JUSTICE LASALLE'S RECORD AND THE STAKES OF CONFIRMING HIM AS CHIEF JUDGE

1. Confirming Justice LaSalle would extend the legacy of former Chief Judge DiFiore, locking in a new four-judge conservative majority bloc on the Court of Appeals until at least 2030.

- Justice LaSalle's jurisprudential approach is fundamentally regressive and wrong for New York. As the rest of this document details, he has written or joined opinions that:
    - Allowed corporations to sue union leaders for lawful strike activity;
    - Effectively held that protecting the right to abortion is not a compelling state interest;
    - Weakened legal doctrine that protects consumers;
    - Facilitated more deportations at the height of the Trump Administration, and denied a troubled teenager access to an immigration program for abused immigrant children, contrary to Congressional intent for such children to be included in the program; and
    - Repeatedly protected agents of the government who lied to secure convictions, undermining New Yorkers' due process rights and other civil liberties.
- Appointing Justice LaSalle to replace Chief Judge Janet DiFiore, and to join Judges Madeline Singas, Anthony Cannataro, and Michael Garcia in a new conservative bloc, would ensure at least seven more years of overwhelmingly conservative high-court decisions.
    - Former Chief Judge DiFiore led a cohesive, ideologically committed bloc of four conservative judges so confident in its power that it stopped writing full opinions in most cases.
    - More decisions like these will continue to harm workers, tenants, immigrants, people involved with the criminal justice system, and all New Yorkers—and will preserve the Court of Appeals' four-judge conservative bloc through the 2030 redistricting cycle.
- Every time Justice LaSalle has been temporarily added to the Court of Appeals, he has voted with the court's conservative bloc.
    - The Chief Judge can add judges to the Court of Appeals in individual cases to resolve ties. LaSalle was added to the Court of Appeals twice by Chief Judge DiFiore, both times this year. Each time he voted with her without comment, providing the decisive vote for the conservative bloc. (The two cases were *White v. Cuomo*, 2022 NY Slip Op 01954 [2022], and *U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 38 N.Y.3d 169 [2022]).
    - Chief Judge DiFiore was notorious for adding justices to the Court who would vote with her. In every case except one, in which she added a judge and did not recuse herself, the added vote sided with DiFiore. (The one exception was *Carlson v. American Intern. Group*, 30 N.Y.3d 288 [2017], a complex insurance case early in Chief Judge DiFiore's tenure.)
- To understand Justice LaSalle's judicial philosophy and assess his qualification for appointment as Chief Judge, senators should look to his judicial decisions, not to testimonials from interested parties.

- Positive ratings and praise from the legal community alone is inevitably influenced by the fact that Justice LaSalle is a sitting judge who, regardless of whether he remains Presiding Justice of the Second Department or is elevated to Chief Judge of the Court of Appeals, would preside over cases brought by these lawyers.
- Senators should therefore look at the disinterested facts: the decisions LaSalle has written and joined. Justice LaSalle has written incredibly few decisions (all six of those decisions are analyzed in the final section below), but the large number of opinions he has joined, and the outcomes those opinions directed, are a substantial body of evidence demonstrating his judicial philosophy and his understanding of the law.

2. Justice LaSalle's record indicates that his confirmation to the Court of Appeals would undermine the rights of workers and unions.

Overview

- Justice LaSalle has permitted lawsuits meant to harass and intimidate union leaders, contradicting binding precedent and opening the door for more state-level anti-union lawsuits that will come if the U.S. Supreme Court guts federal protections. See below for detailed analysis of *Cablevision Sys. Corp. v. Communications Workers of Am. Dist. 1*.
- Justice LaSalle has also joined decisions against workers involved in wage and hour disputes, against workers who suffered workplace injuries, and against unions involved in collective bargaining disputes with employers. These decisions illustrate a pattern of judicial decision-making hostile to workers.
- These decisions are particularly concerning because the DiFiore-led conservative majority on the Court of Appeals regularly held against workers, and similar disputes will come before the Court of Appeals in the coming years as corporations and employers seek to narrow employees' rights under the state's labor laws. LaSalle's record indicates that in cases relating to workers and unions, he would lead a new conservative majority in further narrowing the labor law's protections, at times even in defiance of the Legislature.
    - A recent example of such a decision: The Court of Appeals recently held that workers have no right under Labor Law Article 6 to sue for wage theft resulting from illegal kickback schemes, i.e., schemes in which workers are coerced to return part of their earnings to the employers. This decision contradicted clear and unambiguous language in the statute that grants employees a right to recover all wages illegally withheld or stolen in violation of the New York Labor Law.
- Unions recognize the threat that Justice LaSalle poses to their members. 32BJ, CWA, UAW, the Carpenters Union, ALAA 2325, and LSSA2320 have declared their opposition to LaSalle's nomination. And the New York State AFL-CIO called his record "disturbing."

Cablevision Sys. Corp. v. Communications Workers of Am. Dist. 1

Summary:

- In this 2015 decision that Justice LaSalle joined, the court concluded that big businesses could sue union leaders personally for defamation in retaliation for striking. LaSalle and his colleagues allowed a defamation lawsuit by an employer against union leaders to proceed (1) despite the long-acknowledged fact that such suits are designed to intimidate and harass union leaders, and (2) in contradiction of Court of Appeals' precedent barring lawsuits against unions for lawful striking and organizing activity, which the dissent noted.
- This decision is especially relevant now, as the U.S. Supreme Court is poised to gut federal precedent that largely prohibits state-level lawsuits targeting union leaders in a case that it will hear in two months. **If it does, the Court of Appeals will become the last line of defense for workers in New York, and Justice LaSalle has indicated that he believes the law should not come to workers' defense.**

Full explanation:

Cablevision grew out of a fight between Cablevision (now Optimum), one of the country's largest corporations, and Local 1109. The union's district organizer and the local executive vice president criticized Cablevision for its poor response to Hurricane Sandy, and Cablevision sued the union and its leaders.

The *Martin* rule, established by a 1951 Court of Appeals case, should have prevented the suit, since this was precisely the kind of lawsuit the rule barred. In fact, the First Department heard a case involving a similar issue but with different parties—and threw it out, relying in part on New York's long-standing labor law. But this precedent did not sway Justice LaSalle. Justice LaSalle joined the Second Department opinion that enlarged a loophole, creating a technical workaround to allow a giant corporation to sue union leaders: the suit could go forward against the two union officials in their *individual* capacity, even though the speech in question was delivered as part of their union work.

The decision is deeply concerning. Judges like Justice LaSalle may think New York law should not offer unions this protection, but, as the Court of Appeals recognized, that is a decision for the Legislature to make. The ruling demonstrates a hostility to labor, as well as a willingness to champion the judge's own policy vision over the Legislature's.

The Governor has attempted to wave away this shocking decision as a "procedural decision to send it down for the trial courts." **By this reasoning, *Dobbs* was a procedural decision because it too remanded the case to the lower court for further proceedings.** What *Cablevision* did, substantively, was establish as binding precedent in half of New York State that an employer could sue an employee for defamation associated with lawful union organizing activity. And obviously, having established this new loophole, Justice LaSalle sent down for trial the new claim—which should have been dismissed at outset.

The nomination of a judge with this record comes at the worst possible time. The U.S. Supreme Court will hear a case that could significantly enhance corporations' power to block union efforts by suing union leaders under state law. If, as expected, the conservative supermajority on the Supreme Court sweeps away the federal laws protecting workers from employer harassment, only the Court of Appeals will stand between workers and a new wave of anti-union activity. New York State has signed an amicus brief favoring workers' rights in the U.S. Supreme Court. It would be a deeply harmful irony if the State Senate undermined New York's efforts to protect workers by confirming the appointment of an opponent of workers' rights to the state's highest court.

Wage and Hour Disputes

- In *Moreno v. Future Health Care Services, Inc.*, 186 A.D.3d 594 (2d Dept 2020), Justice LaSalle and colleagues on the Second Department denied class certification to home health workers who had been underpaid for 13-hour-per-day shifts.
    - This case involved workers who work for 24-hour periods looking after elderly and infirm people. Their 24-hour work periods were meant to incorporate three hours of meal breaks and eight hours of sleep for 13 total work hours. Many of them filed lawsuits against their employers, arguing that state minimum wage laws required they be paid for 24 hours of work.
    - The Court of Appeals held in *Andryeyeva v. N.Y. Health Care, Inc.*, 33 N.Y.3d 152 (2019) that the law permitted the 13-hours-pay-for-24-hours-work arrangement, but the workers could still receive class certification, and thus litigate their claims together, if they did not receive the minimum time for sleep and meal breaks during their 24-hour shifts, or if their employers did not maintain adequate records of, or compensate them for, the hours they actually worked, and provide appropriate sleep facilities.
    - In a deeply problematic ruling, Justice LaSalle did not take the Court of Appeals up on its implicit instruction to allow the workers' class action to proceed on other grounds. Ignoring worker allegations that the Court of Appeals found persuasive, Justice LaSalle and his colleagues killed the case in one stroke by denying class certification, on factual grounds, *without permitting further fact-finding.* In doing so, LaSalle enabled continued massive wage theft from these vulnerable workers by their employers.

Workplace Injury

- In *Campanelli v. Long Is. Light. Co.*, 164 A.D.3d 1416 (2d Dept 2018), Justice LaSalle voted that utilities could not be held liable for the lead poisoning of their worker's child via the worker's clothing, even though the utility companies did not take the basic steps needed to ensure the worker's clothes were not exposed to lead. The Court held that violations of the Occupational Safety and Health Act (OSHA) regulations do not constitute negligence *per se* and that the plaintiff—the son of the employee—was not within the class intended to be protected by OSHA.

- In *Singleton v. New York City Employees' Retirement Sys.*, 208 A.D.3d 882 (2d Dept 2022), Justice LaSalle voted that a former corrections officer who sustained serious injuries to his neck and back during an altercation in a jail should be denied disability payments. In initially denying his application for benefits, the New York City Employees' Retirement System's Board of Trustees had acted on reports prepared by their Medical Board. However, as the dissent pointed out, there was strong evidence that the reports prepared by the medical board had misled the Board of Trustees on the causal connection between the altercation and the retiree's disabilities, unjustly depriving him of benefits.

Union-Employer Disputes

- In *Town of N. Hempstead v Civ. Serv. Employees Assn., Inc.*, 164 A.D.3d 1348 (2d Dept 2018), Justice LaSalle voted that a collective bargaining agreement's labor arbitration provision did not apply to multiple consecutive five-day suspensions because it only applied to suspensions that exceeded five days. By ruling that multiple consecutive five-day suspensions did not count as a suspension exceeding five days, the court prevented the employee and the union from enjoying the benefit of a protection for which they had collectively bargained.

Independent Contractor vs. Employee Status

Misclassification of employees as independent contractors is a major driver of wage theft in New York—and a major source of tax underpayment. The U.S. Department of Labor has observed that "misclassified workers are denied basic workplace protections including the rights to minimum wage and overtime pay, making it harder for them to support themselves and their families. Lower pay caused by misclassification reduces workers' purchasing power, which undermines the entire economy. Meanwhile, employers who comply with the law are at a competitive disadvantage when competing against employers who misclassify employees and pay them less than the law requires and fail to provide other employment-based worker protections." Misclassification also causes significant harm to federal and state treasuries in the form of unpaid employment taxes, unemployment insurance contributions, Social Security contributions, and more.

On the question of employee-vs.-independent-contractor classification, Justice LaSalle has taken stances that defer to company-supplied evidence that an employee is an independent contractor and ignore contradictory evidence of employee status. For example:

- In *Sanabria v. Aguero-Borges*, 117 A.D.3d 1024 (2d Dept 2014), Justice LaSalle voted to reverse a trial court and grant summary judgment to a company in a personal injury case, ignoring the plaintiff's evidence that he was an employee of the company. The decision is notable because it discusses the company's evidence that the defendant was an independent contractor but fails to so much as *mention* the plaintiff's contrary evidence that the defendant was in fact an employee of the company, let alone justify why that evidence was insufficient to raise a factual dispute for trial.

- The trial court in its opinion acknowledged the contrary evidence the plaintiff submitted and held that whether the defendant was an employee of the company was a question of fact for a jury to determine. The appeals court, in contrast, claimed that the plaintiff "failed to submit evidence raising a triable issue of fact as to whether [the defendant] was an independent contractor or an employee" of the company.
- *Sanabria* is significant because it suggests how Justice LaSalle might approach independent contractor misclassification cases in the employment context, deferring to companies' evidence of independent contractor classification, even at the summary judgment stage, and even when faced with contradictory evidence that a trial court concludes is sufficient to require a trial.

3. Justice LaSalle has stood in the way of New York State government efforts to protect full access to abortion, reproductive rights, and gender equality.

Matter of Evergreen Ass'n, Inc. v. Schneiderman

Summary:

- In 2017, LaSalle joined a ruling holding that parts of the Attorney General's investigation into anti-abortion crisis pregnancy centers were unconstitutional. Governor Hochul has signed multiple laws defending abortion, and crisis pregnancy centers are an issue of ongoing concern to Governor Hochul and Attorney General James.
- The Attorney General's brief in *Evergreen* explicitly argued that the investigation into the crisis pregnancy centers was required by the state's compelling interest in protecting "a woman's freedom to seek lawful medical services in connection with her pregnancy."
- But the LaSalle-joined majority opinion effectively rejected protecting the right to choose as a compelling state interest, instead only narrowly recognizing a state interest in preventing the unlicensed practice of medicine. LaSalle ruled this way five years before *Dobbs* overturned *Roe*—meaning that even when abortion was protected under the federal constitution, LaSalle voted as if it were not.
- At the time, anti-abortion groups knew the stakes of this litigation and articulated them publicly. At the beginning of the litigation, in 2013, an anti-abortion news website wrote, "Crisis pregnancy centers are under fire in the state of New York." Writing about a temporary stay in the litigation that LaSalle's decision would later uphold, other anti-abortion news site published articles with headlines like "Breaking News: Pro-Life Pregnancy Center Wins Stay Against Pro-Abortion Attorney General" and "Pregnancy Center Wins Another Battle Against New York's Bid to Shut It Down."
- Justice LaSalle's defenders have argued that the decision "has nothing to do with abortion." In fact, it has everything to do with abortion. The decision distorted the First Amendment to extend extraordinary and unprecedented immunity to the funders of organizations whose primary mission is to dissuade women from abortions. And its functional impact was to reduce access to clinical and social services that support pregnant people no matter their reproductive decisions.

- Across the country, abortion opponents are increasingly using state-level litigation to attack access to abortion and reproductive health services. In the face of such attacks, New Yorkers need a Chief Judge whose record demonstrates they will treat the defense of the right to abortion as a compelling state interest.

Full explanation:

This case concerned an investigation conducted by then-Attorney General Schneiderman into certain "crisis pregnancy centers" that attempt to prevent women from having abortions by masquerading as abortion clinics or medical service providers. Often religiously affiliated, these centers' primary aim is to divert women from having abortions, and they are known to be manipulative and coercive. Their practices include offering resources like pregnancy tests and diapers—conditioned on taking classes or workshops with religious messages—providing misinformation about abortion risks, advertising services that appear related to abortion and maternal care while not providing those services, and more. Many are not actually medical clinics, and thus behave as though they do not have any obligations to keep patient information private under HIPAA requirements, with disastrous implications and results. Patients seeking services from these centers are often low-income women and women of color looking for medical services and material support that can be expensive and difficult to receive, as crisis pregnancy centers vastly outnumber abortion clinics in New York State.

The Attorney General sought to investigate the centers for undermining "a woman's freedom to seek lawful medical services in connection with her pregnancy," including abortion, and for pretending to be licensed to practice medicine when they were not.

The Attorney General has legal authority to enforce statutes prohibiting the unlicensed practice of medicine, and had good-faith reason to believe the crisis pregnancy centers in question were practicing medicine without a license and misleading women into believing that they were being seen by a medical doctor. Everyone involved in this case agreed that the Attorney General had a reasonable basis to investigate this fraud.

As part of his investigation, the Attorney General issued a subpoena seeking, among other things, documents that would shed light on any deceptive activities and any persons who took part in creating such deceptions, including the corporations controlling the centers.

In this opinion, Justice LaSalle voted to strike all the parts of the subpoena that did not specifically deal with regulating the unlicensed practice of medicine. He and other judges did so by **rejecting any state interest in protecting, in the words of the Attorney General's brief, "a woman's freedom to seek lawful medical services in connection with her pregnancy, [which] is not only a strong, but a compelling state interest" (pp. 35-36). The LaSalle-endorsed opinion does not even mention this interest**, or mention protecting the rights of the patients seeking care from crisis pregnancy centers, which are too often not designed or equipped to support the needs of pregnant people regardless of what medical, social, or material support they seek. Instead, the only compelling state interest the opinion

acknowledged was the prevention of unauthorized medical practice and the health harms associated with unlicensed medicine—even though the Attorney General's office *specifically argued* that the state has a compelling interest in protecting women from misleading practices and facilitating their freedom to access lawful medical services related to their pregnancies. Because the majority refused to recognize any compelling state interest other than preventing the unlicensed practice of medicine, **the court effectively concluded that protecting access to abortion and reproductive health care was not a compelling state interest**.

Further, fraud is not protected First Amendment speech. But instead of allowing the Attorney General to finish its investigation to determine whether Evergreen was engaged in fraud, the LaSalle-endorsed opinion asserted that Evergreen had First Amendment protections regardless. The opinion, and its defenders, have asserted that the subpoena at issue would have impaired the crisis pregnancy centers' associational rights—without asking why a group of fraudulent businesspeople have a First Amendment right to avoid accountability for perpetuating what the Attorney General could reasonably investigate as fraud (a fact that, again, the LaSalle-joined majority opinion admits). Our law does not prohibit the Attorney General from conducting fraud investigations into potentially false representations no matter the target—even charitable fundraisers (*see generally Illinois, ex rel. Madigan v. Telemarketing Assoc., Inc.*, 538 US 600, 619 [2003])—so why should it prohibit such an investigation here? The LaSalle-endorsed opinion answered that question solely by explaining it was because the subject of the subpoena was "an ideologically driven organization with strongly held views on this controversial issue." **In other words, according to the opinion, anti-abortion centers get a special pass *because* they are anti-abortion.** That the crisis pregnancy center suffered harm from the Attorney General's investigation should not bear on whether the First Amendment gives it a right to avoid disclosure to a lawful—and important—state inquiry arising out of concrete evidence of fraud.

Most shockingly, the LaSalle-joined opinion quashed all parts of the subpoena requesting "materials disseminated on websites, radio, and television and Internet broadcasts"—the very documents containing the alleged false advertising that was the source of the investigation—because, apparently, disclosure of these *public-targeted materials* violated First Amendment associational rights *to privacy*. This conclusion can only follow from the premise that New York does not have an interest in protecting pregnant people's right to seek abortions, but instead only an interest in halting unlicensed medical practice.

Defenders of this opinion have claimed that it "is not about abortion"—an argument they can make only because the opinion is cursory and lacks detail to justify its conclusions. Some of its most troubling doctrinal moves become apparent only upon review of the appellate briefing. Our appellate courts have developed an unacceptable habit of not fully and fairly presenting the arguments and considerations that undergird them. The Court of Appeals has been roundly and properly criticized for resolving too many of its cases in short unsigned opinions. Though this opinion was signed, it omitted key arguments that the litigants advanced, presenting the decision as dealing only with certain issues, when the litigants in fact argued far more.

Nor can Justice LaSalle be excused in this case by the fact that he joined, rather than "wrote," the decision. Had Justice LaSalle not shared the regressive analysis of the majority, he could (and should) have issued a separate opinion disassociating himself from it. Indeed, his position would be far less concerning if he had merely acknowledged the compelling state interests at work here and explained why he felt constrained by precedent to curtail them. But **he chose the most regressive option instead—silently signing on to an opinion that not only rejected the compelling state interest in protecting abortion *but ignored its existence altogether***. It is no comfort to imagine a future Court of Appeals decision on which Judge LaSalle provides the critical fourth vote for the anti-abortion right on an opinion another judge authors.

Finally, the Second Department's decision required that the documents they did allow the Attorney General's office to request of Evergreen had to be individually reviewed by the Supreme Court in Westchester County. **By ruling as they did, Justice LaSalle and his colleagues substantively barred the Attorney General from collecting significant quantities of information.**

Abortion is protected by statute in New York State, and this year, the Legislature began the two-year process toward enshrining abortion rights in our state's constitution. The far-right has correctly concluded, therefore, that attacks on abortion in New York will most effectively come via the courts, particularly through federal law, given the far-right U.S. Supreme Court. In this case, Justice LaSalle distorted First Amendment precedent to quash important parts of a fraud investigation into crisis pregnancy centers in an opinion built on the premise that protecting women's reproductive health choices was not a compelling state interest. That is not consistent with New Yorkers' values, the demand that courts grant equal treatment to all, or Governor Hochul's campaign pledges to protect reproductive rights.

Other Notable Cases Involving Gender Equality

- *Reynolds v All Island Media. Inc.*, 2013 N.Y. Slip Op. 32583[U] (N.Y. Sup Ct, Suffolk County 2013): As a trial court judge, Justice LaSalle dismissed five of the seven causes of action in a gender discrimination complaint brought by a plaintiff whose coworker propositioned her repeatedly, making offensive comments and lewd gestures—and whose employer knew and did nothing, telling her that her harasser was "just being friendly" and that she "should not take his conduct personally."
- *Gadson v. City of New York*, 156 A.D.3d 685 (2d Dept 2017): Justice LaSalle and other judges reversed in part the trial court's denial of summary judgment to the defendant, the Department of Education. The plaintiff sued after a middle school janitor approached her seventh-grade daughter in the school lunchroom—where she was sitting with other students—pointed at her, and called her a "retarded little bitch." As the student attempted to flee, the janitor followed her, shouting, "What's wrong with you, you little bitch" and "suck your mother." The harassment caused the seventh grader's school work to suffer, gave her nightmares, and made her afraid to go out. Justice LaSalle's panel held that the trial court erred in denying defendant's motion for summary judgment as to the plaintiff's claim for intentional infliction of emotional distress, disregarding the janitor's

conduct as a mere "isolated incident of name calling." The court's holding—that no reasonable jury could possibly find that such threatening, misogynistic misconduct, by a school employee toward a seventh-grade girl, could constitute "extreme and outrageous conduct"—is deeply troubling. Students should be able to learn free from gendered harassment and abuse at school.

4. Justice LaSalle's regressive jurisprudence extends to consumer protection, immigrant justice, and civil liberties.

Consumer Protection

Singh v. City of New York

Summary:

- In a shocking decision, currently under review by the Court of Appeals, Justice LaSalle voted to allow big corporations to use boilerplate contracts to abandon the duty of good faith—the foundational duty of all parties to contracts, established by Chief Judge Cardozo, that sits at the heart of consumer protection law and most commercial contracting. Without the duty of good faith, big businesses can lie, cheat, and steal from consumers and small businesses with almost no legal recourse as a matter of contract law.
- Justice LaSalle joined a majority opinion that rejected a taxi cab medallion owner's lawsuit seeking compensation for the catastrophic crash in medallion values, which drove many drivers, often working-class immigrants of color, to deep debt and suicide.
- The majority did so by holding that a paragraph of obscure legalese had excused the City from acting with good faith—undermining the foundational requirement of all contracts in New York that, until this decision, was universally thought to be unwaivable.
- By permitting big corporations to waive the duty of good faith using boilerplate language, Justice LaSalle and his colleagues opened the floodgates to massive abuses by big businesses against small businesses and consumers.
- The decision also suggests a limited understanding of core contract doctrines, which is particularly harmful given the enormous importance of stable contract law doctrine to New York's commercial sector.

Full explanation:

The context of *Singh* is the ongoing dispute between owners of taxi cab medallions and the City of New York concerning the devaluation of the medallions in recent years. First, the drivers argued that the City fraudulently induced them into overpaying for the medallions. Second, the drivers argue that the City took bad faith actions to devalue the medallions after their purchase.

The *Singh* opinion is concerning because of the second part of the case, the claims that the City breached its contractual obligation to behave in good faith—known as the "implied covenant of good faith and fair dealing." The implied covenant of good faith and fair dealing is a foundational

rule of American law, developed in and central to New York State. The covenant is also vital to the protection of the rights of consumers, who rely on businesses to behave in good faith in the course of the contract (like car dealers or cable companies or any other business that writes contracts with fine print). It requires that "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 NY 79, 87 [1933]).

The implied covenant of good faith and fair dealing is fundamental to New York commercial law for both small and large businesses: Commercial parties rely every day on the enforceability of this implied promise to ensure that their counterparties don't lie, cheat, or steal their way out of their contractual promises. It is also essential for consumers, who often cannot read or understand the contracts they sign. No matter what a consumer signs, this doctrine says the businesses they're buying from must not deprive them of the benefits of their bargain (by, for example, selling them a defective product).

Justice LaSalle's opinion broke from this profoundly New York tradition. Regarding the contract between the taxi medallion owners and New York City, Justice LaSalle read one of the contract's clauses to effectively *exempt* the City from acting in good faith, **meaning the City or any business could give itself permission to engage in bad faith, fraudulent, or destructive acts—simply by inserting an innocuous disclaimer.**

This conclusion is radical, far beyond the bounds of this case. The covenant of good faith was universally believed to be compulsory, meaning parties cannot contract out of it. This is an essential consumer benefit, because the vast majority of consumer contracts include fine print that businesses have written and which consumers are ill-equipped to sift through. No New York appellate decision had ever held that this duty can be disclaimed, because doing so would undermine a fundamental tenet of contract law. Justice LaSalle's decision conflicts with the First Department in *Roli-Blue, Inc. v. 69/70th Street Assocs.*, 119 A.D.2d 173 (1st Dept 1986), and with the Second Department's own earlier decision in *Legend Autorama, Ltd v. Audi of Am., Inc.*, 100 A.D.3d 714 (2d Dept 2012). Even federal courts have asserted that "New York law does not allow parties to contract out of the implied covenant for good faith and fair dealing." *Shin v. Am. Airlines Grp., Inc.*, No. 17-CV-2234-ARR-JO, 2017 WL 3316129, *9 (E.D.N.Y., Aug. 3, 2017).

This is a rare case where the interests of consumers and big businesses are aligned: We cannot afford to meddle with the basic rules of contract law in the contract capital of the world. But that is precisely what LaSalle's panel did, all in an effort to extinguish claims against the City from taxi cab drivers driven to suicide over the destruction of the medallion market.

Whatever the outcome upon appeal at the Court of Appeals, the LaSalle-endorsed decision here—combining an apparent misunderstanding of well-established contract doctrine with an over-the-top effort to shield a large commercial actor from accountability—bodes poorly for future cases implicating consumers and small businesses.

Aybar v. Aybar

In *Aybar v. Aybar*, 169 A.D.3d 137 (2d Dept 2019), ***aff'd***, 37 N.Y.3d 274 (2021), Justice LaSalle voted to allow out-of-state corporations to avoid compensating victims of their faulty products, even though those corporations registered to do business in New York. In this specific case, Ford was held not to be within the jurisdiction of the New York courts despite doing enormous business in the state. This decision, later affirmed by the Court of Appeals' conservative bloc, made it even harder for New Yorkers who are victims of out-of-state wrongdoing to receive justice in New York courts. See Judge Wilson's dissent in *Aybar v. Aybar*, 37 N.Y.3d 274, for more on the harms of the decision.

Immigrant Justice

Matter of Keanu S.

Summary:

- In *Matter of Keanu S.*, 167 A.D.3d 27 (2nd Dept 2018), Justice LaSalle disregarded the plain text of a statute to facilitate more deportations at the height of the Trump Administration. Justice LaSalle joined a majority opinion denying a troubled teenager access to an immigration program for abused, neglected, and abandoned immigrant children on grounds that the child was a "juvenile delinquent"—even though Congress intended for such children to be included in the program as a public safety measure.

Full explanation:

The question in this case was whether Keanu, an immigrant teenager, would be qualified to enter a federal program designed for children who are in Family Court Custody due to their histories of violent behavior. Congress designed the system to allow these children to stay in the U.S. and in Family Court custody, reasoning that taking them away from the rehabilitative services of the Family Court support structure and subjecting them to immigration detention, exile to the U.S. border, or some other precarious state would be illogical and harmful as a matter of public safety.

The legal question in this case was straightforward. Was the child, in the words of the statutory text, "declared dependent on a juvenile court located in the United States" and was his "reunification with 1 or both of [his] parents not viable due to abuse, neglect, abandonment, or a similar basis found under State law"? As the dissent explained, the answer to this question was almost certainly yes as a factual matter: Family Court is our juvenile court in New York; the child was declared dependent on Family Court (precisely because he had been held to be a delinquent); and all parties agreed that he could not be reunited with his parents.

In federal statutory interpretation, whose rules govern here because the court was interpreting federal law, the U.S. Supreme Court has ruled repeatedly over the years in favor of respecting

the plain meaning of a statute's language, arguing that "the people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration" (*Bostock v. Clayton County, Georgia*, 140 S Ct 1731, 1749 [2020]).

Justice LaSalle and the majority flouted this foundational doctrine and substituted their ideas of what Congress must have meant—never mind what Congress actually said in the law—when fashioning immigration policy. Congress's intent was to prioritize services to help support migrant children with violent histories, not to deport them. And New York agrees with that reasoning, as evidenced by the state's Raise the Age legislation, which is premised on the ideas that children are children and that all of us are safer if we rehabilitate rather than incarcerate children. Instead, LaSalle and the majority denied Keanu access to a program Congress designed to ensure that immigrant children with criminal legal contact, both serious and minor, have access to rehabilitative services by using his history against him.

Worse, as the dissent explained, the LaSalle-joined opinion was "so broad that it would preclude neglected, abused, or abandoned children who have committed much less serious misconduct, including graffiti or marijuana possession, from [accessing the program]." Indeed, the dissent also noted that in so holding, the LaSalle majority broke with courts in California, Maryland, and Minnesota, which found that children who are placed in the custody of a state agency or department as a result of juvenile delinquency proceedings meet the dependency requirement.

In sum, the decision cavalierly disregarded the clear text of a statute—and the U.S. Supreme Court's decades-long bipartisan command about interpreting statutes—in order to make it easier to deport young people with histories of misconduct, rather than keep them connected to services meant to support their wellbeing and community safety.

Civil Liberties & Due Process Rights

Justice LaSalle has repeatedly taken positions out of step with his Appellate Division colleagues, disregarding New Yorkers' due process rights by affirming convictions even when injustice has clearly occurred.

- In *Matter of Tyler L.*, 197 A.D.3d 645 (2d Dept 2021), a case from last year, Justice LaSalle joined a 3-2 majority opinion finding that a 15-year-old child with an IQ of 74 could waive his *Miranda* rights just by answering a few yes-or-no questions, even though the American Psychiatric Association finds such an IQ range to indicate "significant limitation in intellectual functioning."
    - Despite a juvenile psychology expert's conclusion that the child "could not have made an intelligent, knowing, and voluntary waiver of his *Miranda* rights during police questioning" being undisputed at trial, LaSalle and his colleagues refused to accept this finding. Instead, they pointed to the 15-year-old's disability-related individual education plan, which described him as a "strong reader." The court's failure to recognize the difference between basic reading skills and comprehension of the legal ramifications of a *Miranda* waiver is deeply concerning, as is the court's rejection of the only expert testimony in this case, in order to substitute its own presumptions about intellectual functioning.

    - The dissenting justices stressed that the evidence showed that the child could only read and listen at a 4th-grade level and took issue with the majority's rejection of both the expert testimony and the child's educational records. The dissent further noted that the First Department came to the exact opposite conclusion just one year earlier, in *People v. Patillo*, 185 A.D.3d 46 (1st Dept 2020), which unanimously held that courts should take special care to ensure that an intellectually disabled child fully understands their rights.
- In *People v. Corbin*, 121 A.D.3d 803 (2d Dept 2014), Justice LaSalle joined a contentious 3-2 majority opinion approving a defendant's waiver of the right to appeal in a case about a warrantless search, even though the trial judge's explanation of this right was vague and contradicted the information on a written form. Instead of reaching the merits, the majority relied on a procedural outcome, claiming that the defendant had waived his right to make this appeal.
    - During the plea, the trial judge told the defendant that even if he signed the waiver form, some constitutional issues could still be appealed. The judge did not specify which ones and did not tell the defendant that his particular claim regarding the search might be barred. Moreover, the judge's explanation contradicted the written form that said the conviction was final. Despite this substantial confusion, Justice LaSalle and his colleagues concluded that the defendant knowingly waived his right to appeal the warrantless search.
    - This reasoning was rejected by even the conservative judges on the Court of Appeals a few years later. In *People v. Thomas*, Chief Judge DiFiore found that an appeal waiver cannot survive if the judge's colloquy gives a "confused message about the important rights being waived," which was precisely the scenario presented to Justice LaSalle in *Corbin*. The Court of Appeals also stressed that its decision adhered to its well-established precedent; in other words, contradictory and confusing appeal waivers should always have been rejected.
- In several other cases, Justice LaSalle's votes against defendants have been reversed by the conservative Court of Appeals. For example:
    - In *People v. Bridgeforth*, the Court of Appeals held that a prosecutor's discriminatory removal of "dark-colored women" from serving on a jury was unconstitutional. This decision overturned *People v. Bridgeforth*, 119 A.D.3d 600 (2d Dept 2014), a decision that Justice LaSalled joined, which had refused to find protections against discrimination on the basis of skin color in either the United States or New York Constitutions.
    - In *People v. Tsintzelis*, the Court of Appeals unanimously overturned *People v. Tsintzelis*, 153 A.D.3d 558 (2d Dept 2017), and *People v. Velez*, 164 A.D.3d 622 (2d Dept 2018), two LaSalle-endorsed opinions that restricted defendants' rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.
    - In *People ex rel. Negron v. Superintendent* (in an opinion written by Republican former prosecutor Michael Garcia), the Court of Appeals ruled that a state law that permits people to be held in prison past the end of their sentences must be narrowly construed, overturning the holding of *People v. Superintendent*, 180

A.D.3d 920 (2d Dept 2020), a decision that Justice LaSalle joined, which looked past the language of the statute to try and expand its reach.

In every dissent Justice LaSalle has ever written or joined, he dissented in favor of allowing unjustified arrests and maintaining wrongful convictions.

- In his appellate career, Justice LaSalle has written three dissents (detailed in the final section below) and joined two dissents written in the name of others (*People v. Gerald*, 197 A.D.3d 1324 [2d Dept 2021], and *People v. Nettles*, 186 A.D.3d 861 [2d Dept 2020]), all of which argued in favor of maintaining a criminal conviction. Dissenting is extraordinarily rare in the Second Department, because of the pressure of the court's enormous caseload. That Justice LaSalle has reserved his dissents exclusively to argue in favor of expanded incarceration underscores that these decisions are representative of his judicial philosophy. Justice LaSalle's dissents demonstrate a repeated willingness to tip the scales of justice against criminal defendants and in favor of convictions.
    - In *People v. Delvillartron*, 120 A.D.3d 1429 (2d Dept 2014), the majority held that police could detain and question a man who was sitting in a lawfully parked car a full avenue away from (and not within sight of) the location of a robbery.
        - The majority held that the police had enough reasonable suspicion that the man could have been involved as a getaway driver but that, without any other evidence that he attempted to resist or evade police, the police could not automatically arrest him, because merely "fumbl[ing] with keys in trying to place them in the ignition" is innocuous.
        - Justice LaSalle dissented alone, arguing that the police had full probable cause to arrest the man because fumbling of keys is suspicious enough to permit a full arrest. Justice LaSalle's dissent was not only anti-defendant; it also mischaracterized the majority's findings. He wrote that, "Contrary to the conclusion of the majority, in evaluating the totality of the circumstances, I do not believe the defendant's behavior can be viewed as 'innocuous.'" But the majority never said the *totality* of the defendant's behavior was innocuous. Instead, it said that the facts supported reasonable suspicion. What was innocuous in the majority opinion was, specifically, that the defendant fumbled his keys.
    - In *People v. Gerald*, 197 A.D.3d 1324 (2d Dept 2021), Justice LaSalle joined a dissent that refused to accept that a defendant wanted to withdraw his guilty plea, despite repeated statements that he was innocent and only pleaded guilty because his attorneys misled him about the law and the facts of the case.
        - The standard rule in such cases is to allow a withdrawal as a matter of course, and the majority held that the plea should be withdrawn because the evidence showed that the man had been led astray by faulty attorney advice.
        - Opinions like the one LaSalle joined here, a concurrence in part and dissent in part, are extremely rare in the Second Department. They entail the very serious time costs of dissenting (a major issue given the Department's notorious backlog) with none of the advantages of

facilitating further appellate review (since dissents can sometimes facilitate taking appeals, while concurrences generally can not). They are accordingly used only when justices feel extremely strongly about a legal issue. It is telling that Justice LaSalle believed this strong signal should be deployed to advocate to make it harder for a defendant to strike a fraudulently obtained guilty plea. As the Innocence Project has noted, a false guilty plea, whereby an actually innocent person pleads guilty to a crime they did not commit, is much more commonplace than many people realize. Of the more than 3,000 exonerations of innocent people that have been revealed since 1989, 1 in 5 pled guilty. Of the 319 people in New York who have been exonerated of crimes they did not commit, 23 of them pled guilty.

Other opinions endorsed by Justice LaSalle demonstrate reluctance to acknowledge the difficult circumstances facing many of the people who appear in New York's courts every day, displaying the same disdain for just outcomes that former Chief Judge DiFiore exhibited.

- In *Matter of Adonnis M.*, 194 A.D.3d 1048 (2nd Dept 2021), Justice LaSalle joined a 3-2 majority opinion approving a Family Court order that deprived a foster mother of custody over her children, despite the mother being without counsel at a key hearing.
    - The dissent meticulously explained the case history—including that the mother was abandoned by her lawyer before the key hearing—as well as the need to consider the best interests of the boy, who was bonded with his foster mother and was happy and healthy. Underlying the majority's callous opinion appears to be the sentiment that the case's long languishment in Family Court—likely due to the court system's massive underfunding—should be laid at the feet of a foster mother poorly served by her lawyer.
- In *Martucci v. Nerone*, 198 A.D.3d 654 (2nd Dept 2021), Justice LaSalle joined a majority decision affirming the imprisonment of a father during the COVID-19 pandemic for not paying $12,000 in child support, even though in a previous appeal the same court had cut the amount the father owed to $500, and even though the father had health conditions that made COVID-19 exposure deadly.
    - Justice LaSalle's insistence on the father's payment resulted in a particularly vulnerable person being sent to an overcrowded jail for 60 days during the first year of the COVID-19 pandemic, before vaccines were available. The opinion ended: "[C]ontrary to the father's contention, neither the existence of the COVID–19 pandemic nor his alleged health issues warrant reversal of the orders of commitment."

Adding a fourth former prosecutor to the Court of Appeals would entrench the worst aspects of the DiFiore Court and would diverge from the positive change that President Biden has brought to the federal judiciary.

- In nominating Justice LaSalle, Governor Hochul has taken an approach to judicial nominations opposite that of President Biden on the federal level. Biden's nominations

have emphasized not only racial and gender diversity, but also professional diversity, as more than half of his nominees so far have been public interest lawyers working in public defense, civil rights, consumer protection, labor, and similar areas. Governor Hochul had (and has) the opportunity to join President Biden in prioritizing racially and professionally diverse nominees to help lead our state court system into the future.

- The Court of Appeals is already half former prosecutors and currently has no judges with significant defense experience. **Its imbalance in professional experience has created an unacceptable pro-prosecution bias so severe even that the U.S. Supreme Court had to step in (8-1, with only Justice Thomas dissenting) because the Court of Appeals refused to protect the constitutional rights of defendants.**
- If Justice LaSalle is confirmed, he will be the third consecutive former prosecutor appointed to New York's highest court.

5. Justice LaSalle has written only six opinions under his own name in ten years as an appellate judge, none of which is influential or has developed the law.

Exceptionally Few Written Opinions

- Although Governor Hochul said she wanted to nominate "the caliber of individual that can be tapped for the Supreme Court someday," she selected a judge who has written exceptionally little, even compared to his peers on a court well known for avoiding detailed analysis.
  - Investigation of Justice LaSalle's appellate judicial record has uncovered only three majority opinions and three dissents that he has authored in the ten years he has been an appellate judge. Justice LaSalle's three named majority opinions came in *Matter of Masullo v. City of Mount Vernon*, 141 A.D.3d 95 (2d Dept 2016); *People v. Buyund*, 179 A.D.3d 161 (2d Dept 2019), *revd*, 37 N.Y.3d 532 (2021); and *Fisch v. Davidson*, 204 A.D.3d 104 (2d Dept 2022). His three dissents came in *People v. Delvillartron*, 120 A.D.3d 1429 (2d Dept 2014); *People v. Sanchez*, 148 A.D.3d 831 (2d Dept 2017), *revd*, 31 N.Y.3d 949 (2018); and *People v. Derival*, 181 A.D.3d 918 (2d Dept 2020).
  - It appears that Justice LaSalle wrote no signed opinions on the Appellate Term, the appellate court to which he was assigned from 2012 to 2014.
  - It is remarkable that a jurist with such a tiny body of written work over a decade-long appellate career could be praised as "a brilliant jurist."
- Though most Appellate Division opinions are unsigned memoranda written by staff attorneys implementing the directions of the judges on a given panel, most Appellate Division justices manage to write many more signed opinions than Justice LaSalle has. For example:
  - Court of Appeals Judge Shirley Troutman wrote 16 named opinions in her six years on the Appellate Division;

    - Justice Francesca Connolly, who appeared on the same Court of Appeals shortlist as Judge Troutman last year, and who has spent six years on the Second Department with Justice LaSalle, has written 14 named opinions in that time;
    - Judge Paul Feinman, who served five years on the First Department before his elevation to the Court of Appeals, wrote 16 named opinions; and
    - Justice Sonia Sotomayor, in dramatic contrast, wrote over 380 named opinions during her decade on a federal intermediate appeals court.
- Confirming a justice as the new Chief Judge who has written so little over a decade-long tenure will likely entrench the Court of Appeals' harmful trend toward writing fewer signed decisions.
    - In recent years, the Court of Appeals has been criticized both for hearing fewer and fewer cases and for increasingly relying on unsigned memorandum opinions, which leave important points in the law vague and fail to guide lower-court judges and future litigants. Appointing a new Chief Judge who has written so few decisions would only extend and exacerbate this problem.

Opinions Not Notable or Influential

- Justice LaSalle's supporters have not been able to point to any area of law that Justice LaSalle personally developed in his writing—despite his having over 5,000 opportunities to go beyond rubber-stamping a staff attorney memo and instead write a full opinion.
    - Given that he wrote only three majority opinions, the most that can be said about Justice LaSalle's personal writings from his ten years on the appellate bench is that he has sought to clarify, first, that under New York law certain kinds of municipal workers need not reapply for disability benefits upon retirement (*Matter of Masullo v. City of Mount Vernon*, 141 A.D.3d 95 [2d Dept 2016]) and, second, that sheltering in a beach house does not change residency for purposes of a high-dollar divorce (*Fisch v. Davidson*, 204 A.D.3d 104 [2d Dept 2022]).
- **Justice LaSalle's named opinions have been cited outside the Second Department only two times in ten years, indicating that other courts have not found his opinions persuasive or influential.**
    - Citations to an opinion indicate that other courts have found the opinion persuasive, and that the opinion did not simply apply binding authority or cover procedural history.
    - The only citations to any of Justice LaSalle's named decisions have come from *People v. Simmons*, 203 A.D.3d 106 (1st Dept 2022), and *SRI Eleven 1407 Broadway Operator LLC v. Mega Wear Inc.*, 71 Misc 3d 779 (Civ. Ct. 2021), both of which cited *People v. Buyund*. Only the former case cited *Buyund* substantively, while the latter merely cited it for a standard line about statutory interpretation.
- This is not surprising, since two of Justice LaSalle's three majority opinions are merely lengthy expositions of fairly obvious legal points—and one was later reversed by the Court of Appeals.

    - Two of Justice LaSalle's three opinions merely laid out facts and applied established law. His opinion in *Fisch v. Davidson* noted that the legal question at issue was already largely resolved by a prior Second Department case, and the opinion therefore merely applied facts to reach its conclusion. Similarly, his opinion in *Masullo v. City of Mount Vernon* simply laid out a variation on the facts set out in *Matter of McGowan v. Fairview Fire Dist*., 51 A.D.3d 796 (2d Dept 2008). As Justice LaSalle pointed out in the opinion, the facts in this case, barring one exception, were functionally identical to those in *McGowan*.
    - The third opinion, *People v. Buyund*, was reversed by the Court of Appeals in *People v. Buyund*, 37 N.Y.3d 532 (2021).
- Justice LaSalle has shown in multiple cases not to have a strong grasp of New York contract law.
    - See the "Consumer Protection" section above for a lengthy discussion of his opinion in *Singh v. City of New York*. Additionally, in *Ditech Fin., LLC v. Naidu*, 175 A.D.3d 1387, 1389 (2d Dept 2019), Justice LaSalle joined an opinion dealing with mortgagors in foreclosure, which the Court of Appeals reversed on a 6-1 vote, holding that this approach was "both analytically unsound as a matter of contract law and unworkable from a practical standpoint."
- Judges often write concurrences to reflect good-faith intellectual disagreements with their peers and to further develop the law. Justice LaSalle has not once concurred in an attempt to develop the law on a legal point in a decision that he otherwise agreed with.