SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

ANTONELLA RUTH, as Administratrix of the Estate of LUCIA CONSOGLIO,

Plaintiff-Appellant,

– against –

ELDERWOOD AT AMHERST, ELDERWOOD AT WILLIAMSVILLE, 4459 BAILEY AVENUE OPERATING COMPANY, LLC, 4459 BAILEY AVENUE, LLC, 200 BASSET ROAD OPERATING COMPANY, LLC, 200 BASSETT ROAD, LLC, POST ACUTE PARTNERS MANAGEMENT, LLC, JEFFREY RUBIN, D.M.D, WARREN COLE,
Defendants-Respondents,

Defendants-Appellant.

NOTICE OF MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Docket No. CA 22-00069

PLEASE TAKE NOTICE that, upon the annexed affirmation of Vincent Levy, dated July 25, 2022, prospective *amici curiae*, the Chamber of Commerce of the United States of America, the American Property Casualty Insurance Association, the New York Insurance Association, Inc., the American Tort Reform Association, the Lawsuit Reform Alliance of New York, the Center for Jurisprudence, Inc., the Restaurant Law Center, and the New York State Restaurant Association ("*Amici*"), will move this Court at the M. Dolores Denman Courthouse, 50 East Ave #200, Rochester, New York 14604, on Monday, August

8, 2022 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order pursuant to Section 1250.4(f) of the Practice Rules of the Appellate Division, granting *Amici* leave to file the accompanying brief as *amicus curiae*, and for such other and further relief as the Court deems just and proper. A copy of the proposed brief accompanies this motion.

Dated: New York, New York
July 29, 2022

Respectfully Submitted,

By: Vincent Levy

Vincent Levy
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Ave. 14th Floor
New York, New York 10017
(646) 837-5151
vlevy@hsgllp.com

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

ANTONELLA RUTH, as Administratrix of the Estate of LUCIA CONSOGLIO, Plaintiff-Appellant, – against – ELDERWOOD AT AMHERST, ELDERWOOD AT WILLIAMSVILLE, 4459 BAILEY AVENUE OPERATING COMPANY, LLC, 4459 BAILEY AVENUE, LLC, 200 BASSET ROAD OPERATING COMPANY, LLC, 200 BASSETT ROAD, LLC, POST ACUTE PARTNERS MANAGEMENT, LLC, JEFFREY RUBIN, D.M.D, WARREN COLE, Defendants-Respondents, Defendants-Appellant.	**AFFRIMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE** Docket No. CA 22-00069

1. VINCENT LEVY, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms the following pursuant to New York Civil Practice Law and Rules 2106 and subject to the penalties of perjury:

2. I am a partner of the law firm of Holwell Shuster & Goldberg, LLP, attorney for the prospective *amici curiae*, the Chamber of Commerce of the United States of America, the American Property Casualty Insurance Association, the New York Insurance Association, Inc., the American Tort Reform Association, the

Lawsuit Reform Alliance of New York, the Center for Jurisprudence, Inc., the Restaurant Law Center, and the New York State Restaurant Association ("*Amici*").

3. I submit this affirmation in support of *Amici*'s motion for leave to file a brief *amicus curiae*, urging affirmance of the Order of Supreme Court, Erie County (Grisanti, J.), dated August 5, 2021, that granted Defendants-Respondents' motion to dismiss the Complaint under the Emergency Disaster Treatment Protection Act ("EDTPA"), Public Health Law §§ 3080-3082, from which Order Plaintiff-Appellant has taken the appeal herein.

AMICI'S INTEREST IN THE CASE

4. The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

5. The Chamber's members have a profound interest in ensuring that state and federal laws governing their conduct be applied, at least as a presumptive

matter, solely on a prospective basis. This interpretive presumption against retroactivity safeguards profound interests in providing regulated entities with adequate notice before the laws are changed, so that commercial enterprises may organize their affairs to maximize their economic well-being, and ultimately the well-being of our economy, against the background of a given regulatory regime.

6. The Chamber's membership includes a wide range of non-profit and private businesses that provide a range of healthcare services to their communities throughout New York. These businesses include hospitals, skilled nursing facilities, home-health agencies, hospices, and other institutions thrust onto the front lines of New York's battle against COVID-19, who relied on a since-repealed litigation safe harbor to continue their life-saving care under extremely uncertain circumstances. The Chamber's membership also includes non-profit and private businesses outside the healthcare industry that are subject to state regulatory schemes that, like the one at issue here, have broad-ranging effects on settled rights and expectations that are essential to the flow of commerce.

7. In addition, the Chamber has filed amicus briefs in prior retroactivity cases, including *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), *Sonoco Prod. v. Michigan Dep't of Treasury*, 137 S. Ct. 2157 (2017), *Hambleton v. Washington Dep't of Revenue*, 577 U.S. 922 (2015), *Ford Motor*

Credit Co. v. Mich Dep't of Treasury, 562 U.S. 1178 (2011), and *People ex rel. Schneiderman v. Sprint Nextel Corp.*, 26 N.Y.3d 98 (2015).

8. The Chamber is thus well suited to offer a perspective on the impact of retroactive laws on businesses like those affected here, and has a strong interest in ensuring that the regulatory environment in which its members operate is a consistent and predictable one.

9. The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market, which includes medical professional liability insurance, and write nearly $28 billion in premiums in the State of New York. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases before federal and state courts, including this Court.

10. The New York Insurance Association, Inc. ("NYIA") is a state association of over 65 property and casualty insurers writing in excess of $15 billion in annual New York premiums—over 25% of the market. NYIA represents

both the largest national commercial and many of the largest personal lines insurance companies, and its membership is comprised of stock, mutual and cooperative property and casualty insurers doing business in virtually every region of New York State. NYIA was formed in 1997 by the unification of the former New York Insurance Alliance, founded in 1882, and the New York State Insurance Association, founded in 1942.

11. NYIA's mission is to promote a viable and strong insurance market in order to better serve the insuring public, to promote the economic, legislative and public standing of its members and the insurance industry, to provide a forum for discussion of policy issues of common concern to its members and the insurance industry, and to serve the public interest through activities promoting safety and security of persons and property. As an association of insurers, NYIA brings special expertise in the knowledge of insurance markets, law, and policy.

12. The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

13. The Lawsuit Reform Alliance of New York (the "Alliance") is a New York not-for-profit corporation that brings together businesses, healthcare providers, membership organizations, and concerned taxpayers with the aim of improving New York's civil justice system by reducing lawsuit abuse. The Alliance is generally opposed to retroactive law, and specifically opposed in this case. If the court were to overturn the emergency protections at issue here, the frontline workers we celebrated as heroes in streets, and whom the government sought to protect, would go from heroes to targets of litigation. A ruling to retroactively abolish those emergency protections would open the courts to a deluge of lawsuits against our frontline heroes, and for that reason the Alliance is opposed.

14. The Center for Jurisprudence, Inc. (the "Center") is a New York not-for-profit corporation that is dedicated to improving our civil justice system by, among other things, increasing consistency and predictability of our civil courts. The Center is interested in this case because it regards the application of retroactive law and, as a consequence, the consistent and predictable application of law. In the Center's view, the integrity of both our legal system and our legislative process is at stake in this case.

15. The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food

service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States. Through amicus participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's amicus briefs have been cited favorably by state and federal courts.

16. The New York State Restaurant Association ("NYSRA") is a not-for-profit employer association which represents food service establishments throughout New York State. Founded in 1935, NYSRA is the oldest and most comprehensive professional organization for restaurant management in New York. It provides a forum for restaurants to exchange ideas and information, participate in creative problem-solving, and receive education. The NYSRA also advocates on behalf of the New York restaurant industry through amicus brief submissions when a case, such as this one, could have a significant short or long term legal impact on its members.

AMICI'S BRIEF RAISES NEW MATTERS THAT ARE RELEVANT TO THE DISPOSITION OF THE CASE

17. *Amici* respectfully submit that the brief attached as Exhibit A will be helpful to the Court in its review of Supreme Court's Order.

18. Through their proposed brief and drawing on their experience, *Amici* will explain to the Court the mistaken analysis on which Appellant's argument in favor of retroactivity rests, will elaborate on the constitutional concerns, and will describe the adverse consequences of retroactive application of the law for *Amici*'s members and constituents.

AMICI'S APPLICATION SHOULD BE GRANTED

19. *Amici* have an important perspective to add in this appeal and can identify infirmities with reversal that have otherwise escaped the parties' attention.

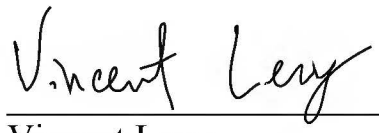
20. *Amici*'s participation would not prejudice any party to this appeal.

21. If the motion is granted, *Amici* will serve and file the requisite number of copies of the brief within the time established by this Court.

22. For these reasons, *Amici*'s motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Dated: New York, New York
July 29, 2022

Respectfully Submitted,

By: 

Vincent Levy
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Ave. 14th Floor
New York, New York 10017
(646) 837-5151
vlevy@hsgllp.com

EXHIBIT A

To be Argued by:
VINCENT LEVY
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

ANTONELLA RUTH, as Administratrix of the Estate of LUCIA CONSOGLIO,

Plaintiff-Appellant,

Docket No.: CA 22-00069

– against –

ELDERWOOD AT AMHERST, ELDERWOOD AT WILLIAMSVILLE, 4459 BAILEY AVENUE OPERATING COMPANY, LLC, 4459 BAILEY AVENUE, LLC, 200 BASSET ROAD OPERATING COMPANY, LLC, 200 BASSETT ROAD, LLC, POST ACUTE PARTNERS MANAGEMENT, LLC, JEFFREY RUBIN, D.M.D, WARREN COLE,

Defendants-Respondents.

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, NEW YORK INSURANCE ASSOCIATION, INC., AMERICAN TORT REFORM ASSOCIATION, LAWSUIT REFORM ALLIANCE OF NEW YORK, CENTER FOR JURISPRUDENCE, INC., RESTAURANT LAW CENTER, and NEW YORK STATE RESTRAURANT ASSOCIATION

HOLWELL, SHUSTER & GOLDBERG LLP
Vincent Levy, Esq.
Daniel M. Sullivan, Esq.
Timothy W. Grinsell, Esq.
Attorneys for Amicus Curiae
425 Lexington Avenue
New York, New York 10017
(646) 837-5151
vlevy@hsgllp.com
dsullivan@hsgllp.com
tgrinsell@hsgllp.com

Erie County Clerk's Index No. 804780/2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution and Statutes

Other Authorities

The Chamber of Commerce of the United States of America, the American Property Casualty Insurance Association, the New York Insurance Association, Inc., the American Tort Reform Association, the Lawsuit Reform Alliance of New York, the Center for Jurisprudence, Inc., the Restaurant Law Center, and the New York State Restaurant Association ("*Amici*") submit this Brief as *amici curiae* in support of an affirmance of the Order of Supreme Court, Erie County (Grisanti, J.), dated August 5, 2021, that granted Defendants-Respondents' motion to dismiss the Complaint in its entirety.

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members have a profound interest in ensuring that state and federal laws governing their conduct be applied, at least as a presumptive matter, solely on a prospective basis. This interpretive presumption against retroactivity

safeguards profound interests in providing regulated entities with adequate notice before the laws are changed, so that commercial enterprises may organize their affairs to maximize their economic well-being, and ultimately the well-being of our economy, against the background of a given regulatory regime. The Chamber has filed *amicus* briefs in prior retroactivity cases, including *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), *Sonoco Prod. Co. v. Michigan Dep't of Treasury*, 137 S. Ct. 2157 (2017), *Hambleton v. Washington Dep't of Revenue*, 577 U.S. 922 (2015), *Ford Motor Credit Co. v. Mich. Dep't of Treasury*, 562 U.S. 1178 (2011), and *People ex rel. Schneiderman v. Sprint Nextel Corp.*, 26 N.Y.3d 98 (2015).

Moreover, the Chamber also has an interest in the specific legal issues presented in this case. The Chamber's membership includes a wide range of non-profit and private businesses that provide a range of healthcare services to their communities throughout New York. These businesses include hospitals, skilled nursing facilities, home-health agencies, hospices, and other institutions thrust onto the front lines of New York's battle against COVID-19, who relied on a since-repealed litigation safe harbor to continue their life-saving care under extremely uncertain circumstances. The Chamber's membership also includes non-profit and private businesses outside the healthcare industry that are subject to state regulatory schemes that, like the one at issue here, have broad-ranging effects on

settled rights and expectations that are essential to the flow of commerce. The Chamber is thus well suited to offer a perspective on the impact of retroactive laws on businesses like those affected here, and has a strong interest in ensuring that the regulatory environment in which its members operate is a consistent and predictable one.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market, which includes medical professional liability insurance, and write nearly $28 billion in premiums in the State of New York. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

The New York Insurance Association, Inc. ("NYIA") is a state association of over 65 property and casualty insurers writing in excess of $15 billion in annual New York premiums—over 25% of the market. NYIA represents both the largest national commercial and many of the largest personal lines insurance companies,

and its membership is comprised of stock, mutual and cooperative property and casualty insurers doing business in virtually every region of New York State. NYIA was formed in 1997 by the unification of the former New York Insurance Alliance, founded in 1882, and the New York State Insurance Association, founded in 1942.

NYIA's mission is to promote a viable and strong insurance market in order to better serve the insuring public, to promote the economic, legislative and public standing of its members and the insurance industry, to provide a forum for discussion of policy issues of common concern to its members and the insurance industry, and to serve the public interest through activities promoting safety and security of persons and property. As an association of insurers, NYIA brings special expertise in the knowledge of insurance markets, law, and policy.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

The Lawsuit Reform Alliance of New York (the "Alliance") is a New York not-for-profit corporation that brings together businesses, healthcare providers,

membership organizations, and concerned taxpayers with the aim of improving New York's civil justice system by reducing lawsuit abuse. The Alliance is generally opposed to retroactive law, and specifically opposed in this case. If the court were to overturn the emergency protections at issue here, the frontline workers we celebrated as heroes in streets, and whom the government sought to protect, would go from heroes to targets of litigation. A ruling to retroactively abolish those emergency protections would open the courts to a deluge of lawsuits against our frontline heroes, and for that reason the Alliance is opposed.

The Center for Jurisprudence, Inc. (the "Center") is a New York not-for-profit corporation that is dedicated to improving our civil justice system by, among other things, increasing consistency and predictability of our civil courts. The Center is interested in this case because it regards the application of retroactive law and, as a consequence, the consistent and predictable application of law. In the Center's view, the integrity of both our legal system and our legislative process is at stake in this case.

The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other

foodservice providers are the second largest private sector employers in the United States. Through *amicus* participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's *amicus* briefs have been cited favorably by state and federal courts.

The New York State Restaurant Association ("NYSRA") is a not-for-profit employer association which represents food service establishments throughout New York State. Founded in 1935, NYSRA is the oldest and most comprehensive professional organization for restaurant management in New York. It provides a forum for restaurants to exchange ideas and information, participate in creative problem-solving, and receive education. The NYSRA also advocates on behalf of the New York restaurant industry through *amicus* brief submissions when a case, such as this one, could have a significant short or long term legal impact on its members.

INTRODUCTION

In the uncertain early days of the COVID-19 pandemic, the Governor ordered hospitals, skilled nursing facilities, home-health agencies, hospices, and

other healthcare institutions to take emergency measures to combat the virus.[1] In light of those emergency directives, New York's Legislature enacted a safe harbor from suit in Article 30-D of the Public Health Law (Emergency or Disaster Treatment Protection Act ("EDTPA") (Apr. 3, 2020)). As the Legislature recognized, healthcare institutions and their workers, especially during the pandemic's first waves, "were asked to do a lot more than they normally would," including working without adequate protective equipment and providing care beyond their traditional scope. N.Y. Assemb. Sess. Proc. at 45 (Mar. 4, 2021) (statement of Mr. Byrne). Those workers and institutions relied on EDTPA's safe harbor to answer the State's call for help and comply with the Governor's mandates.

This appeal raises an issue of fundamental due process in the context of the nationwide—indeed, worldwide—public health emergency that COVID-19 represented. Specifically, this Court must determine whether, when the Legislature repealed EDTPA, the repeal was retroactive.

In other words, did the Legislature—which had feared just a year earlier that exposure to potential liabilities would chill the full efforts of the healthcare

[1] *See, e.g.*, Executive Order No. 202.10, http://dmna.ny.gov/covid19/docs/all/EXEC_COVID19_ExecutiveOrder202.10_032320.pdf (last visited July 12, 2022).

industry when those efforts were desperately needed (and indeed mandated) to combat a then-unknown virus—intend by repealing the statute to impose a grotesque bait-and-switch? For the healthcare workers and institutions that relied on Article 30-D's immunity in rushing to the aid of New Yorkers, the answer must urgently be "no." But the answer's impact reaches even farther, implicating not only the State's capacity to draft workers and businesses into the provision of emergency healthcare—or, indeed, any other emergency service—but also, more generally, the predictability and stability on which commerce depends.

Supreme Court's decision correctly held that EDTPA's April 6, 2021, repeal (the "repeal bill") is not retroactive. First, in New York as elsewhere, laws are presumed to apply *prospectively* absent a showing of clear legislative intent, and there is no such showing here. The legislative history around which Appellant attempts to construct retroactive intent is not only massively outweighed by contradictory evidence; it also rests on a fatal linguistic confusion.

Second, in interpreting statutes, New York courts are obliged to avoid interpretations that would invite constitutional questions. If Supreme Court were reversed, not only would this unsettle the expectations of workers and businesses that rushed to help New Yorkers in reliance on EDTPA's safe harbor, but it would also offend due process.

I. THE PRESUMPTION AGAINST RETROACTIVITY IS WELL-SETTLED AND CONSISTENTLY APPLIED

A. The presumption is deeply rooted in fundamental principles of fairness

New York's presumption against the retroactive application of statutory law, like its federal counterpart, is "deeply rooted" and based on "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 370 (2020) (quoting *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994)). It "embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265; *see also E. Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("[F]or centuries our law has harbored a singular distrust of retroactive statutes."); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842–44 (Scalia, J., concurring) (collecting cases).

Retroactive laws are "oppressive, unjust, and tyrannical" and therefore "condemned by the universal sentence of civilized man." *Ogden v. Saunders*, 25 U.S. 213, 266 (1827); *see also* 2 J. Story, *Commentaries on the Constitution* section 1398 (2d ed. 1851) ("[R]etrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact"); *Kaiser Aluminum & Chem.*, 494 U.S. at 855 ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed

when the conduct took place has timeless and universal human appeal.") (Scalia, J., concurring). Several states, including New York, enshrine this principle either in their constitutions or statutes.[2]

The reason for the longstanding skepticism of retroactive laws is simple: They are fundamentally *unfair*. *E. Enters.*, 524 U.S. at 558 (1998) (Breyer, J. dissenting) (the Due Process Clause protects against retroactivity in light of "a basic purpose: the *fair application of law*"). Retroactive laws allow the exercise of

[2] N.Y. Gen. Constr. Law § 93 ("The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected."); *see also, e.g.*, Colo. Const. art. II, § 11 ("No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly."); Ga. Const. art. I, § 1 ("No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed."); Idaho Const. art. XI, § 12 ("the legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past."); Mo. Const. art. I, § 13 ("[N]o ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."); N.H. Const. pt. 1, art. 23d ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."); Tenn. Const. art. I, § 20 ("[N]o retrospective law, or law impairing the obligations of contracts, shall be made."); Tex. Const. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.").

arbitrary power by enabling the legislature to single out known individuals for special treatment, perhaps motivated by political backlash or favoritism; they prevent citizens from knowing what conduct will subject them to liability; and they upset settled expectations, discouraging investment and undermining respect for the rule of law. *See Landgraf*, 511 U.S. at 265 ("The rule of law is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance.") (quotation marks, ellipsis, and citation omitted); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (stating predictability is "a needful characteristic of any law worthy of the name").

"The presumption of nonretroactivity," then, "gives effect to enduring notions of what is fair, and thus accords with what legislators almost always intend." *Kaiser Aluminum & Chem.*, 494 U.S. at 856 (Scalia, J., concurring). Under this settled presumption, a New York statute will generally apply "*only* prospectively," and retroactive legislation is viewed with "great suspicion." *Regina Metro.*, 35 N.Y.3d at 370 (emphasis added, citation and quotation marks omitted). To overcome this presumption, it takes a "clear expression of the legislative purpose," including assurances that the Legislature has "affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* (citation and quotation marks omitted).

B. The presumption against retroactivity serves the public interest

Retroactive civil liability of the sort dreamed up by Appellant not only offends longstanding law, but also reflects poor policy. "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 266. Conversely, insufficient "transparency, uniformity, and predictability" make it all but impossible to "reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly." Maurice E. Stucke, *Better Competition Advocacy*, 82 St. John's L. Rev. 951, 1000 (2008); *see* Anthony D'Amato, *Legal Uncertainty*, 71 Cal. L. Rev. 1, 5-6 (1983) ("uncertain law may deter activity" and "leave persons unsure of their entitlements").

It is particularly important for commercial enterprises to have notice of the legal rules against which their conduct will be evaluated. *First*, "[f]ear of post-investment opportunism by the government may well deter parties from relying on the government's promises as much as they should for the sake of efficiency." Daniel E. Troy, *Toward A Definition and Critique of Retroactivity*, 51 Ala. L. Rev. 1329, 1344 (2000). In other words, retroactive application of laws like the repeal bill causes commercial enterprises to think twice before investing.

Second, and relatedly, retroactive application of the law effects a wealth transfer from the poor to the rich. Indeed, legal uncertainty has a regressive effect,

scaring away firms least able to bear the risk (new entrants or mom-and-pop type institutions with less capital) in favor of firms most able to bear it (established industry players with plenty of capital). Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. Disp. Resol. 149, 151 (2019) ("[A] shift from a more certain legal regime to a less certain one transfers wealth from risk-averse parties to risk-neutral parties. Thus, because poor people are more risk-averse than rich people, legal uncertainty leads to a transfer of wealth from poor people to rich people.").

Third, retroactive application of the law raises costs for everyone. For example, the cost of healthcare organizations' insurance coverage will increase in the face of uncertain civil liability (if insurance for the relevant risks in fact remains available). *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569, 572 (1984) (noting that private insurance markets have not provided coverage for the risks associated with regulatory changes such as rezonings). These organizations will also demand higher returns for their greater risk—returns reflected in price increases for patients and for services rendered to the State.

As James Madison wrote to New Yorkers in *The Federalist* No. 62: "What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the

encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government?" The presumption against retroactivity thus reflects not only settled law but also sound policy.

II. THE PRESUMPTION AGAINST RETROACTIVITY HAS NOT BEEN OVERCOME

There is no clear expression that the Legislature intended the repeal bill to be retroactive. The statutory text—"the best indicator of legislative intent," *Regina Metro.*, 35 N.Y.3d at 352—is two sentences long:

> Section 1. Article 30-D of the public health law is repealed.
>
> Section 2. This act shall take effect immediately.

Respondent ably demonstrates the common sense behind Supreme Court's decision that this statute is not retroactive: (1) "immediately" does not mean "at some point in the past"; (2) "shall" references the future, not the past; and (3) the Legislature knows how to make bills retroactive, and indeed it *explicitly did this when it enacted the statute that this latest bill repealed*. Meanwhile, numerous cases hold that when a statute "directs it is to take effect immediately," that "does not have any retroactive operation or effect." *E.g.*, *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 423 (1st Dep't 2010); *Matter of Kuryak v. Adamczyk*, 265 A.D.2d 796, 796 (4th Dep't 1999) ("[A] a statute framed in future words, such as 'shall' or 'hereafter,' is construed as prospective only."); *compare* EDTPA

(enacted in April 2020 and stating that "[t]his act shall take effect immediately and shall be deemed to have been in full force and effect on or after March 7, 2020.").

Appellant's theory of the case depends on venturing well beyond the text and into legislative history. In the first place, this is a forbidden journey in the circumstances of this case. *See People v. Francis*, 30 N.Y.3d 737, 745 (2018) (If statutory language "is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation."). But even if one indulges Appellant's detour through the legislative history, there is no "clear expression" that the Legislature intended the repeal bill to have retroactive effect. Appellant relies primarily on the Sponsor's Memo,[3] which identifies the purpose of the bill to "repeal[] Article 30-D of the Public Health Law (colloquially known as the Emergency or Disaster Treatment Protection Act) with the intent of holding health care facilities, administrators, and executives accountable for harms and damages *incurred*." Sponsor's Memo, S. B. No. 5177, 244th Sess. (N.Y. 2021) (emphasis added). Appellant argues that the "use of the past tense is irrefutable evidence of its intent to apply the repeal of Article 30-D retroactively." App. Br. at 8.

That Appellant has been reduced to parsing the grammar of a passing statement made by a single member of the Legislature illustrates the weakness of

[3] Not, as Appellant incorrectly describes it, a report of a legislative committee.

the legal case for retroactivity here. As Respondent points out, the legislative history, were one to canvass it fairly, clearly evidences an intent for the repeal bill to apply prospectively. Resp. Br. at 14–15 (quoting debate in the New York Senate and Assembly: *e.g.*, "[I]t is with the belief and understanding that this bill is being applied prospectively, not retrospectively, that I will be voting in the affirmative."). To privilege a single sentence in the Sponsor's Memo, while focusing solely on the tense of the verb, is plainly inappropriate, and clearly does not constitute the sort of plain evidence the canon against retroactivity demands.

Moreover, Appellant's argument fails on its own terms because the argument rests on a linguistic confusion threatening absurd results. The past participle "incurred" in the statutory context does *not* unambiguously refer to a time before the repeal bill's passage; rather, it may (and on the better reading does) refer to a time before which certain facilities, administrators, and executives are held "accountable." In other words, the sentence in the Sponsor's memo merely describes the bill's purpose as holding bad actors accountable for damages incurred before they are sued. *That* time frame, of course, does not require retroactive application of the repeal bill, because liability is always based on conduct occurring before suit is brought.

Indeed, Appellant's own examples prove the point, as do statutes from around the country. A note providing a guaranty for "all liability incurred" "means

liabilities *to be incurred*." *Agawam Bank v. Strever*, 18 N.Y. 502, 510 (1859) (emphasis added). A Louisiana statute providing that, in some circumstances, a donee is "accountable for the loss *sustained* by the donor" does not regulate only losses sustained *before* the statute's effective date—the absurd reading that Appellant's linguistic confusion would impose. La. Civ. Code Ann. art. 1533. A Tennessee statute providing that a state administrator "shall not be accountable for losses *incurred*" in the making of certain welfare advances does not regulate only losses incurred before the statute's effective date. *See* Tenn. Code Ann. § 71-4-405. And a New York statute providing that a municipality is "accountable for any damages *sustained*" when it breaks equipment it borrows does not regulate only damages that occurred before the statute's effective date. N.Y. Gen. Mun. Law § 120-u(11); *see also B&B Assocs. v. Amoco Oil Co.*, 2000 WL 33539366, at *2 (Mich. Ct. App. Jan. 4, 2000) (costs "lawfully incurred" include costs postdating effective date of statute); *Hall v. Cook Cnty.*, 359 Ill. 528, 545 (1935) (discussing a liability "incurred" after the effective date of the relevant law). In *none* of Appellant's examples does the participle "incurred" give retroactive effect to a statute.[4]

[4] Appellant's remaining examples interpret language other than a statute, which makes them inapposite. *See Jamie v. Jamie*, 19 A.D.3d 330, 331 (1st Dep't 2005) (interpreting a court order); *State ex rel. Prudential Ins. Co. of Am. v. Bland*, 353 Mo. 956, 963 (1945) (interpreting language in a bond); *State v. Holsing*, 736

This should not be surprising. According to Appellant, a statute would apply retroactively wherever it uses a past participle, a common part of speech. Such a result would undermine predictability and certainty in the application of statutes, with serious implications for regulated individuals and businesses.

In short, Appellant's primary evidence for retroactivity rests on a linguistic confusion that ignores the common use of past participles in prospective statutes. This is no rebuttal to the presumption against retroactivity.

III. RETROACTIVE APPLICATION OF THE REPEAL BILL WOULD RAISE CONSTITUTIONAL CONCERNS

Appellant's interpretation is wrong for another reason: According to longstanding New York practice, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917). The repeal bill should be construed to avoid retroactive application because it would otherwise raise serious questions under the Due Process Clause.

The Due Process Clause concerns are demonstrated by *Landgraf*, whose analysis the Court of Appeals has adopted. *Regina Metro. Co.*, 35 N.Y.3d at 365. There, Congress had expanded certain causes of action under Title VII in the Civil

---

N.W.2d 883, ¶13 (S.D. 2007) (interpreting a court order); *May v. Sec'y of Health & Hum. Servs.*, 1995 WL 298554, at *2 (Fed. Cl. May 2, 1995) (discussing expenses "incurred" after an appropriation).

Rights Act of 1991, providing for previously unavailable monetary relief in some cases and for relief under entirely new theories in others. 511 U.S. at 252-54. The Court explained that statutory provisions are prospective unless they clearly evidence a contrary intent, held that the provisions there at issue did not apply to cases already pending on the statute's effective date, and advised that a contrary conclusion would raise serious constitutional questions. *Id*. at 281-83.

As the repeal bill did here, the 1991 Act "create[ed] a new cause of action," and "its impact on parties' rights [was] especially pronounced." *Id*. at 283. Thus, in no case before or since has the Court read an ambiguous statute "substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Id*. at 284. And as the repeal bill did here, the 1991 Act made available previously unavailable punitive damages.[5] As the *Landgraf* Court held, "[r]etroactive imposition of punitive damages would raise a serious constitutional question." *Id.* at 281.

This case presents an even more problematic request for retroactive application. Not only would the repeal bill expose regulated parties to legal liability that they did not have before the repeal, it would *undo* the Legislature's

[5] Resp. Br. at 5 ("The Plaintiff commenced her action on April 13, 2021, seeking to recover both compensatory and punitive damages for the claims made in her Complaint.").

own unambiguous promulgation shielding those parties from liability. The retroactive application Appellant seeks, then, is more troubling than the ordinary one (about which, as noted above, the law has long been deeply skeptical in any event). As Appellant would have it, the Legislature told healthcare institutions that they would be immune from suit so they could focus on fighting—at the Governor's request—a worldwide pandemic causing unprecedented panic and disruption to the lives of New Yorkers. Then—as Appellant has it—the Legislature told those same institutions that, actually, they might be sued after all during the time the Legislature told them they would not be.

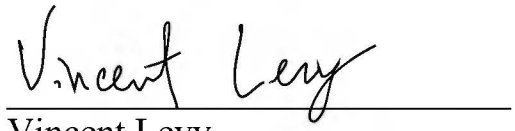
To say this would pose a serious constitutional question would be an understatement. "When a government agency officially and expressly tells you that you are legally allowed to do something, but later tells you 'just kidding' and enforces the law *retroactively* against you and sanctions you for actions you took in reliance on the government's assurances, that amounts to a serious due process violation. The rule of law constrains the governors as well as the governed." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 48 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc,* 881 F.3d 75 (D.C. Cir. 2018) (Kavanaugh, J.).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request this Court affirm Supreme Court's order.

Dated: New York, New York
July 29, 2022

Respectfully Submitted,

By: 

Vincent Levy
Daniel M. Sullivan
Timothy W. Grinsell
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Ave. 14th Floor
New York, New York 10017
(646) 837-5151
vlevy@hsgllp.com

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14pt

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 4,749.