



**COMMUNICATIONS & MEDIA LAW
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Hon. Andrew M. Cuomo
Governor of the State of New York
Executive Chamber Capitol Building
Albany, New York 12224

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

Dear Governor Cuomo:

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

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

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

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

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

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

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

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

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

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

³ *Id.*

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

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

⁶ N.Y. Civ. Rights Law § 76-a(1).

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

- Second, they expansively define an action involving public petition and participation as one based on “(1) any communication in a place open to the public or a public forum in connection with an issue of public concern; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.”
- Third, they stay discovery pending resolution of a motion to dismiss, thus relieving defendants subject to SLAPP suits of the ominous threat of incurring substantial litigation costs during discovery.
- Fourth, they make the award of fees mandatory, as opposed to discretionary, where it is shown that a claim “was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.” Consistent with the intent of the Legislature to broaden the application of the statute, the Committee understands this provision as requiring an award of fees upon the granting of a motion to dismiss pursuant to CPLR 3211.

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

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

Respectfully,

Matthew L. Schafer /s/

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Chair, Communications and Media Law Committee

Zoey Chenitz /s/

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Co-Chair, Civil Rights Committee

Kevin Jason /s/

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