make litigation a "sham." Under the First Department's test, essentially any additional or secondary motive a survivor may have for bringing suit may lead to the case being characterized as a "sham." That expansive definition of "sham" means that the First Department's "exception" swallows the rule and eviscerates the historic protections of the litigation-related privileges in virtually any sexual assault claim.

The facts of Kesha's case illustrate the danger that the First Department's "sham" exception poses to survivors. Here, Kesha sued Dr. Luke to prove that Dr. Luke sexually assaulted her, and sought release from a contractual relationship requiring her to work with her abuser for years after the assault. Yet, the First Department held that evidence showing that Kesha sued to "pressure" Dr. Luke to

release her from her contract created a jury issue as to whether the litigation-related privileges apply to her statements. *See Gottwald v. Sebert*, 193 A.D.3d 573, 580 (1st Dep't 2021). And if the jury concludes that Kesha sued to "pressure" Dr. Luke to release her from her contract, the litigation-related privileges will not shield her statements from being a basis for defamation liability. Under the First Department's rule, then, pursuing litigation for the purpose of *protecting the victim from ongoing harm* is an illegitimate motive that renders the suit a "sham." In other words, the First Department decided that if Kesha *also* wanted to stop working with Dr. Luke, a juror could rely on that information to conclude that her claims of sexual abuse were a "sham."

However, survivors can be motivated by one, two, or many reasons at the same time, and still bring a sexual assault claim. Indeed, far from being a "sham," Kesha's lawsuit and the remedies she seeks constitute a legitimate use of the legal process. Virtually *all* lawsuits aim to influence a defendant's future behavior in some way. In fact, the very act of a plaintiff requesting injunctive relief inherently represents an attempt to make the defendant alter his conduct. By equating Kesha's desire for Dr. Luke to change his behavior with a lack of "good faith," the First Department's exception eviscerates the litigation-related privileges in the context of sexual assault claims.

For instance, consider a survivor who was employed at a retail store until her supervisor raped her and she reported the assault, leading to her constructive discharge. *See, e.g.*, Complaint, *Robinson v. Vineyard Vines, Inc.*, No. 7:15-cv-4972-VB (S.D.N.Y. June 25, 2015).[52] If the survivor were to file a complaint seeking reinstatement to the position from which she was wrongfully dismissed after reporting her assault—an entirely common and appropriate form of relief[53]—an abuser could argue that the lawsuit was a "sham" solely designed to help get the

[52] *See also, e.g.*, Judith I. Avner, *Sexual Harassment: Building a Consensus For Change*, 3 KAN. J. L. & PUB. POL'Y 57, 58 (1994) (describing the findings of New York's Governor's Task Force on Sexual Harassment, including that "[v]irtually every victim with whom the Task Force met had lost a job, and in some cases a career subsequent to making a complaint about sexual harassment"); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 8, at II.D; Bryce Covert, *The Staggering Costs of Sexual Harassment*, NATION (Sept. 3, 2021), https://www.thenation.com/article/society/sexual-harassment-workplace-settlements/ (describing the gap between settlement amounts paid to survivors and the lifetime economic costs of experiencing sexual harassment).

[53] Complaint at 23, *Patrick v. 3D Holdings LLC*, No. 1:13-cv-638 (D. Haw. Nov. 21, 2013) (alleging that coworker sexually assaulted plaintiff and seeking compensatory damages and reinstatement); Complaint at 15 ¶ 4, *Kramer v. Wasatch County Sheriff's Office*, No. 2:08-cv-475-DN (D. Utah June 19, 2008) (bringing Title VII claims, including claims based on rape perpetrated by coworker, and seeking compensatory damages, "advancement of Plaintiff to position she would have occupied," and "back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff had not lost the opportunity for advancement."); Complaint at 12-13, 14 ¶¶ 73, 84, *Fuller v. State of Idaho*, No. 1:13-cv-35-DCN (D. Idaho Jan. 22, 2013) (suing under Title VII, section 1983, and the Fourteenth Amendment based on rape perpetrated by coworker and seeking reinstatement, back pay, and front pay).

victim their job back. A court applying the First Department's misguided "sham" exception could allow the harms of a retaliatory defamation case to continue all the way through trial, because the allegation of sexual abuse was also made to "pressure" the employer into rehiring the survivor.

Or consider a survivor on a college campus whose abuser lives in the same dormitory and is enrolled in the same courses.[54] This survivor decides to report the assault to her school and informs administrators that she does not want to have to live and learn in the same environment as her abuser—a request that federal law requires schools to honor, if such an accommodation is reasonably available.[55] Far from providing evidence of a false allegation, this request would be completely consistent with a survivor having experienced sexual assault. Yet, under the First Department's "sham" exception, her abuser could bring a defamation suit that portrays the survivor's report as an effort to "pressure" the abuser to change his classes or transfer dorms. Such a broad "sham" exception will encourage abusers

[54] *See, e.g.*, NESBITT & CARSON, *supra* note 17, at 4 (sharing survivors' stories, including those of survivors who "changed majors because they shared a class required for their major with their perpetrator").

[55] 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 106.30(a) (requiring schools to provide "supportive measures . . . as appropriate, as reasonably available, and without fee or charge," which may include "modifications of work or class schedules" or "changes in work or housing locations").

on campus to use threatened and actual defamation litigation to stop survivors from coming forward and deprive them of equal access to education.

Indeed, even an ordinary sexual assault claim seeking exemplary damages "'to send a message' to deter others from similar conduct against women," *Deborah S. v. Diorio*, 153 Misc. 2d 708, 716 (Civ. Ct., N.Y. County 1992), could, under the First Department's exception, be considered a "sham" because the victim had the additional motive of using the case as an example to other abusers.

As these examples illustrate, there is simply no limiting principle to the First Department's vast conception of "sham" litigation. And the result is grossly unfair for survivors of sexual abuse. Outside of the sexual abuse context, parties routinely bring lawsuits for multiple reasons—and seek a variety of remedies—without any doubt cast on their motives. No one would suggest, for example, that a litigant bringing a breach of contract action is engaging in a "sham," simply because he seeks rescission of the agreement ("just trying to get out of the contract") or requests consequential damages ("just trying to make a quick buck"). Yet, under the framework adopted by the decision below, a different set of standards applies to survivors of sexual assault—who must justify that their lawsuit seeks only one thing (and nothing else), in order to avail themselves of the litigation-related privileges. The result of the First Department's double standard is that virtually any survivor seeking redress through the courts for life-altering trauma caused by sexual abuse

now exposes themselves to a retaliatory defamation lawsuit. This Court should reaffirm the vital protections afforded by the long-established litigation-related privileges and unequivocally reject the First Department's novel, vast, and harmful "sham" exception.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully Submitted,

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Dated: April 14, 2022

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Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 6,173 words.

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Dated: April 14, 2022
New York, New York

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Samir Deger-Sen

ADDENDUM

LIST OF *AMICI CURIAE*

1. The American Federation of State, County and Municipal Employees, AFL-CIO
2. Birnbaum Women's Leadership Network
3. Cyber Civil Rights Initiative
4. Desiree Alliance
5. Disability Rights Advocates
6. Equal Rights Advocates
7. Gender Justice
8. Girls for Gender Equity
9. Human Rights Campaign
10. If/When/How: Lawyering for Reproductive Justice
11. International Action Network for Gender Equity & Law (IANGEL)
12. KWH Law Center for Social Justice and Change
13. Lawyers Club of San Diego
14. Legal Aid At Work
15. Legal Momentum, the Women's Legal Defense and Education Fund
16. National Association of Social Workers
17. National Consumers League
18. National Crittenton
19. National Network to End Domestic Violence
20. National Women's Law Center
21. National Women's Political Caucus

22. New York State Coalition Against Domestic Violence
23. New York State Coalition Against Sexual Assault
24. Oklahoma Call for Reproductive Justice
25. Reproaction
26. The Women's Law Center of Maryland
27. Unite Women
28. Women Employed
29. Women Lawyers Association of Los Angeles
30. Women Lawyers On Guard Inc.
31. Women's Bar Association of the District of Columbia
32. Women's Bar Association of the State of New York
33. Women's Institute for Freedom of the Press
34. Women's Law Project
35. Women's Media Center
36. Nurses for Sexual and Reproductive Health

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On the 14th day of April 2022, I served 3 true copies of the within

BRIEF FOR AMICUS CURIAE THE NATIONAL WOMEN'S LAW CENTER AND 35 ADDITIONAL ORGANIZATIONS IN SUPPORT OF APPELLANT AND REVERSAL

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Commission Expires September 16, 2023

Giovanni Feliciano

Case Name: Gottwald v. Sebert
Index Number: APL-2021-00131
Docket No: 2020-01908, 2020-01910