APL-2022-00082
New York County Clerk's Index No. 653118/14
Appellate Division– First Department Appellate Case No. 2021-03036

Court of Appeals

of the

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.

(For Continuation of Caption See Inside Cover)

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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December 14, 2022

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,

– and –

DOES 1-25, inclusive,

Counterclaim Defendants.

COURT OF APPEALS
STATE OF NEW YORK

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—*against*—

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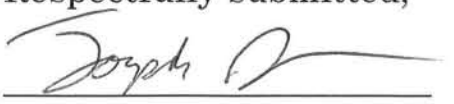
NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

PLEASE TAKE NOTICE that upon the annexed affirmation of Joseph M. Sanderson, dated December 14, 2022, and all exhibits attached thereto including the accompanying proposed brief of amici curiae, and upon all papers, pleadings, and proceedings had herein, Legal Momentum, Equal Rights Advocates, and the National Women's Law Center will move this Court, on Tuesday, January 3, 2023, or as soon thereafter as counsel may be heard, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, for an order granting them leave, pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York, to file an amici curiae brief, in support of Appellant Kesha Rose Sebert, and for such other relief as this Court may deem just and proper.

Dated: December 14, 2022
New York, NY

Respectfully submitted,



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BY FEDERAL EXPRESS

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1 (g) of the Rules of Practice of the Court of Appeals of the State of New York, amici certify that they are nonprofit organizations and have no parents, subsidiaries, or affiliates, except that The National Women's Law Center Fund, LLC and the National Women's Law Center Action Fund may be deemed to be affiliates of the National Women's Law Center.

COURT OF APPEALS
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Appellate Division,
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Case No. 2021-03036

New York County
Clerk's Index No.
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AFFIRMATION IN SUPPORT OF
MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Joseph M. Sanderson, pursuant to CPLR 2106 (a) and Rule 500.23 (a) (4) of the Rules of Practice of the Court of Appeals of the State of New York, affirms the following under penalty of perjury:

1. I am an attorney in good standing admitted to the Bar of the State of New York and an associate of the law firm of Steptoe & Johnson LLP, counsel to the proposed amici curiae Legal Momentum, Equal Rights Advocates, and the National Women's Law Center.

2. Legal Momentum, the Women's Legal Defense and Education Fund, is the first and longest-serving national nonprofit civil rights organization dedicated to advancing the rights of women and girls, including survivors of gender-based violence. For over 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education. Legal Momentum has worked for decades to ensure that the survivors of gender-based violence have access to legal protections and remedies and an unbiased justice system. Legal Momentum regularly appears before state and federal courts, including the Supreme Court, as amicus curiae on issues

related to sexual harassment and sexual assault. The prominence of the #MeToo movement that encouraged many sexual harassment and sexual assault survivors to publicly voice their experiences was met by a spike in defamation lawsuits filed by abusers trying to further silence their victims. In response, Legal Momentum created *A Guide to Defamation for Survivors of Sexual Assault or Harassment*, available at https://www.legalmomentum.org/library/guide-defamation-survivors-sexual-assault-or-harassment.

3. Equal Rights Advocates (ERA) is a national nonprofit legal organization that advocates for gender justice in workplaces and schools across the country. Since its founding in 1974, ERA has been fighting on the front lines of social justice to protect and advance rights and opportunities for women, girls, and people of all gender identities through litigating groundbreaking legal cases on behalf of workers who have experienced civil rights violations, including sexual harassment and other forms of discrimination. ERA has also led bold policy reform to strengthen protections against sexual harassment in California as well as in other states and at the federal level. ERA has participated as amicus curiae in scores of cases involving the interpretation and

application of legal rules and laws affecting workers' rights and access to justice. ERA has a strong interest in ensuring that victims of sexual assault and sexual harassment remain able to exercise their right to speak freely and openly about sexual harassment and abuse without fear of retaliation and intimidation—particularly retaliation and intimidation by perpetrators who seek to use the legal system to silence such victims.

4. The National Women's Law Center (NWLC) fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequities that shape our society and to break down barriers that harm all of us—especially women and girls of color, LGBTQ people, and low-income women and families. Since 1972, NWLC has worked to advance educational opportunities, income security, access to child care, workplace justice, and health and reproductive rights for women and girls and has participated as counsel or amicus curiae in a range of cases—including defamation cases filed by abusers against sexual assault survivors—before federal and state

courts to secure protections against sex discrimination. The NWLC Fund houses and administers the TIME'S UP Legal Defense Fund, which improves access to justice for those facing workplace sex harassment, including through grants to support legal representation.

5. Each of the amici thus has extensive experience representing and advocating for survivors of sexual harassment, including sexual assault, and intimate partner abuse, and specifically including survivors who have faced retaliatory lawsuits after speaking up about their experiences—or even reporting crimes committed against them to law enforcement authorities—and threats of litigation to attempt to silence them.

6. The amici are thus familiar with the precise issues of "SLAPP" lawsuits against survivors that the sponsors of New York's amended Anti-SLAPP law identified in passing the bill—and in rejecting then-Governor Cuomo's proposed chapter amendment that would have eliminated the applicability of the statute to pending suits continued after the law's effective date.

7. Amici seek leave to file this brief to assist this Court with understanding the substantial negative effect of the First Department's

decision on survivors of sexual assault, sexual harassment, and intimate partner abuse. Sexual assault and other forms of sexual harassment affect millions of people in this country, disproportionately women and girls and LGBTQ+ individuals. Survivors face substantial hurdles to reporting, and when they do report the abuse, whether to an employer, to a school or to law enforcement, they frequently face retaliation. One increasingly common form of retaliation is that the named harasser threatens to sue them if they report the incident. All too often, the threat of a retaliatory defamation lawsuit has its desired effect: survivors do not report; sexual harassers abuse more people, threatening to ruin them if they report; and the cycle repeats. That was precisely what the legislature sought to tackle in amending New York's Anti-SLAPP law.

8. *Amici* are also ideally placed to assist this Court with understanding why it was so crucial for the legislature to recognize speech about sexual assault as speech of public importance and thus subjecting it to the actual malice standard. For too much of our history, sexual violence was treated as a private matter, to be kept behind closed doors and ignored. When survivors spoke up, they would be

confronted with a society and legal system that presumed them to be liars, demonstrated by its history of instructing jurors that victims were probably lying and deeming their own testimony worthless as a matter of law unless there were corroborating witnesses. New York's amendments to its Anti-SLAPP law, with the specific purpose of protecting survivors, thus marked a key step in moving away from a system that privileges abusers' reputations over survivors' ability to tell the truth.

7. The First Department's decision clearly splits from a substantial body of case law in the lower courts statewide and federal courts that had interpreted the amendments to the Anti-SLAPP law to apply if a case was continued after the amendments' effective date. Further, it conflates the amendments to the standard for libel liability with the other provisions of the amendments. Given that and given the significant public interest in protecting the ability of survivors to tell their stories—to friends or employers, to law enforcement, or to the wider public, as they choose—this Court should reverse the Appellate Division's decision, and in so doing, clarify that the November 2020 amendments to Civil Rights Law §§ 70-a and 76-a apply—as the

legislature intended—to *pending* cases continued after its effective date. Alternatively, *amici* request, at a minimum, that this Court recognize that the amendments regarding standards for motions to dismiss (CPLR 3211 [g]) and for summary judgment (CPLR 3212 [h]) govern procedural matters, and thus apply to pending cases.

8. The accompanying brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or party's counsel contributed content to the brief or otherwise participated in its participation (other than informing counsel for amici of deadlines and providing an electronic copy of Appellant's brief and the record on appeal).

9. No party or counsel to any party contributed money intended to fund preparation or submission of this brief.

10. No person, other than the *amici* or their counsel, contributed money that was intended to fund preparation or submission of this brief.

11. The *amici* have thus demonstrated their interest in this matter and that they can provide special assistance to this Court in resolving this motion. For the foregoing reasons, and for those stated in

the proposed *amici curiae* brief, the *amici* respectfully seek this Court's permission to serve and file the attached proposed *amici curiae* brief, and for such other and further relief as the Court may deem just and proper.

Dated: December 14, 2022

New York, New York

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Proposed Brief

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(For Continuation of Caption See Inside Cover)

BRIEF OF LEGAL MOMENTUM, EQUAL RIGHTS ADVOCATES & THE NATIONAL WOMEN'S LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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PRELIMINARY STATEMENT

New York's recent amendments to its Anti-SLAPP law were a landmark for survivors of sexual harassment, including sexual assault, and intimate partner violence. Passed in the wake of a slew of retaliatory defamation lawsuits against survivors who spoke up about their experiences to friends, employers, or the media or reported their assaults to law enforcement, the legislature made clear that enough

[1] The accompanying brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or party's counsel contributed content to the brief or otherwise participated in its participation (other than informing counsel for amici of deadlines and providing an electronic copy of Appellant's brief and the record on appeal). No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amici or their counsel, contributed money that was intended to fund preparation or submission of this brief.

was enough. Abusers were using the courts as instruments of their abuse; that needed to stop. As the legislative leaders noted in passing the bill, New York provided too many weapons to those who wanted to use meritless litigation to punish survivors who spoke out and threaten those considering it. The bill's lead Senate sponsor made clear: "This bill is going to protect survivors."[2] "Survivors in New York," he said, "must be able to speak without threat of impoverishment and intimidation."[3] The legislative leaders of both chambers called New York's libel law a "broken system," that had led to, among others, "survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them."[4]

The First Department's decision holds that the legislature meant to fix this "broken system" only for those who happened to be sued after the amendments' effective date—and did not intend to help the very people whose plight it cited as the reason for amending the law, since

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[2] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286002032701210626?s=20.
[3] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286032867152334851?s=20
[4] New York State Legislature, Press Release, Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech (July 22, 2020), https://nyassembly.gov/Press/files/20200722a.php.

they had already been sued. Under the First Department's rule, it does not matter that a rapist has sued a survivor for daring to report the assault to their shared employer or school to intimidate the survivor into dropping the complaint as long as the abuser commenced the suit before November 2020—even if the case is ongoing and the abuser is still using the court as instrument of abuse *today*. If an abusive spouse filed a libel lawsuit in October 2020 to try to punish their partner for telling friends about the abuse, and the case is on-going, the First Department would deny the victim this protection even as the legal system requires the victim to continue to defend that lawsuit for years into the future. Similarly, the First Department would allow an abusive ex-spouse to continue a defamation suit against the victim, as long as it was filed before November 2020, even if the abuser is only doing so to get the victim to drop objections in a child custody claim.

That is not what the legislature did or said. It made abundantly clear that the statute was remedial, and thus presumptively applicable to *pending* cases, even rejecting an amendment to make it prospective only. And it made application to *pending* cases explicit in the law's text: it created a robust, substantive cause of action for bringing abusive

SLAPP suits that applies to actions "continued," not just actions "commenced." (Civil Rights Law § 70-a [1].) Departing from other states that only apply their Anti-SLAPP laws early in the case, Section 70-a unambiguously states that a lack of substantial basis can be proven at any stage, as an alternative to a CPLR 3211 (g) motion to dismiss or a CPLR 3212 (h) motion for summary judgment. It carefully calibrated the standard for fee-shifting (Civil Rights Law § 70-a [1] [a]), compensatory damages for improper purpose akin to common law civil malicious prosecution or abuse of process (Civil Rights Law § 70-a [1] [b]), and punitive damages for purely malicious suits (Civil Rights Law § 70-a [1] [c].) Under the plain text of the statute, an individual who brings an abusive lawsuit against a survivor has a choice: stop using the courts as an instrument of abuse, or pay the price. Those who chose to continue their suits face the consequences under Section 70-a of their choices.

The First Department's erroneous decision has serious negative impacts on survivors of sexual harassment, including assault, and intimate partner violence. These forms of abuse are driven by the perpetrator's desire to control, to deprive victims of agency and

inherently involve gender-based animus. (*See Breest v Haggis*, 180 AD3d 83 [1st Dept 2019].) It is unsurprising then, that when survivors dare to speak up or report, exercising control and agency, abusers retaliate. And when the abusers have money to hire lawyers, that retaliation often comes in the form of turning the law that is supposed to protect survivors into the instrument to torment and threaten. Retaliatory litigation by abusers has grown drastically, motivating the legislature to amend the Anti-SLAPP law. Sexual assault is already drastically underreported, as survivors fear disbelief or punishment for speaking up—an often-founded result. The First Department's decision substantially weakens one of the crucial tools that the legislature gave survivors to fight back and reclaim their agency.

Indeed, the practical effect of the First Department's decision may be to deprive survivors of the ability to defend themselves at all. The mandatory fee-shifting provisions of the Anti-SLAPP amendments have made it more possible for survivors to obtain counsel on contingency: once the survivor defeats the retaliatory lawsuit, the abuser is likely on the hook for the fees. That is especially important in defamation litigation over sexual assault, since New York's short statute of

limitation for intentional torts means that a survivor who—as is common—delays reporting due to fear of retaliation or being trapped under an abuser's control often loses their ability to bring affirmative tort or antidiscrimination claims. And since this case is not a matrimonial or child custody case, the Domestic Relations Law's fee-shifting provisions are no help. When an abuser can afford a lawyer but a survivor cannot—which is most often the case given the inherent nature of such abuses being fueled by the abuser's power over the victim—that is a recipe for silence.

Amici thus ask this Court to protect survivors of sexual harassment, including sexual assault, and intimate partner violence, by reversing the First Department's decision and clarifying that the November 2020 amendments to Civil Rights Law §§ 70-a and 76-a apply—as the legislature intended—to *pending* cases continued after the amendments' effective date. Alternatively, amici request, at a minimum, that this Court recognize that the amendments' other provisions regarding standards for motions to dismiss (CPLR 3211 [g]) and for summary judgment (CPLR 3212 [h]) govern procedural matters, and thus apply to pending cases.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Legal Momentum, the Women's Legal Defense and Education Fund, is first and longest-serving national nonprofit civil rights organization dedicated to advancing the rights of women and girls, including survivors of gender-based violence. For over 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education. Legal Momentum has worked for decades to ensure that the survivors of gender-based violence have access to legal protections and remedies and an unbiased justice system. Legal Momentum regularly appears before state and federal courts, including the Supreme Court, as amicus curiae on issues related to sexual harassment and sexual assault. The prominence of the #MeToo movement that encouraged many sexual harassment and sexual assault survivors to publicly voice their experiences was met by a spike in defamation lawsuits filed by abusers trying to further silence their victims. In response, Legal Momentum created *A Guide to Defamation for Survivors of Sexual Assault or Harassment*, which is available at https://www.legalmomentum.org/library/guide-defamation-survivors-sexual-assault-or-harassment.

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ARGUMENT

The legislature revised New York's Anti-SLAPP statute in response to courts' narrow interpretation of the prior version of the

statute and ongoing abuse of the legal system by powerful and often high-profile people to silence or punish those who spoke out about abuse. The First Department's decision nevertheless holds that these reforms apply only to cases commenced after the amendments' enactment—even if *pending* cases were *continued* afterwards. It holds that the amendments leave unprotected those whose maltreatment, through the misuse of courts' process, predated then-Governor Cuomo's signature of the bill intended to redress that maltreatment.

That is not what the bill says. The legislature repeatedly referred to *continuation* of meritless SLAPP suits precisely because it intended to cover the pending suits that inspired the amendments' passage. It rejected a push for a chapter amendment that would have made the law prospective only. And it did so precisely because of the pervasive trend of retaliatory defamation litigation and because legislators realized that abuse was being swept under the rug because the mere threat of a lawsuit meant survivors had to choose between telling the truth and protecting themselves from abuse of the legal process to retraumatize and financially destroy them.

I. Abusers Are Increasingly Turning Courts into Instruments of Abuse.

People commit sexual assault and other forms of gender-based violence because they believe they are entitled to exercise power, to control or punish their victim, and to negate their victim's agency.[5] Abusers are particularly likely to lash out when their victims reassert

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[5] Because male-abuser-on-female-victim abuse is the most common form of abuse, much of the literature addresses this in the context of male abusers' views of women, although similar attitudes are in play in same-gender, non-binary, or female-abuser-on-male-victim abuse. (*See e.g.* Jeffrey Fagan & Angela Browne, *Violence Between Spouses and Intimates: Physical Aggression Between Women and Men in Intimate Relationships*, *in* 3 Understanding and Preventing Violence: Social Influences 115, 202-203, 205 [Albert J. Reiss Jr. & Jeffrey A. Roth eds. 1994] [collecting studies showing that views regarding "attitudes regarding male dominance, objectification of women as chattel," and "power of males over women in the home" were associated with intimate partner violence]; Richard B. Felson & Steven F. Messner, *The Control Motive in Intimate Partner Violence*, 63 Soc Psych Q 86, 91 [2000] [presenting quantitative evidence of the use of threats before violence "suggesting that males' assaults on female partners are especially likely to involve a control motive" and "the observed interaction effect is quite strong"]; Diana Scully & Joseph Marolla, *'Riding the Bull at Gilley's': Convicted Rapists Describe the Rewards of Rape*, 32 Social Problems 251, 255-259 [1985] [describing interviews with men who committed rape to "conquer[]" women who turned down sex, to have sex with women that the rapists "believed . . . would not be sexually attracted to them," or as a form of "impersonal" sex in order to be "totally dominant" and to have "the ability to have sex without caring about the woman's response," as well as to punish or degrade, and noting that many rapists expressed the belief that "men have the right to discipline and punish women"].)

their agency and challenge the control by speaking up and demanding accountability or protection.[6]

The civil legal system is a way to invoke the state's power for one's own ends, so it should come as little surprise that scholars have for decades recognized that courts and their procedures can be corrupted by abusers as a tool to continue abuse, especially when survivors seek to challenge the abuser's power.[7] The cost of defending against this "paper abuse" is also a lever to assert other forms of power, such as extorting concessions in child custody or child support proceedings or hush

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[6] Joan Zorza, *Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court Practices*, 3 Domestic Violence Report 67, 67 (1998) ("Men who abuse women minimize or deny their abuse or falsely blame their circumstances or others, especially their victims, for their behavior. . . . When batterers feel that their authority is being threatened, they escalate their violent and terroristic tactics.").

[7] Zorza, 3 Domestic Violence Report at 68, 74; Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J Soc Just 1053, 1084 (2011); Susan L. Miller and Nicole L. Smolter, *"Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking*, 17 Violence Against Women 637 (2011); Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 Violence Against Women 1367, 1387-1388 (2005).

agreements.[8] Historically it often came in matrimonial or child custody proceedings—one reason why the legislature provides for fee-shifting in those proceedings. (Dom. Rel. Law § 237.) But increasingly, it comes through civil claims, where fee-shifting has rarely been available.

Even utterly baseless and abusive defamation or similar claims often can be sufficiently pleaded to avoid dismissal under the usual CPLR 3211 (a) (7) standard. "This means that survivors are often forced to endure lengthy and costly discovery. Discovery can entail a number of personal and invasive requests, including requiring the survivor to sit for a deposition during which [they] will be interrogated about matters relevant to the case, having the survivor answer questions relating to the case in writing via interrogatories and requests for admission, obligating the survivor to sift through all documentation [they] ha[ve] that is relevant to the case and to compile and share that information

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[8] *See e.g.* Andrea Vollans, *Court-Related Abuse and Harassment: Leaving an Abuser Can Be Harder Than Staying*, YWCA Vancouver (2010), https://ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf; Jessica Klein, *How Domestic Abusers Weaponize the Courts*, The Atlantic (July 19, 2019), https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/.

with [their] assailant's counsel."[9] Indeed, an assailant may often *personally attend* a survivor's deposition, or the survivor must incur further expense to move for a protective order to prevent it. This monetary expense and psychological retraumatization make even utterly baseless defamation litigation a potent tool to extort promises of silence or concessions in matrimonial or child custody litigation or to deter reporting, testifying, or speaking out.

The amendments to New York's Anti-SLAPP law came in the wake of a growing awareness of how threats to sue for speaking the truth—whether to the media, to employers or educational administrators, or law enforcement—silence survivors and perpetuate abuse. The public and legislators discovered that the decades-long conspiracy of silence surrounding Harvey Weinstein was a conspiracy of litigators. When the dam finally broke, countless articles and two book-length accounts told of how threats—to sue for libel, to enforce non-disclosure agreements themselves often extorted through the threat of abusive litigation tactics, to sue for tortious interference with those non-

[9] Nicole Ligon, *Protecting Women's Voices: Preventing Retaliatory Defamation Claims in the #MeToo Context*, 94 St. John's L Rev 961, 965 (2022).

disclosure tactics, and more—tried, successfully for years, to keep the truth hidden.[10]

And yet, even as a movement grew to root out the ways in which society, including laws and the courts, protect predators at the expense of the people they target, retaliatory litigation has grown too as a reaction. Dubbed the "legal backlash to the MeToo movement," libel cases "have been filed at a faster rate" as more survivors spoke out and as cultural pressure for abusers to face consequences grew.[11] "In a

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[10] *See generally* Jodi Kantor & Megan Twohey, *She Said: Breaking the Sexual Harassment Story That Helped Ignite A Movement* (2019); Ronan Farrow, *Catch and Kill: Lies, Spies, and a Conspiracy to Protect Predators* (2019). *See also* Neil Fulton, Book Review, *All the News That's Fit to Hide: Sexual Assault and Silence in Hollywood and the Lawyers Who Let It Happen*, 40 Loy LA Ent L Rev 395 (2020) (discussing the legal ethics implications of the conduct by lawyers discussed in *Catch and Kill*).

[11] Madison Pauly, *She Said, He Sued*, Mother Jones (Mar. 2020), https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault; *see also* Hazel Cills, *Students Accused of Misconduct Are Increasingly Filing Defamation Suits Against Their Accusers*, Jezebel (Dec. 5, 2017, 5:15 PM), https://jezebel.com/students-accused-of-sexual-misconduct-are-increasingly1821026491; Tyler Kingkade, *As More College Students Are Saying "Me Too," Accused Men Are Suing for Defamation*, BuzzFeed News (Dec. 5, 2017, 11:26 AM), https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing (noting a significant increase in the number of libel claims filed against survivors reporting

perverse twist in the #MeToo age," the U.N. Special Rapporteur on Freedom of Expression reports, "women who publicly denounce alleged perpetrators of sexual violence online are increasingly subject to defamation suits or charged with criminal libel or the false reporting of crimes."[12] These cases are expensive[13]—and just as importantly, retraumatizing[14]—for survivors to defend. They have been recognized

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sexual assault); Bruce Johnson, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips*, American Civil Liberties Union Blog (Jan. 22, 2018, 4:00 PM), https://www.aclu.org/blog/womens-rights/worried-about-getting-sued-reporting-sexual-abuse-here-are-some-tips ("The #MeToo movement has drawn an outpouring of testimony by the victims of sexual harassment and sexual abuse. In response, there has been a surge in retaliatory defamation lawsuits by their abusers.").

[12] Irene Khan, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, A/76/258 (July 30, 2021), https://undocs.org/en/A/76/258.

[13] *See* Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Am L Rev 441, 448-449 (2019) (describing studies on costs of defending libel suits and citing a survivor's experience of a libel lawsuit *after* a university quasi-judicial process found that abuser had committed rape that cost the survivor "twice her monthly income, reaching $20,000 even in the early stages of the lawsuit" to defend).

[14] *See* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum L Rev 1, 103 (1977) (discussing traumatic experience of sexual assault trials for survivors); Leader, 17 First Am L Rev at 448 ("Survivors are likely to face stress and trauma from the continued interaction with an abuser required by the process of litigation.").

by the U.N. Special Rapporteur on Violence Against Women as "a form of G[ender] B[ased] V[iolence] in and of itself."[15] And experts have expressed concern that the rise in retaliatory defamation lawsuits "will further discourage reporting."[16]

All too often, these suits are brought by abusers who *know* that the litigation will not succeed on the merits.[17] They are process as punishment, pure and simple, for daring to speak or report. Indeed, because New York provides only a qualified privilege for reporting crimes to law enforcement, this abuse of the legal system is not simply about high-profile reports in newspapers or on television; it is about the survivor who goes to the precinct because they need an order of protection and criminal proceedings are often the only way to get one in

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[15] Jorie Dugan, *Defamation Lawsuits: Another Tactic to Silence Survivors*, Ms. Magazine (Jan. 18, 2022), https://msmagazine.com/2022/01/18/defamation-lawsuit-sexual-assault-rape-me-too/.

[16] Chesley N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement*, 94 Tulane L Rev Online 1 (2020) (collecting examples of the trend and quoting Sarah Friedmann, *Reporting Sexual Assault on Campus Is Becoming Riskier Than Ever—Here's Why*, Bustle [Dec. 6, 2017], https://www.bustle.com/p/reporting-sexualassault-on-campus-is-becoming-riskier-than-ever-heres-why-7209692.).

[17] Leader, 17 First Am L Rev at 447.

New York. (*See Sagaille v Carrega*, 194 AD3d 92 [1st Dept 2021] [defamation claim by former Kings County ADA for survivor's report to NYPD].) Or it is about the student who reports abuse to school administrators so they can be moved out of classes with their abuser and in order to receive other measures aimed at ensuring a safe learning environment. (*Cf. Vander-Plas v. May*, 2016 WL 5851913, 2016 Tex App LEXIS 10822 [Tex Ct App Oct. 4, 2016, No. 07-15-00454-CV] [defamation claim against student who requested that university prevent attacker from stalking her repeatedly outside classrooms].) And it is all too often survivors who are least able to fight back who are targeted.[18]

II. The Legislature Acted to Redress Use of the Courts As Instruments of Abuse.

It was against this backdrop that the legislature acted. It made no secret of the fact that it was specifically motivated by the growth of abusive and retaliatory litigation for speaking up or reporting sexual violence. Touting support from advocates for survivors of sexual assault

[18] Lesley Wexler et al., *#metoo, Time's Up, and Theories of Justice*, 2019 U Ill L Rev 45, 58 (2019) (noting that most of those requesting representation from the Time's Up Legal Defense Fund are low-income wage-earners).

and harassment, Senator Hoylman, the bill's lead state senate sponsor, promised: "This bill is going to protect survivors."[19] "Survivors in New York," he said, "must be able to speak without threat of impoverishment and intimidation."[20] A joint press release by the leadership of both chambers called for a change to New York's "broken system" of anti-speech litigation that had led to, among others, "survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them."[21] That is a classic remedial statute: "[T]he term remedial is especially applicable to statutes giving a mode of remedy for a wrong not available or ineffective under the prior system of law." (McKinney's Cons Laws of NY, Book 1, Statutes § 35; *see also Nelson v HSBC Bank USA*, 87 AD3d 995, 998 [2d Dept 2011] ["Remedial statutes are those 'designed to correct imperfections in prior law, by generally giving relief to the aggrieved party'"].) The legislature identified how abusers were, under the prior law, bringing

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[19] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286002032701210626?s=20
[20] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286032867152334851?s=20
[21] "New York State Legislature, Press Release, Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech (July 22, 2020), https://nyassembly.gov/Press/files/20200722a.php).

meritless claims to make the courts themselves into instruments of abuse; it sought to give relief to those being abused.

The amendments, moreover, bear all the hallmarks of remedial legislation that the legislature intends to apply to *pending* cases. (*See In re Gleason (Michael Vee, Ltd.)*, 96 NY2d 117, 122 [2001] ["[R]emedial legislation should be given retroactive effect in order to effectuate its beneficial purpose."].) The legislature sought to remedy process-as-punishment, so many of the changes it wrought were procedural. (*Id.* [giving retroactive effect to procedural change to CPLR Article 75].) It identified narrow judicial interpretations of the prior version of the Anti-SLAPP law as a reason for its passage. (*Id.* [noting similar language in sponsor's memorandum for changes to Article 75 and identifying "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" as considerations favoring application to *pending* cases].) Notably, the bill jacket also indicates that the final bill *rejected* a push for a chapter

amendment to make the bill prospective only—a tell-tale sign that all concerned viewed it as applicable to *pending* cases.[22]

Indeed, in SLAPP suits, it is courts themselves that are the instrument of abuse. The court's process is what requires a sexual assault survivor to spend more than they earn to hire a lawyer—or miss work as they struggle to represent themself *pro se*. The court's process is what retraumatizes the survivor by compelling their testimony at deposition or trial, often in the physical presence of their abuser. At bottom, abuse-by-litigation works because when the abuser invokes the legal system through the courts, the abuser is invoking the threat of the sheriff seizing the survivor's property or even imprisonment for contempt. (*See* David Gray Carlson, *Critique of Money Judgment Part One: Liens On New York Real Property*, 82 St John's L Rev 1291, 1293 [2008] ["Debt enforcement, however, is what all of civil procedure aims for. It is the very *telos* of private law."].) So here, the legislature directed that litigants seeking to invoke courts' substantial powers, backed by the force of the state, to suppress speech on matters of public interest

[22] Letter of Rent Stabilization Ass'n to Gov. Cuomo (Nov. 4, 2020), Bill Jacket, L 2020, ch 250.

must pass thresholds of merit. Viewed through that lens, the Appellate Division's decision misapprehends what the legislature was directing. The legislature told courts to stop allowing themselves to be weaponized and gave them a tool to do so. The Appellate Division's decision holds that harassers and abusers may continue to use the courts as instruments of abuse exercising their power against survivors and other targets of retaliatory litigation without meeting the thresholds the legislature set so long as the exercise of the court's power today is in aid of a lawsuit filed a couple years ago. That is fundamentally what the legislature sought to stop and why the Appellate Division's divergence from the series of prior decisions holding otherwise was in error. It is no coincidence that at least two of the series of trial court cases finding the amendments retroactive—from which the Appellate Division departed—involved defamation claims brought in retaliation for #MeToo revelations about abusive behavior. (*Coleman v Grand*, 523 F Supp 3d 244, 257-260 [ED NY 2021] [finding amendments retroactive in a case involving "sexual impropriety and power dynamics in the music industry," which "as in others, were indisputably an issue of public interest."]; *Goldman v Reddington*, 2021 WL 4755293, *3, 2021 US Dist

LEXIS 78103, *9-12 [ED NY Apr. 21, 2021, No. 18CV3662RPKARL] [allowing Anti-SLAPP counterclaim in defamation case arising from statements about campus sexual assault], *report and recommendation adopted,* 2021 WL 4099462, 2021 US Dist LEXIS 171340 [ED NY Sept. 9, 2021].)

Indeed, it is also why this case is nothing like *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]). There, this Court confronted a statute that would have exposed landlords to treble damages and extended a lookback period beyond the period for which they had been required to keep records under the prior law. Here, the effect of the First Department's decision is to condemn parties, including survivors of sexual assault, sexual harassment, and intimate partner violence, to suffer at the hands of a process that the legislature has decided should not continue and, as relevant to this case, face liability under a standard that the legislature considers unjust. That is much more analogous to cases like *People v Dyshawn B.* (196 AD3d 638 [2d Dept 2021]), where the Second Department found that repeal of certain surcharges and fees on youthful offenders applied to *pending* cases. The legislative history,

much as here, expressed the view that the prior law had been oppressive and imposed disproportionate burdens on the most vulnerable, and "[e]limination and waiver of these surcharges and fees was meant to remedy these negative impacts." (*Id.* at 640.) Likewise, in *Matter of Mia S. (Michelle C.)* (— AD3d —, 2022 NY Slip Op 06932, 4 [2d Dept Dec. 7, 2022]), in assessing the legislature's intent regarding whether removing marijuana usage as a sufficient basis for a child neglect finding would apply to pending cases, it held that "the Legislature essentially expressed the view that marihuana prohibition had been a mistake, with unfortunate consequences, and that the MRTA was designed to correct that mistake and to address those consequences." Thus, the elimination of "a negative consequence" by language that "corrects an imperfection in the prior law" was "remedial," and the immediate effective date "evinced a sense of urgency, which favors giving retroactive effect to the 2021 amendment." (*Id.*)

So too here; the legislature acted to alleviate the abuse caused by meritless retaliatory lawsuits and the extremely narrow interpretations courts had given to its prior attempt to address that abuse, and it is

illogical and inconsistent with that goal to hold that it cared only about retaliatory lawsuits that would be filed in the future. It cited *existing* abusive lawsuits as its justification. The immediate effectiveness of the amendments conveys precisely the urgency that shows that it intended them to apply to pending suits.

III. Section 70-a Expressly Applies to *Pending* Meritless Suits—Unambiguously Indicating the Legislature's Intent

The First Department's decision holds that the "2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law" do not "apply retroactively to pending claims." (*Gottwald v Sebert*, 203 AD3d 488, 489 [1st Dept 2022].) But the fact that a case is "pending" is precisely why the statute is not being "appl[ied] retroactively." No-one here is arguing that the amendments apply to *concluded* litigation—rather, this case involves a plaintiff who chose voluntarily to *continue* his lawsuit after the amendments became effective. Yet the First Department denied Ms. Sebert leave to amend to plead a cause of action under Civil Rights Law § 70-a, even as to the post-2020 continuation of this action. (*Id.*) The First Department thus appears to have held that *all* of the amendments do not apply to *pending* cases that are continued after the effective date of the law.

That is facially inconsistent with the statute. Civil Rights Law § 70-a creates a cause of action against "any person who commenced or *continued*" a SLAPP suit without substantial basis. (Emphasis added.) There is no plausible reading of "continued" that excludes continuing pending suits. "Continued" means "continued." (*Patrolmen's Benev. Ass'n of City of New York v City of New York*, 41 NY2d 205, 208 [1976] ["[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used."].) It does not mean "continued but only if it was started after a particular date." Pre-amendment plaintiffs were on notice: they could discontinue without penalty, but if they chose to continue to prosecute suits involving public petition and participation, as defined by the amendment, without a substantial basis, then they faced the tougher new cause of action for bringing a meritless suit.

Those consequences, of course, were precisely the point: harassers and abusers were increasingly using the courts as instruments of abuse through meritless litigation; the legislature created these additional protections for survivors. Parties who did not withdraw their abusive suits after the effective date of the revised Anti-SLAPP statute were on

notice that continuing the case would mean the revised statute would apply.

The First Department's apparent determination that *everything* in the statute does not apply to pending suits is especially troubling because it threatens survivors' ability to retain counsel. One of the beneficial effects of the Anti-SLAPP amendments was that mandatory fee-shifting under Civil Rights Law § 70-a (1) (a) for suits determined to be without substantial basis encouraged lawyers to represent defendants in SLAPP suits on a contingency or partial contingency basis. (*Cf. Ketchum v Moses*, 24 Cal 4th 1122 [2001] [discussing a similar Anti-SLAPP contingency fee arrangement under California's Anti-SLAPP statute].) That is particularly important to survivors of sexual harassment and intimate partner abuse. Given the dynamics that breed such abuses, retaliatory lawsuits for reporting sexual harassment most often involve a plaintiff-abuser who is more powerful, financially and otherwise, such as an executive who harasses a more junior employee by abusing the power disparity inherent in the employment relationship. And since intimate partner abuse frequently involves financial abuse as well as violence, survivors are frequently

unable to afford an apartment, let alone a lawyer. For these targets of retaliatory litigation, the availability of lawyers willing to work on Anti-SLAPP contingency terms is essential.

The First Department's decision is thus in error to the extent that it finds Section 70-a entirely unavailable to Ms. Sebert. Even if this Court adheres to the Appellate Division's decision as to level of fault necessary for substantive libel liability and even if this Court finds that Section 70-a provides no remedy for being subjected to a suit *filed* without a substantial basis pre-amendment absent its post-amendment continuation, Ms. Sebert can still prevail. Her request to assert a Section 70-a counterclaim is still viable as long as she shows that Mr. Gottwald *continued* his suit after the effective date of the statute without a substantial basis—for example, if a jury found that he knew that the challenged statements were true.

IV. The Motion to Dismiss and Summary Judgment Amendments Govern Procedural Matters, and Thus Apply to Pending Cases

At any rate, the special motions to dismiss (CPLR 3211 [g]) and for summary judgment (CPLR 3212 [h]) apply to pending cases because they are procedural. New York law is settled that "statutes governing

procedural matters should be applied retroactively." (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998].) The standard for a motion to dismiss or motion for summary judgment is quintessentially procedural, so those amendments must apply to pending cases, even if this Court were to find that some other parts of the amendments do not apply to pending cases.

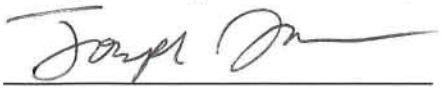
But, while no such motion was before the First Department in this case, its decision rejects the application to pending cases of the "amendments," without differentiating between the different changes, implying that even the procedural reforms of the statute do not apply. The legislature's judgment that people facing litigation in retaliation for speaking out should have more favorable standards for a motion to dismiss and a motion for summary judgment—or conversely, that a plaintiff must make a greater preliminary showing of merit—can stand separate from its expansion of the actual malice standard. As *Majewski* makes clear, as procedural reforms, they apply to pending suits; to the extent that First Department's decision implies otherwise, it should be reversed.

CONCLUSION

The First Department's decision undoes much of what the legislature did to tackle abusers' perversion of the courts into instruments of retaliation and control against survivors of sexual assault, sexual harassment, and intimate partner violence. The legislature made plain its intent that the courts stop lending their aid to abusive and retaliatory litigation by requiring higher showings of merit to proceed, higher standards before courts impose liability, mandatory fee-shifting for lawsuits brought without a substantial basis, and other remedial reforms. This Court should reverse the First Department's order, and in so doing, clarify that the November 2020 amendments to Civil Rights Law §§ 70-a and 76-a apply—as the legislature intended—to *pending* cases continued after its effective date. Alternatively, amici request, at a minimum, that this Court recognize that the amendments' other provisions regarding standards for motions to dismiss (CPLR 3211 [g]) and for summary judgment (CPLR 3212 [h]) govern procedural matters, and thus apply to pending cases.

Dated: December 14, 2022
New York, NY

Respectfully submitted,



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CERTIFICATION PURSUANT TO 22 NYCRR § 500.13 (C) (1)

I hereby certify pursuant to the Rules of the Court of Appeals, (22 NYCRR) § 500.13 (c) (1) that the foregoing brief was prepared on a computer.

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December 14, 2022

Joseph M. Sanderson

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 14, 2022

deponent served the within: **MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT**

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on December 14, 2022

Mariana Braylovskiy

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Qualified in Richmond County
Commission Expires March 30, 2026

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