UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION INFORMATION STATEMENT

Docket Number(s): 21-800

Caption [use short title]: Coleman v. Grand

Motion for: Leave to File Amici Curiae Brief in Support of Defendant-Appellee

Set forth below precise, complete statement of relief sought:
The Reporters Committee for Freedom of the Press and 30 media organizations move for leave to file an amici curiae brief in support of Defendant-Appellee seeking affirmance

MOVING PARTY: RCFP and 30 Media Organizations

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: N/A

MOVING ATTORNEY: Katie Townsend

OPPOSING ATTORNEY: N/A

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Court-Judge/Agency appealed from: U.S. District Judge Eric N. Vitaliano, Eastern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: Katie Townsend **Date:** 10/13/21 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 21-800

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEVEN DOUGLAS COLEMAN,
Plaintiff-Appellant,
v.

MARÍA KIM GRAND,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK,
No. 1:18-cv-5663 (ENV) (RLM)

MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 30 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLEE

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The Reporters Committee for Freedom of the Press and 30 media organizations (collectively "amici") move for leave to file the attached proposed amici curiae brief in support of Defendant-Appellee María Kim Grand pursuant to Federal Rules of Appellate Procedure 27 and 29 and Local Rule 27.1.[1] Defendant-Appellee Grand consents to the filing of the amici brief. Plaintiff-Appellant Steven Douglas Coleman opposes the filing of the amici brief.

The proposed amici brief addresses matters "relevant to the disposition" of this appeal. Fed. R. App. P. 29(a)(3) (providing that a motion for leave to file an amicus brief during a court's initial consideration of a case on the merits must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case"). Specifically, the proposed amici brief addresses the applicability of the actual malice fault standard of New York's recently amended anti-SLAPP law in federal court, as well as what constitutes "an issue of public interest" under that anti-SLAPP law. The brief will aid the Court by providing amici's informed perspective on these issues, which affect journalists and news organizations across the country. As members of the news media and advocates for the First Amendment and newsgathering rights of the news media,

[1] A list of all amici, a supplemental statement of identity and interest of amici, and corporate disclosure for all amici are included in the attached proposed amici brief.

amici have a strong interest in ensuring the proper interpretation and application of the provisions of New York's anti-SLAPP law in federal courts.

As set forth in the proposed amici brief, the Court should affirm the district court's application of the actual malice fault standard of New York's anti-SLAPP statute in this case and affirm the district court's conclusion that Defendant-Appellee's statements of opinion regarding sexual harassment within her professional industry are issues of public interest within the meaning of New York's anti-SLAPP law. To hold otherwise would, *inter alia*, chill future reporting on matters of public import, including within the context of the #MeToo movement, and undermine journalists' efforts to inform the public.

For these reasons, amici respectfully request leave to file the attached proposed amici curiae brief in support of Defendant-Appellee.

Dated: October 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on October 13, 2021.

Dated: October 13, 2021

By: */s/ Katie Townsend*
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Counsel for Amici Curiae

No. 21-800

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEVEN DOUGLAS COLEMAN,

Plaintiff-Appellant,

v.

MARÍA KIM GRAND,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK,
No. 1:18-cv-5663 (ENV) (RLM)

[PROPOSED] BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 30 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLEE SEEKING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENTS

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MPA - The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York News Publishers Association has no parent company and issues no stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News Leaders Association has no parent corporation and does not issue any stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Newsday LLC is a Delaware limited liability company whose members are Tillandsia Media Holdings LLC and Newsday Holdings LLC. Newsday Holdings LLC is an indirect subsidiary of Cablevision Systems Corporation. Cablevision Systems Corporation is (a) directly owned by Altice USA, Inc., a Delaware corporation which is publicly traded on the New York Stock Exchange and (b) indirectly owned by Altice N.V., a Netherlands public company.

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The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

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Vox Media, LLC has no parent corporation. NBCUniversal Media, LLC, a publicly held corporation, owns at least 10% of Vox's stock.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press, The Atlantic Monthly Group LLC, BuzzFeed, Inc., Cable News Network, Inc., CBS Broadcasting Inc., on behalf of CBS News and WCBS-TV, New York, The Center for Investigative Reporting (d/b/a Reveal), The E.W. Scripps Company, Fox Television Stations, LLC, Freedom to Read Foundation, Gannett Co., Inc., Hearst Corporation, The Media Institute, Media Law Resource Center, Mother Jones, MPA - The Association of Magazine Media, National Press Photographers Association, New York News Publishers Association, The New York Times Company, The News Leaders Association, News Media Alliance, Newsday LLC, Online News Association, Penguin Random House LLC, Radio Television Digital News Association, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, Tully Center for Free Speech, Vice Media Group, and Vox Media, LLC. A supplemental statement of identity and interest of amici curiae is included below as Appendix A.[1]

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), amici declare that (1) no party's counsel authored the brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (3) no person, other than amici, their members, or their counsel, contributed money intended to fund preparing or submitting the brief.

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 federal courts sitting in diversity properly interpret and apply the provisions of state anti-SLAPP laws, including when, as here, those provisions protect important substantive interests. Plaintiff-Appellant's argument that no provision of New York's recently amended anti-SLAPP law should apply in federal court has potentially broad ramifications for amici and for the exercise of free speech rights. In addition, Plaintiff-Appellant's claims that the subjective views expressed by Defendant-Appellee are not constitutionally protected opinion, if accepted, could chill protected speech and stymie the news media's ability to report on matters of significant public concern, including in the context of the #MeToo movement.

SOURCE OF AUTHORITY TO FILE

Pursuant to Federal Rules of Appellate Procedure 27 and 29 and Local Rule 27.1, amici have filed a motion for leave to file this amici curiae brief in support of Defendant-Appellee.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This action arises from a letter sent by Defendant-Appellee María Kim Grand in November 2017—in the early days of the #MeToo movement—to approximately 40 of her friends and colleagues within the jazz music industry concerning her relationship with Plaintiff-Appellant Steven Douglas Coleman. *Coleman v. Grand*, No. 18-cv-5663 (ENV)(RLM), 2021 WL 768167, at *1 (E.D.N.Y. Feb. 26, 2021). Grand, an aspiring jazz saxophonist, met the 52-year-old Coleman, a prominent jazz saxophonist, in 2009 when she was 17 years old. *Id.* In 2011, they began a sexual relationship which continued on-and-off for five years. *Id.* at *1–2. Grand's letter provides her views of their relationship, including that she felt pressured to have sex with Coleman so that he would continue to teach and work with her. *Id.* at *2. In sending the letter, Grand articulated her desire to share her personal "experience" with "sexism in the music industry" in order to prompt "a larger conversation about what's acceptable and what's not." *Id.* at *11.

In October 2018, Coleman sued Grand for defamation in the Eastern District of New York (the "District Court") for statements Grand made in the letter and in an email she sent to seven friends asking for assistance in proofreading the letter (collectively, the "Communications"). *Id.* at *2–3. The parties eventually cross-moved for summary judgment. *Id.* at *1.

In November 2020, before the District Court's scheduled hearing on the parties' respective summary judgment motions, New York amended its anti-SLAPP law, expanding the definition of "public petition and participation" to include any "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of 'public interest.'" N.Y. Civ. Rights Law § 76-a(1)(a)(2). In doing so, the Legislature explained that the original anti-SLAPP law "as drafted, and as narrowly interpreted by the courts" had "failed to accomplish [its] objective" of protecting free speech on matters of public interest. *See* S52A Sponsor Mem., N.Y. State Senate (July 22, 2020), https://perma.cc/2KD2-GKAU.

The amended law provides that in order to recover damages in an action for defamation involving "the exercise of the constitutional right of free speech in connection with an issue of public interest" a plaintiff must establish "by clear and convincing evidence" that the defendant acted with actual malice in making such statements (i.e., "with knowledge of its falsity or with reckless disregard of whether it was false") regardless of whether the plaintiff is a public or private figure. N.Y. Civ. Rights Law § 76-a(1)-(2). Because the amendments to the law are remedial, the District Court, below, correctly concluded that the amendments apply retroactively. *Coleman*, 2021 WL 768167, at *7–8; s*ee Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21, 26 (S.D.N.Y. 2020) (holding that the amendments to New

York's anti-SLAPP law apply retroactively, as "remedial legislation . . . should be given retroactive effect in order to effectuate its beneficial purpose" (collecting cases)).

The District Court awarded summary judgment to Grand with respect to Coleman's claims, finding that: (1) Coleman failed to show by clear and convincing evidence that Grand acted with actual malice; and (2) that Grand's statements are protected opinion and, thus, not actionable. *Coleman*, 2021 WL 768167, at *10, 12.

Amici urge the Court to affirm the District Court's award of summary judgment to Grand. The District Court correctly held that the actual malice fault standard under New York's anti-SLAPP law applies in federal court, as it does not conflict with the Federal Rules of Civil Procedure[2] and is substantive state law. Moreover, because Grand's statements were made in connection with the "exercise of the constitutional right of free speech" on a matter of significant public interest—specifically, discussions regarding the sexual exploitation of artists within the jazz music industry—they fall within the scope of New York's anti-SLAPP law. N.Y. Civ. Rights Law § 76-a(1)(a)(2). Finally, even assuming, *arguendo*, that the District Court improperly applied the provisions of New York's

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[2] Hereinafter the "Federal Rules" or "Rules."

anti-SLAPP law to this case—which it did not—Coleman's claims must still fail. As the District Court correctly held, Grand's statements concerning her personal opinions and perceptions of her relationship with Coleman are "inherently subjective evaluations" that are not capable of being proven true or false and are, thus, "unsuitable as a foundation for defamation." *Cummings v. City of New York*, No. 19-cv-7723 (CM)(OTW), 2020 WL 882335, at *22 (S.D.N.Y. Feb. 24, 2020). To hold otherwise would significantly impede the ability of the news media to report on matters of public interest. Faced with the threat of potential civil liability, individuals impacted by sexual harassment or misconduct in the workplace may choose not to share their subjective, personal experiences with the news media, thus depriving the public of meaningful discourse on a matter of vital concern.

ARGUMENT

I. The actual malice fault standard under New York's anti-SLAPP law applies in federal court.

The District Court did not err in finding the actual malice fault standard under New York's newly amended anti-SLAPP law to be "manifestly substantive" and thus applicable in federal court. *Coleman*, 2021 WL 768167, at *7 (citation omitted). As a general rule, federal courts sitting in diversity apply state substantive law and federal procedural law. *See Erie R.R. Co. v. Tompkins*, 304

U.S. 64 (1838); *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996). Federal courts exercising diversity jurisdiction engage in a two-step analysis, in sequence, to determine whether to apply a state law. *First*, courts ask whether a Federal Rule "answers the question in dispute," such that it occupies the field and leaves no room for the operation of state law. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010); *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980) ("The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court," creating a "direct collision" that "leav[es] no room for the operation of [state] law." (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987)). If so, the Federal Rule governs, so long as it does not violate the Rules Enabling Act. *Shady Grove Orthopedic Assocs.*, 559 U.S. at 418.

Second, if no Federal Rule answers the question in dispute, the federal court must determine whether the state law is substantive within the meaning of *Erie*. *Id.* at 417. In doing so, it asks whether the state law seeks to protect important substantive interests. In making that determination, the court looks to the "twin aims" of *Erie*: the "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

A. The actual malice fault standard is substantive and does not conflict with any Federal Rule.

Here, with respect to the first prong of the analysis, the "question in dispute" is the level of fault required to establish liability for defamation. No Federal Rule addresses the applicable standard of fault for establishing liability in civil matters, whether in the context of a claim for defamation or otherwise. New York's courts have applied a "gross negligence" standard where a defamation claim arose from communications "arguably within the sphere of legitimate public concern" for nearly half a century. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975). And district courts within the Second Circuit, sitting in diversity, have routinely applied this liability standard. *See Lindberg v. Dow Jones & Co.*, 2021 U.S. Dist. LEXIS 151397, at *16–17 (S.D.N.Y. Aug. 11, 2021) (citing *Chapadeau*, 38 N.Y.2d at 199)). Thus, the actual malice fault standard does not conflict with any Federal Rule.

Under the second prong of the analysis, the federal court must ask whether the state law seeks to protect important substantive interests. Here, in expanding the definition of "an action involving public petition and participation" under New York's anti-SLAPP law—and making the actual malice standard applicable to such actions—the New York Legislature sought to "better advance the purposes [it] originally identified in enacting New York's anti-SLAPP law," specifically to

protect and encourage the exercise of free speech on matters of public interest. *See* S52A Sponsor Mem., N.Y. State Senate (July 22, 2020), https://perma.cc/2KD2-GKAU. The actual malice fault standard does just that. Indeed, as the U.S. Supreme Court recognized in *Gertz v. Robert Welch, Inc.*, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual." 418 U.S. 323, 347 (1974). Accordingly, the New York legislature amended its anti-SLAPP law to set a higher standard of fault for establishing a claim of liability with respect to defamation claims involving private individuals implicating speech on matters of public interest, shifting from the "gross negligence" standard of *Chapadeau* to actual malice. In doing so, it sought to protect an important substantive interest: the exercise of free speech about matters of public interest.

In addition, application of the actual malice standard in federal court is essential to avoid forum shopping and promote the equitable administration of the laws. If this Court were to conclude that the actual malice fault standard does not apply in federal court, a private figure libel plaintiff would have a significant incentive to shop for a federal forum rather than to file his or her claim in New York state court.

In short, the *Chapadeau* "gross negligence" standard has never been held to conflict with any Federal Rule, and the actual malice fault standard of New York's amended anti-SLAPP law, likewise, does not do so. Thus, the District Court correctly held that the actual malice fault standard under New York's amended anti-SLAPP law applies in federal court. *Coleman*, 2021 WL 768167, at *7.

B. The Court must analyze the New York anti-SLAPP law's actual malice fault standard separately from the pretrial dismissal provisions to determine whether it applies in federal court.

Coleman argues that the pretrial dismissal provisions of New York's anti-SLAPP law should not apply in federal court and that, therefore, the District Court erred in applying the law's actual malice fault standard in this case. *See* Appellant's Br. at 17–22. But the determination of whether the actual malice fault standard applies in federal court is separate from the question of whether the pretrial dismissal provisions apply.

For example, in *Adelson v. Harris*, this Court separately considered two individual provisions of Nevada's anti-SLAPP law—one creating civil immunity for SLAPP defendants and the other allowing for the recovery of fees—to determine whether each provision applies in federal court. 774 F.3d 803, 809 (2d Cir. 2014). The civil immunity provision of Nevada's anti-SLAPP law protected from liability "good faith communication[s] in furtherance of the right to petition" to the extent such communications were "truthful or . . . made without knowledge

of [their] falsehood[,]" Nev. Rev. Stat. § 41.637—*i.e.*, that fell short of actual malice.

In reaching its decision, the Court did not consider the applicability of the Nevada anti-SLAPP law as a whole, but rather focused on "the specific state anti-SLAPP provisions applied by the district court" in that case, ultimately holding that both the civil immunity provision and the fee-shifting provision were substantive under *Erie* and applicable in federal court. *Adelson*, 774 F.3d at 809. However, the Court declined to address the applicability in federal court of a third provision of the Nevada anti-SLAPP law staying discovery upon the filing of an anti-SLAPP motion. *Id.*

Likewise, the Ninth Circuit has held that although certain procedural elements of California's anti-SLAPP law are not applicable in federal litigation, other substantive provisions of the California anti-SLAPP law do apply. *Compare Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (holding that the discovery-stay provision in Cal. Civ. Proc. Code § 425.16(g) cannot apply in federal court) *with U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970 (9th Cir. 1999) (holding that the substantive fee-shifting provision applies in federal court). The applicability of New York's actual malice fault standard in federal court does not, therefore, depend on the applicability of the law's pretrial dismissal provisions.

This Court's decision in *La Liberte v. Reid* is distinguishable. In *La Liberte*, the Court interpreted California's anti-SLAPP law as providing for an award of attorneys' fees only to defendants who prevail on a special motion to strike under that law. 966 F.3d 79, 88–89 (2d Cir. 2020) (citing Cal. Civ. Proc. Code § 425.16(c)(1)). For that reason, the Court held that its decision that the motion-to-strike provision of California's anti-SLAPP law was inapplicable in federal court was also fatal to the applicability of the law's fee-shifting provision. *Id.* As a preliminary matter, *La Liberte* was decided under a different law than the one at issue here, with different text. Most significantly, however, unlike the fee-shifting provision under California's anti-SLAPP law that was at issue in *La Liberte,* there is nothing in New York's anti-SLAPP law to suggest that application of the actual malice fault standard is contingent upon application of the law's pretrial dismissal provisions. Rather, New York's anti-SLAPP law simply sets forth the substantive standard of fault applicable to establish defendant's liability with respect to the merits of plaintiff's claims. Indeed, the New York legislature made clear this distinction in promulgating the respective provisions of the anti-SLAPP law. The actual malice fault standard is set forth under Chapter Six of New York's Consolidated Laws, which concern substantive Civil Rights Law. *See* N.Y. Civ. Rights Law § 76-a(1)(a)(2). In contrast, the law's provisions for pretrial motions to dismiss and motions for summary judgment in actions concerning public

petition and participation are set forth under Chapter Eight of New York's Consolidated Laws concerning Civil Practice Law and Rules. *See* N.Y. C.P.L.R. 3211(g) (McKinney); N.Y. C.P.L.R. 3212(h) (McKinney).

As this Court stated in *La Liberte*, states are free to "effectively rais[e] the *substantive* standard that applies to a defamation claim." *La Liberte*, 966 F.3d at 86 n.3 (quoting *Adelson*, 973 F. Supp. 2d at 493 n.21) (emphasis in original). Indeed, the Court explicitly distinguished the Nevada law from California's on that basis. *Id.* ("Accordingly, 'even if the *procedural* elements of certain Anti–SLAPP statutes present [conflicts with the Federal Rules], those problems [were] not presented in [*Adelson*], where the effects of the [Nevada] Anti–SLAPP law . . . are substantive.") (emphasis in original).

In sum, application of the pretrial dismissal provisions of New York's anti-SLAPP law is not at issue here and Coleman's attempts to argue otherwise are mere distraction. A federal court sitting in diversity should apply state law with respect to the standard of fault applicable to a claim of defamation, as the Court did in *Adelson*. Here, the District Court properly applied the actual malice fault standard under New York law when granting summary judgment in Grand's favor.

II. Grand's statements were made in connection with a matter of public interest and therefore fall within the scope of New York's anti-SLAPP law.

The Court also correctly found Grand's statements to be "in connection with an issue of public interest," thus bringing the statements within the definition of "an action involving public petition and participation" under the anti-SLAPP law. N.Y. Civ. Rights Law § 76-a(1)(a). As the New York anti-SLAPP law makes expressly clear, the term "public interest" is to be "construed broadly" to apply to "any subject other than a purely private matter." *Id.* § 76-a(1)(d).

Coleman argues that the Communications constitute a "purely private matter," as Grand originally sent her letter to a select group of individuals in the jazz music industry who knew Coleman. *See* Appellant's Br. at 30. But New York courts have consistently held that statements made to a limited audience can nonetheless constitute a matter of public interest or concern where, as here, they affect a particular segment of the community. *See Lindberg v. Dow Jones & Co., Inc.*, No. 20-CV-8231 (LAK), 2021 WL 3605621, at *8 (S.D.N.Y. Aug. 11, 2021) (finding that matters of public interest or public concern "include 'matter[s] of political, social, or other concern to the community,' even those that do not 'affect the general population.'" (quoting *Abbott v. Harris Publ'ns, Inc.*, No. 97-cv-7648 (JSM), 2000 WL 913953, at *7 (S.D.N.Y. July 7, 2000))).

For example, in *Abbott*, the district court found allegedly false statements in plaintiff's application to judge a sanctioned dog show to be a matter of public concern because of their implications for the dog show community. *Abbott*, 2000

WL 913953, at *7. The same has been held true of other controversies of interest to limited audiences, such as art collectors and boxing fans. *See, e.g.*, *McNally v. Yarnall*, 764 F. Supp. 838, 847 (S.D.N.Y. 1991) (finding statements concerning the authenticity of an artist's works to be a matter of public import "among the segment of the population that trades such works as well as the community of scholars" with an interest in the artist); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 783 (S.D.N.Y. 1990) (finding "public interest" in the comments of a boxing promoter because of interest to boxing fans).

Similarly, Grand's statements, though initially directed only to members of the jazz music community, constitute a matter of public interest to that community, not only with respect to Grand's statements concerning her relationship with Coleman, specifically, but also with respect to their broader discussions of "sexism in the music industry." *Coleman*, 2021 WL 768167, at *8.

Indeed, as the District Court recognized, Grand's statements were made on November 17, 2017, "amid the rising tide of public concern over workplace sexual harassment known as the #MeToo movement." *Id.* The movement was born out of a recognized need for increased transparency around issues of sexual harassment and assault. *See* Chloe Hart, *It's still hard for women who report sexual harassment. Here's how #MeToo is changing that*, Pennsylvania Capital-Star (May 22, 2019), https://perma.cc/3BWF-KYJ5. Reporting by journalists in connection

with the #MeToo movement sparked "a domino effect, inspiring dozens of . . . survivors to speak out against the powerful . . . men in their respective industries." *See* Kathryn Lindsay, *The Bombshell Articles That Defined The #MeToo Movement*, Refinery29 (Oct. 7, 2019), https://perma.cc/AW8B-DBMK. These stories addressed not only sexual misconduct, but also broader issues concerning access to employment in various industries, and abuse of power by industry leaders, including private individuals in the music industry. *See id*.; Shanon Lee, *When Will The Music Industry Have Its #MeToo Moment?*, Forbes (Jan. 22, 2020), https://perma.cc/B3BM-9ZYD (discussing cases of sexual harassment and assault in the music industry).

Likewise, Grand's Communications state her intention to "add[] her narrative to industry-wide talks" about "complex topics like the role of sex in professional relationships," *Coleman*, 2021 WL 768167, at *12, and to "speak up" for "the sake of other young women," *id.* at *8. Far from "purely private matter[s]," the Communications address matters of legitimate public interest and concern. *See Chapadeau*, 38 N.Y.2d at 199 (holding that a statement is "within the sphere of legitimate public concern" or public interest when it is "reasonably related to matters warranting public exposition"); *see also Fairley v. Peekskill Star Corp*., 83 A.D.2d 294, 298 (N.Y. App. Div. 1981) (finding matters of public concern to include disputes whose "ramifications will be felt by persons who are

not direct participants" (citation omitted)). Indeed, the Eastern District of New York recently recognized as much in a persuasive decision finding that a magistrate judge "made no error—let alone clear error—in determining" that Facebook and LinkedIn posts made by a college student accusing a fellow student of sexual assault with the hashtag #MeToo concerned more than "a purely private matter." *Goldman v. Reddington*, No. 18-CV-3662 (RPK)(ARL), 2021 WL 4099462, at *4 (E.D.N.Y. Sept. 9, 2021) (quoting N.Y. Civ. Rights Law § 76-a(1)(d)).

To hold that statements such as Grand's are not "in connection with an issue of public interest," N.Y. Civ. Rights Law § 76-a(1)(a), would frustrate the purpose of the anti-SLAPP law and would hamper public discourse. Indeed, much of the most impactful reporting on the #MeToo movement turned on the willingness of individuals to share their subjective, personal experiences. *See, e.g.*, Adam Vary, *Actor Anthony Rapp: Kevin Spacey Made A Sexual Advance Toward Me When I Was 14*, BuzzFeed News (Oct. 29, 2017), https://perma.cc/KQH2-LLNP; Eliza Dushku, *I worked at CBS. I didn't want to be sexually harassed. I was fired*, Boston Globe (Dec. 19, 2018), https://perma.cc/M2TJ-ZYHC; Padma Lakshmi, *I Was Raped at 16 and I Kept Silent*, N.Y. Times (Sept. 25, 2018), https://perma.cc/XH7R-LP4M; Shelley Ross, *Chris Cuomo Sexually Harassed Me. I Hope He'll Use His Power to Make Change*, N.Y. Times (Sept. 24, 2021),

https://perma.cc/W5XQ-H9BZ. Subjecting narratives like Grand's to defamation liability would discourage other individuals from coming forward and would chill the news media's ability to report on matters of intense public interest and concern.

III. Grand's statements are non-actionable, protected opinion.

Even if New York's anti-SLAPP law had no application in this case—which it does—this Court should nevertheless affirm the District Court's grant of summary judgment in favor of Grand, as her statements constitute non-actionable, protected opinion.

It is well-settled that statements of opinion, which are not capable of being proven true or false, are not actionable in defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Indeed, as this Court has recognized, "the New York Constitution provides for absolute protection of opinions." *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 178 (2d Cir. 2000) (citation omitted). Here, as the District Court correctly held, Grand's statements do not make "factual, verifiable . . . claims," *Coleman*, 2021 WL 768167, at *12, but rather reflect her "subjective experience" and "personal opinions on a difficult relationship and related societal issues," *id.* at *11. Indeed, courts in New York and around the country have regularly found statements such as those at issue here—which draw from personal experience and observed facts—to be non-actionable.

"Whether a particular statement constitutes fact or opinion is a question of law" for the court. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381 (1977). In making such a determination under New York state law, courts look to three factors:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal [to] . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.

Gross v. N.Y. Times Co., 82 N.Y.2d 146, 153 (1993) (citation and internal quotation marks omitted).

Here, Grand's statements clearly constitute expressions of her subjective, personal views. Coleman challenges as defamatory Grand's statements that, in 2011, "he convinced [her] to be intimate with him," and that, in 2013, when she "didn't want to be intimate with him anymore . . . the sexual harassment started" including "call[ing] in the middle of the night and never tak[ing] no for an answer." *Coleman*, 2021 WL 768167, at *2. However, not only does language such as "convinced [her] to" and "never tak[ing] no for an answer" fail to convey a "precise meaning," but also none of these statements are "capable of being proven true or false." *Gross*, 82 N.Y.2d at 153. They are "inherently subjective evaluations of intent and state of mind, which are . . . not readily verifiable and

[are] intrinsically unsuitable as a foundation for defamation." *Cummings*, 2020 WL 882335, at *22.

Courts around the country have found statements regarding an individual's perceived experience of sexual harassment—such as those at issue here—to be protected opinion. *See, e.g.*, *Byrnes v. Lockheed-Martin, Inc.*, No. C-04-03941 (RMW), 2005 WL 3555701, at *7 (N.D. Cal. Dec. 28, 2005), *aff'd and remanded sub nom.*, *Byrnes v. Lockheed Martin Corp.*, 257 F. App'x 34 (9th Cir. 2007) (granting summary judgment for defendants where defendants' statements that plaintiff Byrnes "was a 'sex harasser,' a 'dangerous harasser,' an 'unstable person,' a 'menace,' and 'a danger to other employees' [were] couched in defendants' own perceptions and therefore opinions rather than statements of fact"); *see also Dossett v. Ho-Chunk, Inc.*, 472 F. Supp. 3d 900, 914 (D. Or. 2020) (finding "hyperbolic name-calling such as 'predator' [to be] loose, figurative speech that is suggestive of exaggeration, ridicule, or subjective impression, not assertions of provable facts"); *accord Gardner v. Honest Weight Food Coop., Inc.*, 96 F. Supp. 2d 154, 161 (N.D.N.Y. 2000) (finding that allegations "premised upon speculation and conjecture as well as [l]oose, figurative or hyperbolic statements, even if deprecating the plaintiff, do not constitute actionable defamation" (internal citations and quotation marks omitted)). Likewise, here, Grand's Communications are not actionable.

That Grand, in the context of expressing her subjective opinions regarding the nature of her relationship with Coleman, included certain factual information about that relationship does not transform her protected opinions into actionable statements. *See Coleman*, 2021 WL 768167, at *11. To the contrary, New York courts have made clear that "a statement of opinion" that is "accompanied by a recitation of the facts on which [the opinion] is based . . . is readily understood" to be opinion. *Gross*, 82 N.Y.2d at 153–54 (internal citations omitted); *see also Frascatore v. Blake*, 344 F. Supp. 3d 481, 497 (S.D.N.Y. 2018) (finding Blake's comments describing his arrest by a police officer followed by a statement that the officer had not afforded him "the dignity and respect due every person who walks the streets of this country" to be a non-actionable "statement of opinion . . . accompanied by a recitation of the facts," and that "[a] reasonable reader would understand that Blake's opinion . . . was based on his interaction with Frascatore" (citation omitted)); *accord McKee v. Cosby*, 236 F. Supp. 3d 427, 446 (D. Mass.), *aff'd*, 874 F.3d 54 (1st Cir. 2017) (finding that statements undermining the trustworthiness of an individual accusing Bill Cosby of sexual assault to be protected opinion where the author of the statements "fully outline[d] the non-defamatory facts supporting [his] opinion[] and d[id] not imply the assertion of an undisclosed defamatory fact"). Here, too, Grand's stated, subjective views about her personal relationship with Coleman, including statements that she believed she

was sexually harassed, are statements of opinion that any reasonable reader would understand as such.

Moreover, the third prong of the *Gross* analysis requires courts to consider, *inter alia*, "the full context of the communication in which the statement appears." *Gross*, 82 N.Y.2d at 153. And, in doing so, courts should not "sift[] through a communication for the purpose of isolating and identifying assertions of fact," but rather "should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff." *Davis v. Boeheim*, 24 N.Y.3d 262, 270 (2014) (citation and internal quotation marks omitted). Grand's Communications were made at the outset of the #MeToo movement, and her letter specifically states that she "is joining the 'talk[] about sexism in the music industry' by sharing her own experiences." *Coleman*, 2021 WL 768167, at *8. This language alone, coupled with "the broader social context and surrounding circumstances" of the #MeToo movement—in which individuals began sharing their subjective perceptions and personal opinions about sexual harassment in the workplace and, specifically, the entertainment industry—serves to "signal [to] . . . readers . . . that what is being read . . . is likely to be opinion, not fact." *Gross*, 82 N.Y.2d at 153 (citation omitted).

CONCLUSION

For the foregoing reasons, amici curiae urge the Court to affirm the District Court's grant of summary judgment to Defendant-Appellee.

Respectfully submitted,

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APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Advance Publications, Inc. is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable

news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Atlantic Monthly Group LLC is the publisher of *The Atlantic* and TheAtlantic.com. Founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others, *The Atlantic* continues its 160-year tradition of publishing award-winning journalism that challenges assumptions and pursues truth, covering national and international affairs, politics and public policy, business, culture, technology and related areas.

BuzzFeed, Inc. is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Cable News Network, Inc. ("CNN"), a Delaware corporation, is a wholly owned subsidiary of Turner Broadcasting System, Inc., which is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded company. CNN is a portfolio of two dozen news and information services across cable, satellite, radio, wireless devices and the Internet in more than 200 countries and territories worldwide. Domestically, CNN reaches more individuals on television, the web and mobile devices than any other cable TV news organization in the United

States; internationally, CNN is the most widely distributed news channel reaching more than 271 million households abroad; and CNN Digital is a top network for online news, mobile news and social media. Additionally, CNN Newsource is the world's most extensively utilized news service partnering with hundreds of local and international news organizations around the world.

CBS Broadcasting Inc. produces and broadcasts news, public affairs and entertainment programming. Its CBS News Division produces morning, evening and weekend news programming, as well as news and public affairs newsmagazine shows, such as "60 Minutes" and "48 Hours." CBS Broadcasting Inc. also directly owns and operates television stations across the country, including WCBS-TV in New York City.

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

The E.W. Scripps Company is the nation's fourth-largest local TV broadcaster, operating a portfolio of 61 stations in 41 markets. Scripps also owns Scripps Networks, which reaches nearly every American through the national

news outlets Court TV and Newsy and popular entertainment brands ION, Bounce, Grit, Laff and Court TV Mystery. The company also runs an award-winning investigative reporting newsroom in Washington, D.C., and is the longtime steward of the Scripps National Spelling Bee.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

The Freedom to Read Foundation is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine and book publishers, TV and radio broadcasters, and digital platforms, and over 200 law firms working in the media law field. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

MPA – The Association of Magazine Media ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more

than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York News Publishers Association is a trade association which represents daily, weekly and online newspapers throughout New York State. It was formed in 1927 to advance the freedom of the press and to represent the interests of the newspaper industry.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Penguin Random House LLC publishes adult and children's fiction and nonfiction in print and digital trade book form in the U.S. The Penguin Random House global family of companies employ more than 10,000 people across almost 250 editorially and creatively independent imprints and publishing houses that collectively publish more than 15,000 new titles annually. Its publishing lists include more than 60 Nobel Prize laureates and hundreds of the world's most widely read authors, among whom are many investigative journalists covering domestic politics, the justice system, business and international affairs.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30

countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Sinclair is one of the largest and most diversified television broadcasting companies in the country. The Company owns, operates and/or provides services to 191 television stations in 89 markets. The Company is a leading local news provider in the country and has multiple national networks, live local sports production, as well as stations affiliated with all the major networks.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

VICE Media is the world's preeminent youth media company. It is a news, content and culture hub, and a leading producer of award-winning video, reaching young people on all screens across an unrivaled global network.

Vox Media, LLC owns New York Magazine and several web sites, including Vox, The Verge, The Cut, Vulture, SB Nation, and Eater, with 170 million unique monthly visitors.

CERTIFICATE OF COMPLIANCE

I, Katie Townsend, do hereby certify that the foregoing brief of amici curiae:

1) Complies with the type-volume limitation of Local Rule 29.1(c) because it contains 6,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and

2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Times New Roman font.

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Dated: October 13, 2021
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on October 13, 2021.

Dated: October 13, 2021

By: */s/ Katie Townsend*

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