New York Supreme Court

Appellate Division – First Department

JIDE ZEITLIN,

Plaintiff-Appellant,

Docket No.: 2022-04173

– against –

WILLIAM COHAN,

Defendant-Appellee.

AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TK MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF INTEREST OF AMICI CURIAE

Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Other amici are prominent news publishers, professional organizations, and trade groups. A supplemental statement of the identity and interest of the amici is included as Appendix A to amici's motion for leave to file this amici curiae brief.[1]

Amici are dedicated to defending the First Amendment rights of journalists and news organizations. As members and representatives of the news media, amici are the frequent targets of strategic lawsuits against public participation ("SLAPPs") designed to punish and deter constitutionally protected newsgathering and reporting activities. Amici therefore have a strong interest in ensuring that New York's amended anti-SLAPP law is correctly interpreted and applied.

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amici or their counsel, contribute money toward preparing or submitting this brief.

Further, drawing on their collective experience with SLAPPs, amici seek to provide the Court with a broader perspective on the importance of state anti-SLAPP laws to the protection of speech about matters of public interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

SLAPPs are meritless legal claims that threaten to chill the exercise of First Amendment rights. While SLAPPs lack legal foundation, the mere prospect of costly, protracted litigation alone can discourage speech. Indeed, since *New York Times Co. v. Sullivan*, courts have recognized that the threat of a lawsuit—even an ultimately unsuccessful one—can lead to self-censorship and diminish participation in the marketplace of ideas. 376 U.S. 254, 279 (1964). Would-be speakers are forced into a perverse cost-benefit analysis, weighing the value of participating in the public square against the burden of defending against a lawsuit.

To combat this troubling trend, New York, along with thirty-two other states and the District of Columbia, have adopted anti-SLAPP laws that provide mechanisms to lower the costs and other burdens associated with defending against meritless lawsuits aimed at chilling speech in connection with a public issue. *See Anti-SLAPP Legal Guide*, Reporters Comm. for Freedom of the Press, https://perma.cc/VD72-F782.

In 2020, the New York Legislature (the "Legislature") amended the state's anti-SLAPP law to expand its protections for defendants facing meritless lawsuits

arising out of constitutionally protected speech about matters of interest and concern to the public. Under the amended law, if an action arises out of a defendant's speech about an "issue of public interest," a motion to dismiss "shall be granted" unless the plaintiff can show a "substantial basis in law" for their claims, N.Y. C.P.L.R. 3211(g), including "clear and convincing evidence that" the speech "was made with knowledge of its falsity or with reckless disregard of whether it was false," that is, with actual malice. N.Y. Civ. Rights Law § 76-a(2). These provisions ensure that journalists and other speakers facing meritless legal claims arising out of their statements about public issues receive broad protection under the anti-SLAPP law and can quickly secure the dismissal of such claims.

The importance of strong anti-SLAPP protection is evident in the instant case: a multi-year legal battle against a freelance reporter for a nonprofit news organization arising out of the exercise of constitutionally protected speech about a matter of public interest. William Cohan's ProPublica article, *The Bizarre Fall of the CEO of Coach and Kate Spade's Parent Company* (hereinafter, the "Article") describes the rise and fall of the plaintiff, one of only five Black Fortune 500 CEOs. Compl. at Ex. A. The Article describes how Zeitlin, whose mother was a domestic worker in Nigeria, became one of the few Black partners at Goldman Sachs. *Id.* As the Article reports, he was considered for multiple positions in the Obama Administration, nominated for an ambassadorship, and became CEO of

Tapestry, the parent company of Coach, Kate Spade, and Stuart Weitzman. *Id.* The Article also recounts Zeitlin's 2007 extramarital affair with a woman named Gretchen Raymond, and Raymond's allegation to a different reporter in 2009 that Zeitlin had "used deception to lure [her] into an unwanted romantic relationship." *Id.* Cohan quotes Zeitlin in the Article as saying this is "not true." *Id.* Nevertheless, Raymond's allegations contributed to Zeitlin's withdrawal of his ambassadorship nomination in 2009 and his resignation from Tapestry—whose workforce was nearly 80 percent female—in 2020. *Id.* Published in summer 2020, when the #MeToo and Black Lives Matter movements were driving a national discussion, the Article raised important questions regarding when corporate leaders should face professional consequences due to personal relationships, and the lack of racial diversity at the top of major U.S. corporations.

Availing himself of the protections of New York's amended anti-SLAPP law, Cohan moved to dismiss Zeitlin's defamation claims. The trial court granted the motion to dismiss pursuant to the amended anti-SLAPP law, finding that the Article concerned an issue of public interest and that Zeitlin was therefore required—but failed—to show by clear and convincing evidence a substantial basis for finding that Cohan published the Article with actual malice.

Amici urge this Court to affirm. The Article concerns an issue of public interest and is therefore subject to the amended anti-SLAPP law. As discussed

below, the law requires courts to broadly interpret what speech constitutes an issue of public interest. The trial court correctly held that the Article falls squarely within the range of speech protected by the law.

Further, the trial court correctly held that the anti-SLAPP law requires a plaintiff to clearly and convincingly plead actual malice to survive a motion to dismiss. Robust application of the actual malice standard is an essential part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270. Its application pursuant to the anti-SLAPP law deters plaintiffs from bringing meritless speech-chilling lawsuits in the first instance, and protects speakers from the costs of litigation arising out of the exercise of their right to free speech. Together, the amended law's broad scope and actual malice standard are essential to protecting the news media's ability to inform the public about matters of public concern.

ARGUMENT

I. The amended anti-SLAPP law defines "issue of public interest" in a broad, speech-protective manner that encompasses the Article.

New York's amended anti-SLAPP law applies "broadly" to cases involving "any communication in a place open to the public or a public forum in connection with an issue of public interest." N.Y. Civ. Rights Law § 76-a(1)(a)(1), (1)(d). The Article unquestionably meets this standard.

A. New York's amended anti-SLAPP law broadly protects free speech about issues of public interest.

SLAPPs are "characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." *Mable Assets, LLC v. Rachmanov*, 192 A.D.3d 998, 999–1000 (2d Dep't 2021) (quoting *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 137 n.1 (1992)). "Short of a gun to the head, a greater threat to First Amendment expression" than a SLAPP "can scarcely be imagined." *Gordon v. Marrone*, 155 Misc. 2d 726, 736 (Sup. Ct. Westchester Cnty. 1992), *aff'd*, 202 A.D.2d 104 (2d Dep't 1994); *see also Ernst v. Carrigan*, 814 F.3d 116, 117 (2d Cir. 2016) (describing SLAPPs as "brought primarily to chill the valid exercise of a defendant's right to free speech").

In response to the threat posed by SLAPPs, in 1992, New York enacted one of the nation's first anti-SLAPP laws. 1992 N.Y. Sess. Laws ch. 767 (A4299) (McKinney). New York's original anti-SLAPP law aimed to "provide the utmost protection for the free exercise of speech, petition and association rights" by protecting citizens from lawsuits arising out of their public participation. L. 1992, ch. 767, § 1. Though trendsetting, the law's scope was narrow; it limited the definition of "public participation" to applications for public permits or similar government entitlements. L. 1992, ch. 767, § 3. Many courts interpreted the law even more narrowly. *See, e.g., Hariri v. Amper*, 51 A.D.3d 146, 151 (1st Dep't

2008). Thus, despite the law's laudable aims, few defendants received the benefit of its protections.

Recognizing the need to strengthen the anti-SLAPP law to achieve its speech-protective goals, in 2020, the Legislature expanded the definition of public participation to include "any communication in a place open to the public or a public forum in connection with an issue of public interest" and "any other lawful conduct in furtherance of the exercise of the constitutional right[s]" of free speech or petition. N.Y. Civ. Rights Law § 76-a(1)(a)(1)–(2); *see also* S52A Sponsor Mem. (July 22, 2020); L. 2020, ch. 250, Bill Jacket at 5–6 (Letter of Assemblywoman Helene E. Weinstein) (hereinafter "Weinstein Sponsor Letter") (calling this the "most important[]" change in the new law). The Legislature instructed that "'[p]ublic interest' shall be construed broadly, and shall mean any subject other than a purely private matter." N.Y. Civ. Rights Law § 76-a(1)(d).

Courts have duly followed the Legislature's directive to apply the amended anti-SLAPP law "broadly." N.Y. Civ. Rights Law § 76-a(1)(d). In doing so, they have drawn from an extensive body of New York case law addressing a nearly identical issue in the defamation context: whether speech involves a matter of "public concern" or is of "purely private concern." *Albert v. Loksen*, 239 F.3d 256, 270 (2d Cir. 2001) (citation omitted); *see, e.g.*, *Lindberg v. Dow Jones & Co.*, 2021 WL 3605621, at *7 (S.D.N.Y. 2021); *Coleman v. Grand*, 523 F. Supp. 3d 244,

257–58 (E.D.N.Y. 2021); *Aristocrat Plastic Surgery, P.C. v. Silva*, 206 A.D.3d 26, 30–31 (1st Dep't 2022); *Carey v. Carey*, 160 N.Y.S.3d 854 (Sup. Ct. N.Y. Cnty. 2022). Rightly so. The Legislature, in using "materially [the] same language" as New York defamation case law was presumptively "aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 322 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . . they are to be understood according to that construction."). Because the anti-SLAPP amendments imported the well-settled "public" and "purely private" language from New York defamation law, that case law is instructive here.

Under the amended anti-SLAPP law, as in older common-law defamation cases, it is "extremely rare" for courts to label speech a matter of "purely private" concern. *Albert*, 239 F.3d at 269. Instead, courts endorse an "extremely broad interpretation" of what constitutes speech of "public concern." *Id.* Moreover, "offending statements can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences." *Gaeta v. N.Y. News, Inc.*, 62 N.Y.2d 340, 349 (1984). "Personal narratives and "'human-interest items' may be matters of public concern if 'reasonably related to matters warranting public

exposition,'" including "business and romantic pursuits." *Lindberg*, 2021 WL 3605621, at *1, *8 (quoting *Lewis v. Newsday, Inc.*, 246 A.D.2d 434, 435 (1st Dep't 1998)). Courts recognize "the familiar journalistic technique of featuring the experiences of a single individual" to shed light on broader issues, *id.* at *9 (quoting *Gaeta*, 62 N.Y.2d at 350), or on the individual's "public career, even though details about [their] personal life are included," *Carey*, 160 N.Y.S.3d at 854. "Additionally, courts have regularly found that accounts or allegations of sexual assault, harassment or other impropriety constitute matters of public interest." *Travis v. Mail*, 2023 WL 2748858, at *3 (N.Y. Civ. Ct. Mar. 31, 2023). Courts further recognize that the determination of newsworthiness is "best left to the judgment of journalists and editors, which [courts] will not second-guess absent clear abuse." *Lindberg*, 2021 WL 3605621, at *9 (quoting *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595 (1989)).

B. The Article concerns an issue of public interest and warrants anti-SLAPP protection.

Far from being one of the "extremely rare" cases involving only "purely private" matters, *Albert*, 239 F.3d at 269–70, the Article concerns issues of obvious public interest, as the trial court correctly held. It reports on the rise of one of only five Black Fortune 500 CEOs, his nomination for an ambassadorship, and his downfall due in part to allegations of sexual impropriety related to an extramarital affair. That the Article was published at a time when the #MeToo and Black Lives

Matter movements were driving national conversations about race and about sexual misconduct only underscores that the Article addressed issues of paramount public interest and concern.

In recognizing that the Article fell within the scope of the amended anti-SLAPP law, the trial court joined other courts that have held that similar speech is of public interest. For example, in *Coleman v. Grand*, the court held that a musician's statements about her relationship with an older, more prominent musician—which, while "rocky," was "legal and consensual"—were of public interest. 523 F. Supp. 3d at 254. Noting the rise of the #MeToo movement, the court found that "'widespread and difficult conversations about what constitutes inappropriate behavior in professional settings'" were "indisputably an issue of public interest." *Id.* at 259 (quoting *Elliott v. Donegan*, 469 F. Supp. 3d 40, 52 (E.D.N.Y. 2020)). The plaintiff's "prominen[ce]" in his industry "[f]urther add[ed] to the public interest," even though he lacked "household-name status." *Id.* at 260.

In *Lindberg v. Dow Jones*, the court held that Wall Street Journal articles about the "business and romantic pursuits" of an investment firm's founder were of public interest. *Lindberg*, 2021 WL 3605621, at *1, *10. "The fact that the *Journal* highlighted Lindberg's surveillance of romantic interests—a matter that may seem 'unnecessarily sordid' to some—d[id] not change this conclusion." *Id.* at *10 (quoting *Naantaanbuu v. Abernathy*, 816 F. Supp. 218, 226 (S.D.N.Y.

1993)). The court added that it "may not second guess the *Journal*'s judgments as to news content" or its "editorial judgement in employing the journalistic technique of highlighting human-interest items when reporting on a matter of public concern." *Id.* (internal quotation marks and citations omitted).

And, in *Gaeta v. New York News*, the Court of Appeals addressed defamation claims arising from a Daily News article stating that a patient transferred from a mental hospital to a nursing home "suffered a nervous breakdown that psychiatrists said was precipitated by a messy divorce and the fact that his son killed himself because his mother dated other men." 62 N.Y.2d at 346. The mother sued for defamation and argued this statement was not of public concern, but the court disagreed. The court concluded that the statement was tied into the broader issue of the state's controversial transfer of patients to the nursing home. *Id.* at 350; *see also, e.g.*, *Goldman v. Reddington*, 2021 WL 4755293, at *4 (E.D.N.Y. Apr. 21, 2021), *report and recommendation adopted*, 2021 WL 4099462 (Sept. 9, 2021) (woman's allegation that plaintiff sexually assaulted her was of public interest "especially given the public's recent engagement in widespread conversations about sexual misconduct and what constitutes inappropriate behavior on college campuses"); *Huggins v. Moore*, 94 N.Y.2d 296, 304–05 (1999) (actress's statements about plaintiff's "betrayal of trust in their personal and financial relationships" were of public interest given "the greater

significance of [her] personal story, a tragic downfall from a position of stardom and wealth"); *Weiner*, 74 N.Y.2d at 595 (statement in book that woman "always slept with her shrinks" was of public interest because it related to "an inquiry into the failure of family and professional figures to halt the progression of [her] illness before it resulted in murder"); *Shuman v. N.Y. Mag.*, 149 N.Y.S.3d 874 (Sup. Ct. N.Y. Cnty. 2021), *aff'd*, 211 A.D.3d 558 (1st Dep't 2022) ("To the extent the articles discuss their sexual relationships and other private conduct, they do so in connection with the matters of significant public concern," that is, "underlying themes of evolving gender power dynamics in sexual relationships").

The Article similarly is of public interest. Zeitlin's "improbable . . . rise" and "calamitous fall" are themselves issues of public interest—"a tale worth telling," as the Article says. *See* Compl. at Ex. A. "Born in Nigeria, the son of a maid, Zeitlin was largely brought up by an American family . . . and rose to become . . . one of only five Black CEOs among Fortune 500 companies"—at Tapestry, the "parent company of luxury brands such as Coach, Kate Spade and Stuart Weitzman," staffed by "'79% women.'" *Id.* The Article also discusses President Obama's nomination of Zeitlin to the post of U.S. ambassador for U.N. management and reform and his interest in securing a position at the Treasury Department. Yet Raymond's allegations that Zeitlin "used deception to lure [her] into an affair," as she told a Senate staffer and a reporter in 2009, led to the

withdrawal of Zeitlin's nomination and, a decade later, his resignation from Tapestry. *Id.* This profile of Zeitlin's "pathway to [his] public career, even though details about [his] personal life are included," is hardly "'a purely private matter.'" *Carey*, 160 N.Y.S.3d at 854 (quoting N.Y. Civ. Rights Law § 76-a(1)(d)).

Further, the Article—published at a time when the #MeToo and Black Lives Matter movements were at the forefront of public discourse—undeniably relates to these broader issues. As the trial court correctly noted, "New York courts broadly interpret what constitutes matters of public concern and have found that statements about a relationship that touch on topics of sexual impropriety and power dynamics . . . during the advent of the #MeToo movement [are] indisputably an issue of public interest," such that "Plaintiff's claims are subject to the anti-SLAPP law." *Zeitlin v. Cohan*, No. 156829/2021, 2022 WL 3647126, at *4 (Sup. Ct. N.Y. Cnty. Aug. 24, 2022) (internal quotation marks and citation omitted). Moreover, the trial court properly declined to "second-guess" Cohan's and ProPublica's "editorial determination that [Zeitlin's] 'personal saga' was reasonably related to this matter of social concern to the community." *Huggins*, 94 N.Y.2d at 305.

C. A ruling that the Article does not concern an issue of public interest would threaten reporting that benefits the public.

Providing anti-SLAPP protection for speech like the Article is essential to ensuring that journalists—including, especially, freelancers like Cohan and those at

nonprofit and local news outlets—are not deterred from publishing reporting that drives public discourse, social movements, and reforms.

On the topic of sexual relationships and the workplace, while some reporting focuses on allegations of harassment and assault, *see, e.g.*, Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, New Yorker (Oct. 10, 2017), https://perma.cc/KPA3-MS2Q, other reporting focuses on consensual relationships, sparking important conversations about the extent to which such relationships can (or should) have professional repercussions. *See, e.g.*, Vanessa Bohns, *CNN President Jeff Zucker's Resignation Shows Why Even Consensual Office Romances Can Cause Problems*, Conversation (Feb. 2, 2022), https://perma.cc/AE9C-9GBJ ("Whether policies overseeing consensual relationships at work are really necessary has been debated many times. And it seems reasonable to ask: Shouldn't mutually consenting adults be allowed to make these decisions for themselves?"); Andrew Soergel, *#MeToo Contributes to 2019's 'Staggering' CEO Departures*, U.S. News (Jan. 8, 2020), https://www.usnews.com/news/economy/articles/2020-01-08/metoo-contributes-to-2019s-staggering-ceo-departures ("Even outside of specific harassment allegations, executives at Intel, REI, McDonald's and Lululemon are among those who in the past two years have resigned or been ousted as a result of consensual relationships they had with subordinates, coworkers or business partners."); David

Yaffe-Bellany, *McDonald's C.E.O. Fired Over a Relationship That's Becoming Taboo*, N.Y. Times (Nov. 4, 2019), https://perma.cc/S3HK-C7NT ("The mere fact that a successful executive was fired because of what McDonald's described as a 'recent consensual relationship' reflects changing attitudes about romance in the workplace, employment lawyers and other experts said."); Jessica Bennett, *The Complicated Case of Katie Hill*, N.Y. Times (Nov. 1, 2019), https://perma.cc/ZR7B-XTMR (Hill's "case is not clear-cut. . . . [S]he did admit to having a separate sexual relationship with a staffer on her election campaign, which is not barred by House rules."); Barbara Ortutay, *Intel CEO Out After Consensual Relationship with Employee*, Associated Press (June 21, 2018), https://perma.cc/C2CV-LA3N ("Workplace impropriety that has cost executives their jobs runs a broad range from consensual dalliances to accusations of assault.").

These themes echoed throughout the widespread reporting on Zeitlin's departure from Tapestry. *See, e.g.*, Melissa Repko, *CVS Fires Several Employees and Executives After Internal Sexual Harassment Investigation*, CNBC (Mar. 11, 2022), https://perma.cc/QZB8-X3ZV ("The #MeToo movement, which began in Hollywood, has ricocheted across the corporate world from fast-food chains to apparel companies. It has led to the downfall of prominent business leaders, including . . . . Jide Zeitlin[.]"); Lauren Sherman, *In Public Relations, Brands and*

Executives Can No Longer 'Control the Narrative', Bus. of Fashion (July 24, 2020), https://perma.cc/WQ4Y-938C ("This week, two top-level executives[,]" including Zeitlin, "were accused of misconduct within the pages of reputable media outlets. . . . [C]ompanies — and their executives — are being held accountable like never before."); Suzanne Kapner & Telis Demos, *Tapestry Board Had Opened Probe Into CEO Jide Zeitlin Before He Resigned*, Wall St. J. (July 21, 2020), https://perma.cc/GF7S-PVKM; Kellie Ell, *Tapestry CEO Resigns Because of #MeToo Allegations*, Yahoo (July 21, 2020), https://perma.cc/2EEA-NREQ; Kim Bhasin & Jordyn Holman, *Tapestry CEO Resigns Amid Probe of Inappropriate Behavior*, Bloomberg (July 21, 2020), https://perma.cc/KZL8-TN7Q ("The abrupt change comes at a time when executive behavior is under a microscope. In the #MeToo era, transgressions that may once have been considered minor are no longer swept aside.").

The Article and other reporting on Zeitlin's resignation also implicate important issues involving the small number of Black executives at U.S. companies. *See, e.g.*, Sherman, *supra* ("As the only black CEO at a major fashion company, [Zeitlin's] leadership was also seen as progression in an industry bogged down by racism and antiquated infrastructure. But he still resigned, without severance, as Tapestry investigated his conduct."); Phil Wahba, *There Are Now Just 4 Black CEOs in the Fortune 500 as Tapestry Boss Resigns*, Fortune (July 21,

2020), https://perma.cc/N49E-EZLG ("The list of Black CEOs heading a Fortune 500 company got shorter on Tuesday when the chief executive of Coach and Kate Spade parent Tapestry left the fashion company after less than a year on the job."); Bhasin & Holman, *supra* ("The surprise departure . . . marks a setback for Black representation in Corporate America, which has been trying to increase diversity at the highest ranks.").

Without anti-SLAPP protections for such coverage and the statements that form the backbone of it, sources will fear speaking out, members of the news media—particularly freelancers and smaller, nonprofit, or local news outlets—will be chilled from reporting on important issues, and the public will lose access to valuable information. Holding otherwise would not only endanger consequential journalism, but also would invite the exact kind of arbitrary line-drawing and second-guessing of editorial judgment that the Court of Appeals has held is an improper role for courts to undertake. *See Gaeta*, 62 N.Y.2d at 349. The trial court correctly recognized that the Article was of public interest under the amended anti-SLAPP law, and amici urge this Court to affirm.

II. New York's anti-SLAPP law requires the dismissal of a SLAPP unless the plaintiff clearly and convincingly pleads actual malice.

In addition to protecting a broad range of speech, New York's anti-SLAPP law provides journalists and other speakers with another vital protection: it enables them to quickly obtain the dismissal of a SLAPP against them unless the plaintiff

can establish that the suit has a "substantial basis in law." N.Y. C.P.L.R. 3211(g). To make that showing and fend off dismissal, a plaintiff must "establish[] by clear and convincing evidence that" the defendant made the challenged speech with actual malice—that is, with "knowledge of its falsity or with reckless disregard of whether it was false." N.Y. Civ. Rights Law § 76-a(2). This is, intentionally, a high bar. Requiring a substantial, convincing showing of actual malice at the pleading stage is key to the anti-SLAPP law's ability to quash frivolous yet expensive litigation aimed at silencing journalists and other speakers. The trial court correctly applied this legal standard and dismissed Zeitlin's claims.

A. The plain text of the anti-SLAPP law requires a plaintiff to plead clear and convincing evidence of actual malice to survive a motion to dismiss.

Zeitlin contends that the trial court applied the amended anti-SLAPP law incorrectly by requiring him to show actual malice by clear and convincing evidence at the motion-to-dismiss stage, claiming the clear-and-convincing requirement applies only at summary judgment. *See* Appellant's Br. at 27–31. This argument ignores the plain text of the law. The trial court was correct in finding that because Zeitlin's claims arose out of speech about issues of public interest, he was "required to meet the higher pleading standard of establishing by clear and convincing evidence that his causes of action have a substantial basis in

law, i.e., that the article was published with actual malice[,]" to avoid dismissal. *Zeitlin*, 2022 WL 3647126, at *4.

The law expressly requires "the plaintiff, in addition to all other necessary elements" of their claim, to "establish[] by clear and convincing evidence that" the speech at issue was made with actual malice. N.Y. Civ. Rights Law § 76-a(2). This requirement applies throughout the proceedings. The law makes no distinction based on whether the plaintiff is facing a motion to dismiss or a motion for summary judgment. *Id*. Additionally, when facing either a motion to dismiss or for summary judgment, the plaintiff must show a "substantial basis" for the claim. N.Y. C.P.L.R. 3211(g); N.Y. C.P.L.R. 3212(h). "The Legislature viewed 'substantial' as a more stringent standard than the 'reasonable' standard that would otherwise apply." *Sackler v. Am. Broad. Companies, Inc*., 144 N.Y.S.3d 529 (Sup. Ct. N.Y. Cnty. 2021) (quoting *Duane Reade, Inc. v. Clark*, 2 Misc. 3d 1007(A) (Sup. Ct. N.Y. Cnty. 2004)).[2] Putting these provisions together, a SLAPP will be

[2] Outside of the anti-SLAPP context, on a motion to dismiss pursuant to C.P.L.R. 3211(a)(7), as the trial court correctly stated, a "'court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.' However, 'factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.'" *Zeitlin*, 2022 WL 3647126, at *3 (first quoting *Frank v. DaimlerChrysler Corp*., 292 A.D.2d 118, 121, (1st Dep't 2002); then quoting *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003)). As the trial court correctly held, and for the reasons stated in Cohan's brief, Zeitlin's "entirely

dismissed unless the plaintiff pleads facts that, if true, would clearly and convincingly show a substantial basis for concluding that the defendant spoke with actual malice.

What does change at different stages of the litigation is how the plaintiff makes that showing. A SLAPP "plaintiff must *plead*, and ultimately *prove*, that defendants acted with actual malice in order to recover." *Travis*, 2023 WL 2748858, at *4 (emphasis added). On a motion to dismiss, the court looks at the pleadings;[3] on a motion for summary judgment, the court looks at the proof, to determine whether there is a triable issue of fact. N.Y. C.P.L.R. 3211(g), N.Y. C.P.L.R. 3212(b), (h). That is, at the motion-to-dismiss stage, the court asks whether the plaintiff has pled facts that, if true, would clearly and convincingly show a substantial basis for finding the defendant spoke with actual malice. The court does not, however, ask whether the plaintiff has proven those facts to be true.

Consistent with the anti-SLAPP law's plain text, numerous courts applying it have correctly recognized that "[i]n order to avoid dismissal of its SLAPP suit complaint, [a] plaintiff must establish by clear and convincing evidence a

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conclusory" allegations of actual malice doom his defamation claims under any pleading standard. *Id.* at *4.

[3] The anti-SLAPP law also permits courts to consider supporting and opposing affidavits at the motion-to-dismiss stage. N.Y. Civ. Rights Law § 76-a(2).

'substantial basis' in fact and law for its claim," which requires showing by "clear and convincing evidence that the [speaker] published the [challenged speech] with actual malice." *Sackler*, 144 N.Y.S.3d at 529 (quoting *Duane Reade, Inc.*, 2 Misc. 3d 1007(A)); *see also, e.g.*, *Cheng v. Neumann*, 2022 WL 326785, at *6 (D. Me. Feb. 3, 2022), *aff'd*, 51 F.4th 438 (1st Cir. 2022); *Travis*, 2023 WL 2748858, at *4; *Goldman v. Abraham Heschel Sch.*, No. 158209/2021, 2023 WL 2366830, at *3, *6 (Sup. Ct. N.Y. Cnty. Mar. 3, 2023) (rejecting plaintiff's argument that "the clear and convincing evidence standard . . . 'is irrelevant' in determining whether the action can withstand a motion to dismiss"); *Carey*, 160 N.Y.S.3d at 854; *Gillespie v. Kling*, No. 158959/2021, 2022 WL 16699233, at *3 (Sup. Ct. N.Y. Cnty. Nov. 2, 2022); *Omansky v. Tribeca Citizen LLC*, No. 160658/2021, 2022 WL 3647133, at *7 (Sup. Ct. N.Y. Cnty. Aug. 24, 2022); *Vaughn v. Xu*, No. 160322/2020, 2022 WL 3446931, at *4 (Sup. Ct. N.Y. Cnty. Aug. 17, 2022); *Torres v. Marrero*, No. 154253/2020, 2022 WL 3043398, at *5 (Sup. Ct. N.Y. Cnty. Aug. 2, 2022); *Great Wall Med. P.C. v. Levine*, 163 N.Y.S.3d 783 (Sup. Ct. N.Y. Cnty. 2022); *Epoch Group Inc. v. Politico, LLC*, No. 652753/2021, 2021 WL 5850036, at *3 (Sup. Ct. N.Y. Cnty. Dec. 9, 2021); *Massa Const., Inc. v. Meaney*, No. 126837/2020, 2021 WL 4321438, at *2 (Sup. Ct. N.Y. Cnty. May 10, 2021). The trial court below likewise correctly required Zeitlin to plead facts that, if true, would clearly and

convincingly show a substantial legal basis for finding Cohan spoke with actual malice. *Zeitlin*, 2022 WL 3647126, at *4.

B. The actual malice standard protects uninhibited, robust, and wide-open debate on public issues.

Zeitlin's arguments to the contrary would, if adopted, directly undermine the amended anti-SLAPP law's speech-protective goals. For an anti-SLAPP law to be capable of "provid[ing] the utmost protection for" free speech and public participation, L. 1992, ch. 767, § 1, defendants must be able to quickly obtain the dismissal of suits that fail to adequately plead actual malice.

The actual malice standard provides crucial protection for speech, including news reporting, about public figures and issues of public interest. It has its roots in *New York Times v. Sullivan*, where the U.S. Supreme Court held that under the First Amendment, public officials cannot recover damages for defamatory falsehoods relating to official conduct unless they demonstrate actual malice, *i.e.*, that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279–80. The actual malice standard "was fashioned to assure [the First Amendment's guarantee of] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," even when those ideas are "vehement, caustic, and sometimes unpleasantly sharp." *Id.* at 269–70 (citation omitted). The Court recognized that "erroneous statement is inevitable in free debate, and . . . must be

protected if the freedoms of expression are to have the breathing space that they need . . . to survive." *Id.* at 271–72 (citation and internal quotation marks omitted). Absent this speech-protective standard, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true" due to the fear of facing expensive libel litigation, which "dampens the vigor and limits the variety of public debate." *Id.* at 279. Accordingly, a plaintiff's effort to "show actual malice" must demonstrate "the convincing clarity which the constitutional standard demands." *Id.* at 285–86.

The actual malice requirement stood in contrast to the English common law tradition of libel suits as a tool of social control intended to protect the church, crown, and wealthy landed gentry. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151 (1967); *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in denial of certiorari). To the extent that objective survived in the American courts, it had curtailed important social discourse, such as abolitionist literature. *See, e.g.*, Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785 (1995). Indeed, *Sullivan* itself was part of a campaign of libel suits against the press aimed at suppressing criticism of Jim Crow laws. *See Sullivan*, 376 U.S. at 294–95 (Black, J., concurring); Samantha Barbas, *Actual Malice: Civil Rights and Freedom of the Press in New York Times v. Sullivan* 38 (2023) ("Segregationists

devised another means to attack the . . . press—high-value libel suits."). But, beginning with *Sullivan*, the Supreme Court recognized that the First Amendment imposes limits on state libel laws, and has extended those limits to cases brought by public figures, reinforcing the actual malice standard as "an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164–65 (1967) (Warren, C.J., concurring). New York courts, too, have recognized the importance of being "vigilant about the potential 'chilling effect' the threat of defamation actions can have on public debate" and in applying the requirement "to show actual malice on the part of the defendant." *600 W. 115th St. Corp.*, 80 N.Y.2d at 137 (citing *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 248 (1991)).

With the amended anti-SLAPP law, the Legislature extended this vital protection by requiring plaintiffs challenging speech about public issues to clearly and convincingly establish that the defendant spoke with actual malice, "thereby strengthening First Amendment rights in New York State, the media capital of the world." "Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech," N.Y. State Legislature (July 22, 2020), https://nyassembly.gov/Press/files/20200722a.php; *see* N.Y. Civ. Rights Law § 76-a(1)(a)(1), (2). A robust application of the actual malice standard is essential to allowing members of the news media, like Cohan, to report on issues of interest

and concern to the public without fear of being subjected to the expense, harassment, and disruption of meritless, retaliatory litigation. This requirement also benefits the judicial system. By clogging the courts with meritless defamation claims, SLAPP plaintiffs waste judicial resources and co-opt the courts into their harmful efforts to chill speech.

C. Requiring plaintiffs to make a clear and convincing showing of actual malice at the pleading stage is necessary to protect journalists and other speakers faced with SLAPPs.

It is particularly important for journalists and other speakers to be able to swiftly obtain the dismissal of claims against them that fail to clearly and convincingly satisfy the actual malice standard. Zeitlin's arguments to the contrary would strip speakers of this important protection and force SLAPP defendants to spend time and resources defending against claims that, while meritless, are costly to resolve. For many, the most viable option may be to settle, retract the allegedly defamatory statement, and remain silent in the future. Bystanders, afraid of facing protracted, expensive litigation of their own, may self-censor too. The public is then deprived of these contributions to the marketplace of ideas.

As the anti-SLAPP amendments' sponsors noted, news media organizations are facing a growing number of SLAPPs from politicians and others who dislike their reporting, regardless of its accuracy. For example, in its letter to the Legislature in support of the amendments, New York-based WarnerMedia

described three meritless defamation suits faced by its businesses: one against CNN filed by Donald Trump's campaign over a CNN.com op-ed; another against CNN from Representative Devin Nunes related to its coverage of the Trump impeachment proceedings; and one against HBO's "Last Week Tonight with John Oliver," which was filed by the subject of a feature on coal industry safety issues. L. 2020, ch. 250, Bill Jacket at 14 (Letter of WarnerMedia).

But the targets of these baseless suits are not limited to large national media organizations. One local TV station in Wisconsin faced a lawsuit from the Trump campaign after it aired an ad criticizing his COVID-19 policies. *See* Ted Johnson, *Donald Trump's Campaign Sues Wisconsin TV Station for Continuing to Air Super PAC Ad Attacking His Coronavirus Response*, Deadline (Apr. 13, 2020), https://perma.cc/GU5V-VRMM. The suit sparked concerns that the campaign was targeting smaller stations less able to afford to fight back and hoping to intimidate other stations into not airing critical ads. *Id.* Similarly, in Iowa, a small-town newspaper faced a defamation suit from a local police officer after it truthfully reported on his sexual relationships with teenage girls. *See* Meagan Flynn, *A Small-Town Iowa Newspaper Brought Down a Cop. His Failed Lawsuit Has Now Put the Paper in Financial Peril.*, Wash. Post (Oct. 10, 2019), https://perma.cc/W7US-DPQ6. These actions were eventually dismissed on the merits, but not before the defendants incurred significant litigation costs. The Iowa

newspaper, family-owned for nearly a century, sought $140,000 in crowdfunding to avoid having to sell the paper to pay its legal costs. *Id.* Nonprofit newsrooms and individual reporters, too, "are especially vulnerable, as plaintiffs often attack individuals or defendants with fewer resources." Victoria Baranetsky & Robert Rosenthal, *Op-Ed: Scorched Earth Litigation: The Call for Anti-SLAPP May Save You*, Columbia Journalism Rev. (Nov. 16, 2022), https://perma.cc/BPR6-PDNV (describing media organization's effort to defeat SLAPP filed by charity it reported on "which took six years to conclude [and] could have easily bankrupted us").

Other organizations, fearing similarly expensive and protracted legal battles, have refrained from publishing critical commentary. *See, e.g.*, Adam Liptak, *Fearing Trump, Bar Association Stifles Report Calling Him a 'Libel Bully'*, N.Y. Times (Oct. 24, 2016), https://perma.cc/378G-GZYC; D. Victoria Baranetsky & Alexandra Gutierrez, *OP-ED: What a Costly Lawsuit Against Investigative Reporting Looks Like*, Columbia Journalism Rev. (Mar. 30, 2021), https://perma.cc/NB92-ZXTW (describing organization's "exceptionally costly" effort to defeat SLAPP and commenting that "other news organizations might look at this lawsuit and decide that reporting on powerful or deep-pocketed organizations isn't worth the risk").

When journalists and media organizations are forced to spend time and money defending against SLAPPs instead of being able to quickly obtain their

dismissal, reporting and newsgathering suffers, scarce financial resources are diverted from newsrooms to legal fees, and readers lose access to valuable content. Plaintiffs may learn the worrisome lesson that they can effectively silence, intimidate, and bankrupt critics on a minimal showing. Where, however, defendants can avail themselves of strong anti-SLAPP protections, including the dismissal of suits that fail to clearly and convincingly plead actual malice, these threats are minimized. Time and money spared on lengthy litigation can be reinvested in mission-critical newsgathering and reporting work, published without fear of being made to bear the costs of subjects' dissatisfaction.

In sum, a robust application of New York's amended anti-SLAPP law, including its actual malice standard, at the pleading stage is both required by the plain text of the law and essential to ensuring that it achieves its speech-protective goals.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm. The Article concerned an issue of public interest within the scope of the anti-SLAPP law and Zeitlin was therefore required—and failed—to establish by clear and convincing evidence that his claims had a substantial basis in law, including that Cohan spoke with actual malice.

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Respectfully submitted,

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