IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-1042

KEVIN VERICKER,

Petitioner,

vs.

NORMAN C. POWELL,

Respondent.

On discretionary conflict review of a
decision of the Third District Court of Appeal

BRIEF OF PASTOR CARLOS ENRIQUE LUNA LAM AND IGLESIA CASA DE DIOS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI*

Pastor Carlos Enrique Luna Lam ("Pastor Luna") and Iglesia Casa de Dios (the "Church") are plaintiffs in a defamation suit against Univision Communications Inc. and related defendants ("Univision") arising out of statements falsely accusing Pastor Luna and the Church of laundering money and collaborating with a drug trafficker. In making these defamatory allegations, Univision parroted unbelievable statements of a source known by Univision to espouse paranoid conspiracy theories.

Pastor Luna and the Church filed an extensive Second Amended Complaint, which the trial court held stated a cause of action and was sufficient to defeat Univision's anti-SLAPP motion to dismiss. The Third District dismissed Univision's the petition for certiorari review. *Univision Communications, Inc. v. Lam*, 350 So. 3d 145 (Fla. 3d DCA 2022). However, Univision petitioned for discretionary review, and this Court stayed both that case (No. SC22-1495) and the trial court proceedings pending a decision in this case, *Vericker,* No. SC22- 1042.

Pastor Luna and the Church have an interest in participating in this case as *amici*, because their case against Univision will be governed by the outcome in this case. The lawyers representing Pastor Luna and the Church appeared in this Court in *In re Amendments to Florida Rule of*

Appellate Procedure 9.130, No. 22-1084 (Apr. 28, 2023) (the "Rule Change Case"), which involved issues closely related to those in this case, and in which the Court declined to amend Rule 9.130 to permit an immediate appeal of non-final orders denying anti-SLAPP motions. This Court, consistent with the arguments made by the undersigned, ruled that Rule 9.130 would not be amended and thus, effectively, denied defendants who lose anti-SLAPP motions the right to an immediate appeal.

SUMMARY OF ARGUMENT

This Court should approve the decision of the Third District Court of Appeal and hold that orders denying an anti-SLAPP motion for summary judgment, brought under section 768.295, Florida Statutes, are not reviewable by common law certiorari. The heart of Petitioner's argument—that the anti-SLAPP Statute, section 768.295, Florida Statutes (the "Anti-SLAPP Statute"), provides an immunity from suit—is fallacious. The Anti-SLAPP Statute does not confer any immunity, as was thoroughly vetted in a prior case (No. 22-1084) in which this Court declined to amend Rule 9.130 to permit immediate review of non-final orders denying anti-SLAPP motions, implicitly rejecting the immunity argument. Therefore, the remedy Petitioner seeks is not available. Indeed, the Legislature deliberately did not create any special procedural steps for anti-SLAPP motions, and the resulting Anti-SLAPP Statute does little else than to provide for expedited consideration in the trial court, and for prevailing party attorneys' fees. As with any order denying a motion to dismiss or motion for summary judgment, unless it falls within the list of appealable orders in Rule 9.130, review must await the conclusion of the case. And, the Anti-SLAPP Statute itself often requires some factual inquiry—whether the challenged suit was brought "without merit and primarily because [the defendant] has exercised the constitutional

right of free speech in connection with a public issue. . . .” Meaningful review of that issue requires further litigation and factual development in order to know if the statute was violated at the outset. Allowing immediate review in any case which alleges a cause of action arising out of a defendant’s words or expressive conduct, under the guise of the Anti-SLAPP Statute, would turn a useful Legislative effort to bar meritless suits that target speech into a vehicle to promote dilatory and meritless premature appellate review. The Third District (like the First, Fourth, and Fifth Districts) got it right. This Court should approve the decision below.

ARGUMENT

I. Introduction

This case is this Court's second look at the issue of whether Florida's unique Anti-SLAPP Statute, section 768.295, Florida Statutes, creates immunity from suit that justifies a massive departure from the traditional rule that parties who lose a motion to dismiss or summary judgment must defend their cases on the merits before appealing at the end of the case. In the first go-around, the Rule Change Case, this Court was presented with extensive briefing and argument from the Rules Committee and other interested groups on whether it would be advisable to allow immediate appeals as of right from denials of anti-SLAPP motions. That was the proper process to decide this issue: the Court had the relevant legislative history, caselaw, and policy arguments before it, heard oral argument, and **rejected** the proposed change to Rule 9.130.

Now, Petitioner seeks to obtain immediate appellate review via common law certiorari. Certiorari, however, is a very narrow doctrine that is not supposed to be the vehicle by which claims of statutory immunity are brought to the appellate courts. The same arguments that justified rejecting the rule change apply here, and with even more force because of the strong precedent and policies **against** expanding certiorari review.

In adopting the Anti-SLAPP Statute, the Legislature pursued a middle ground and rejected broad procedural and substantive law changes adopted by other states to deter SLAPP suits. Section 768.295 does not create immunity or a special motion to strike procedure. Instead, it is "a garden variety fee shifting provision," which seeks to deter SLAPP suits by exposing those who file them to an award of attorney's fees. *Lam v. Univision Communications, Inc.*, 329 So. 3d 190, 197 (Fla. 3d DCA 2021) (quoting *Bongino v. Daily Beast Co.*, 477 F.Supp.3d 1310, 1323 (S.D. Fla. 2020)). The Rule Change Case and this appeal (and the *amicus* brief filed by the media) represent attempts to obtain from this Court an immunity that the Legislature declined to grant. This Court should adhere to its recent efforts to limit the scope of certiorari review, and hold that appellate review of an order denying an anti-SLAPP motion must await final judgment.

II. This Court's decision in the Rule Change Case already determined that there is no justification for immediate appeals of Anti-SLAPP motions.

This Court already heard and effectively rejected Petitioner's arguments in the Rule Change Case. Responding to suggestions from certain judges, the Appellate Court Rules Committee proposed an amendment to Rule 9.130 to allow immediate appeals from non-final orders

denying anti-SLAPP motions. But this Court rejected the proposed rule change. *In re Amendments to Fla. R. App. Proc. 9.130*, 2023 WL 3151092 at *1 (Fla. Apr. 28, 2023).

Though the Rule Change Case concerned interlocutory appeal and not certiorari review, the arguments presented to and considered by this Court in that case and in this case are the same. Proponents of the rule change argued that the Anti-SLAPP Statute created an immunity from suit in cases that involved speech in connection with public issues. The same theory is being advanced by Petitioner in this case. And that theory has the same deficiencies now that it had when the Court rejected it in the Rule Change Case:

1. *The text of the statute does not confer immunity.* Subsection (4) of the Anti-SLAPP Statute sets forth the substance of the remedy granted by the statute, which includes: (a) the use of existing motion procedures (motion to dismiss or summary judgment), (b) an expedited hearing date in the trial court, and (c) an award of attorney's fees to the prevailing party.

Nothing in Subsection (4) (or elsewhere in the Anti-SLAPP Statute) creates an immunity. The Legislature grants immunity expressly, when it chooses to grant it. For example, a recently passed statute codified in the same part of the Florida Statutes as the Anti-SLAPP Statute contains such

an express grant: "An educational institution that has taken reasonably necessary actions in compliance with federal, state, or local guidance to diminish the impact or the spread of COVID-19 may not be held liable for, and **shall be immune** from, any civil damages, equitable relief, or other remedies relating to such actions." § 768.39(3)(a), Fla. Stat. (emphasis added); *see also id.* subsec. (6) (referring to "any aspect of the immunity under subsection (3)").

Second, the use of existing motion procedures (including summary judgment, which usually occurs after discovery and substantial litigation) and a bidirectional prevailing party attorney's fees provision do not suggest the intention to make a party immune from suit. Rather, this language suggests that some defendants will face substantial litigation before invoking the Anti-SLAPP Statute and may even be required to pay the plaintiff's attorney's fees. This is hardly a sign of immunity from suit.

2. *The potential availability of anti-SLAPP relief to any defendant in any case involving words or expressive conduct shows that the statute does not create immunity.* Immunities are based on the class of defendant—e.g., prosecutors, *Swope v. Kircher*, 783 So.2d 1164, 1167 (Fla. 4th DCA 2001), or judges, *Fuller v. Truncale*, 50 So.3d 25, 27-28 (Fla. 1st DCA 2010), or educational institutions for COVID decisions under section 768.39. Because

they are class-based, traditional immunity doctrines are straightforward to apply—is the defendant a prosecutor? Is the defendant an educational institution? There is a limited universe of defendants who can seek review of such a decision, based on the status of the defendant. Any appeal by a defendant outside that limited class can be quickly dismissed.

The same is not true for the Anti-SLAPP Statute, because it applies to **any** defendant in **any** suit, so long as the suit raises an issue of free speech in connection with a public issue. As such, any defendant in any case involving words, or even arguably expressive conduct, could claim that their case touches upon speech in connection with a public issue and that their motion to dismiss or for summary judgment should be immediately reviewed so that their alleged "immunity" is not compromised.

3. *There are strong policy arguments against characterizing the anti-SLAPP remedy as immunity.* The traditional rule that parties that lose a dispositive motion must litigate their cases in the trial court protects the role of appellate courts. The potential for court congestion is immense if immediate review were to be allowed, as it can be reasonably expected that civil defendants in any case involving words or arguably expressive conduct would seek certiorari review of orders denying their anti-SLAPP motions,

further delaying cases and driving up costs for their opponents while disrupting appellate courts' efficient disposition of an already hefty case load.

Additionally, the Legislature struck a careful balance when it passed the Anti-SLAPP Statute. The statute is a middle ground between no anti-SLAPP protection at all, and statutes in other states, such as California, which create a panoply of substantive and procedural rights, including a special motion to strike mechanism requiring a plaintiff to come forward with evidence at the start of the case, a stay of discovery, an immediate appeal, and a stay of the action pending appeal. *See* Cal. Code Civ. Proc. § 425.16(b)(2), (g) & (i); *Varian Medical Systems v. Delfino*, 106 P.3d 958, 967 (Cal. 2005). The Florida legislature's rejection of the California approach was deliberate. *See* HB135 Staff Analysis at 4 (2000) (early draft of statute contained discovery stay which was later removed).

Petitioner's argument that this case is somehow different because it concerns certiorari review and not direct appeal fails. The issues, the arguments, and the conclusion are all the same under either analysis. If the Anti-SLAPP Statute does not create immunity sufficient to amend Rule 9.130 to allow a direct appeal (as this Court effectively decided in the Rule Change Case), it would not create immunity in the certiorari context either.

Moreover, the same problem that vexed this Court in oral argument in the Rule Change Case—what to do with the anti-SLAPP's threshold requirement that an action be brought "**primarily** because such person or entity has exercised the constitutional right of free speech in connection with a public issue"—exists on certiorari review as well. An appellate court, on a cold record based solely on motion to dismiss papers raising legal issues, will be unable to determine whether a plaintiff's **primary reason** for filing the action was the defendant's exercise of free speech rights, because this is a subjective inquiry that requires discerning the plaintiff's mental state. As noted at the oral argument in the Rule Change Case, such a determination is more likely to be effectively reviewable by an appellate court at the **end** of a case, after a factual record is developed, than on an immediate review of an anti-SLAPP motion to dismiss based solely on the pleadings and motion papers, or on an incomplete record. This is just as true when the review is styled as certiorari review as it would be if a direct appeal were permitted.

None of the issues or arguments have changed from the Rule Change Case. The Anti-SLAPP Statute does not create immunity and immediate review of denials of anti-SLAPP motions would harm plaintiffs by delaying their suits and increasing costs. Consistent with this Court's decision not to amend Rule 9.130 to permit an immediate appeal of

anti-SLAPP motions, this Court should hold that review by certiorari is also not permitted.

III. The weight of district court authority supports the conclusion that there is no basis for certiorari review of Anti-SLAPP motion denials.

The media *amici* engage in a creative grouping of the cases interpreting the anti-SLAPP statute to posit that almost all of the lower courts allegedly believe there should be some sort of immediate appeal. This claim is misleading, as the First, Third, Fourth, and Fifth Districts have all followed this Court's precedent and held that certiorari review is **not** available.

The most representative lower court case is *WPB Residents for Integrity in Government, Inc. v. Materio*, 284 So.3d 555 (Fla. 4th DCA 2019). In *Materio*, the court rejected certiorari review, holding that "when public policy favors interlocutory review, the proper course is for the [Florida Supreme Court] to amend the non-final appeal rule, not to expand certiorari jurisdiction." *Id.* at 560. Importantly, *Materio* did **not** say that there should be a rule change—indeed, it went out of its way to say that there were competing policy arguments that this Court needed to resolve on the issue (*Materio* was decided before this Court took up the Rule Change Case). *Id.* (discussing multi-factor test set forth in *Keck v. Eminisor*, 104 So.3d 359, 365

(Fla. 2012)). The most the *Materio* court said was that this Court "might well" enact a rule change. *Id.* at 561. The main takeaway from *Materio* is: if there is a case to be made for allowing immediate review of a particular sort of interlocutory order, the process for allowing it is the rule change process where this Court can weigh all the competing policies and legal issues (which already happened here), **not** expanding certiorari review.

Numerous cases endorse this approach. *Bosshardt v. Drotos*, 351 So.3d 257, 257 (Fla. 1st DCA 2022) ("[W]e agree with the Fourth District's interpretation of Florida Supreme Court precedent that a rule change would be necessary to enable a nonfinal appeal of an order on an anti-SLAPP motion, *not a certiorari petition*.") (emphasis added); *Vericker v. Powell*, 343 So. 3d 1278, 1280 (Fla. 3d DCA 2022) ("we are reluctant to expand, via caselaw, the very limited scope of our certiorari jurisdiction" even in the face of "strong policy arguments"); *Johnston v. Fischer*, 2023 WL 5491475 at *1–2 (Fla. 5th DCA Aug. 25, 2023) ("Given the Florida Supreme Court's analysis and disposition in *Keck*, we fail to see how this court can review the order in this case by certiorari...Instead, it appears if review is authorized, it must be pursuant to an amendment to [rule] 9.130.") (footnote omitted).

Only the Second District disagrees. *Gundel v. AV Homes*, 264 So.3d 304, 311 (Fla. 2d DCA 2019). But *Gundel* (and its Second District progeny)

is wrong: it is wrong in its interpretation of the statute (which it says is similar to statutes granting immunity—it is not, for the reasons set forth herein), and it is wrong in its interpretation of certiorari (which should not be expanded, even in the face of immunity arguments, as seen in *Keck*). The other Districts and the majority of the cases got it right—the Rule Change Case was the proper forum for this Court to weigh all the arguments and policy considerations, and decide whether immediate appeals were appropriate; this Court decided they were not, and that should end matters here.

IV. The First Amendment does not require immediate appeals of motions to dismiss merely because the defendant asserts a First Amendment defense.

Petitioner conjures up a creative argument that because the First Amendment sometimes protects defamation defendants, and because in cases where a litigant's speech is being enjoined or chilled by a legal restriction the continuing violation of First Amendment rights is considered an irreparable harm that justifies equitable relief, therefore motions to dismiss that are denied also impinge First Amendment rights and are immediately appealable. This is both untrue as a matter of First Amendment doctrine and makes no theoretical sense.

The general rule is that a defendant who loses a motion to dismiss must litigate the case, and having to do so is not irreparable harm. *Citizens Property Insurance Corp. v. San Perdido Ass'n*, 104 So.3d 344, 354-55 (Fla. 2012). The cases have repeatedly held that this rule applies even when First Amendment defenses are raised. *See, e.g., Ernst v. Carrigan*, 814 F.3d 116, 119-22 (2d Cir. 2016) (because appeal of denial of anti-SLAPP motion raising free speech defense is not "completely separate from the merits", it is not appealable whether or not anti-SLAPP statute creates an immunity from suit). Thus, *Metabolic Research, Inc. v. Farrell*, 693 F.3d 795, 800 (9th Cir. 2012) held that a prior version of Nevada's anti-SLAPP statute did not give rise to immediate review: "an anti-SLAPP statute's aim of protecting its citizens' First Amendment rights can, in some circumstances, be adequately protected without recourse to immediate appeal." *Id.* (noted as superseded by statute in *Wynn v. Bloom*, 852 F. App'x 262, 262 n. 1 (9th Cir. 2021)).

To be clear, other cases have interpreted anti-SLAPP statutes as affording immediate review. *See, e.g., NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742 (5th Cir. 2014); *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1013-14 (9th Cir. 2013). But importantly, these cases interpret the collateral order doctrine and the anti-SLAPP statutes themselves—they do **not** hold that there is any First Amendment right to stop

litigation and immediately appeal an interlocutory order denying a motion. *See DC Comics*, 706 F.3d at 1013-14 (discussing legislative history of California statute).

Petitioner's argument relies on an entirely different principle—that a First Amendment violation caused by a legal restriction or injunction supplies the irreparable harm necessary **for injunctive relief**. *See Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) ("*RCD v. Cuomo*"). The facts of *RCD v. Cuomo* illustrate how that principle does not apply in this case. There, the state government imposed a restriction prohibiting certain church gatherings due to the risk of spreading COVID. The Court enjoined the regulation, holding that irreparable harm was shown because the petitioners could not exercise their First Amendment rights during the time the regulation was in place. In other words, if the state directly prohibits the exercise of First Amendment rights, that is irreparable harm.

None of that is true in this case. No statute or regulation prohibits Petitioner from speaking. The alleged First Amendment interest Petitioner is invoking is his claimed right to have his anti-SLAPP motion evaluated by appellate courts before trial. This is a claimed procedural right in litigation, not a First Amendment right to speak to the outside world. Defendants have

not faced cognizable irreparable harm just because they have to litigate their cases after losing a motion to dismiss.

None of the other cases cited by Petitioner apply here either. In *Williams v. Spears*, 719 So.2d 1236 (Fla. 1st DCA 1998), parents of a child challenged an order under a grandparent visitation statute, arguing that the statute was unconstitutional as invading their privacy interests. *Williams* held that the parents would suffer irreparable injury if they had to go through the proceeding before having the constitutionality question decided on plenary appeal because "the damage sought to be avoided by the parents would have already been done, that being inquiry into their private decision-making process concerning the best interest of their child." In *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So.2d 1162 (Fla. 3d DCA 1999), the lower court imposed a gag order while litigation was pending. If immediate appeal was not available, the litigants would suffer an ongoing legal prohibition on their right to speak about the case. Thus, both *Williams* and *Rodriquez* involved the deprivation of substantive First Amendment rights, as opposed to a procedural claim that a party should not have to pay litigation costs.

Petitioner next argues there is a supposed "chilling" effect. But what chilling effect? There is nothing inherent in a pending defamation lawsuit that chills a party from speaking to the public—indeed, defamation litigants

speak to the public all the time. Historically, newspapers or other publishers that are sued for defamation, continue publishing and speaking during the litigation; the fact that they have to defend the lawsuit does not chill them from speaking to the public. *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 674 (1996), which Petitioner cites in support of his "chilling" argument, concerns retaliation against government employees who exercise First Amendment rights (such retaliation can obviously chill speech). It does not apply here, and Petitioner has identified nothing that he wishes to say right now that he is being chilled from saying.

The case closest to Petitioner's First Amendment "chilling" argument is *Gadsden County Times Inc. v. Horne*, 382 So.2d 347 (Fla. 1st DCA 1980). In *Horne*, defendants argued that the determination that the plaintiff was a public figure in a defamation case (and thus would have to meet the "actual malice" First Amendment standard) should be reviewed on certiorari because, without a ruling on the issue, they were uncertain of plaintiff's status (as a public or private figure) and would need to restrain themselves from publishing further stories about plaintiff during the pendency of the case. The First DCA held that certiorari was not available: "Petitioners' claims that the free exercise of their First Amendment rights is jeopardized by their self-imposed prior restraints on further news publications about plaintiff during

trial do not, in our opinion, reach the level of material injury required for certiorari intervention. Petitioners cite no case, state or federal, in which these claims have formed the basis for the exercise of common law certiorari jurisdiction." *Id.* at 348. The First DCA in *Horne* was correct on the "chilling" issue. Even if a defendant decides to chill his own speech, certiorari review is not available based merely on the pendency of a litigation.

This is not to say that the Florida Legislature has not found that some suits are filed for the purpose of chilling First Amendment rights. It has, and it responded with the Anti-SLAPP Statute, which balances the rights of defendants and the rights of plaintiffs to prosecute meritorious suits without delay. In any event, that legislative intent is not First Amendment doctrine—the First Amendment does not confer a right on litigants to seek immediate appellate relief when they lose a dispositive motion.

V. Petitioner's brand new rule change proposal is no better than the one this Court already rejected.

Alternatively, Petitioner seeks to reopen the issue of whether Rule 9.130 should be amended. Petitioner's proposed rule change suffers from all the same defects as the previous rule change rejected by this Court.

The basic problems with the earlier proposed rule change were: (1) the Anti-SLAPP Statute does not create immunity from suit; (2) the statute

does not define a sufficiently narrow class of litigants who can obtain interlocutory appeals; (3) permitting interlocutory appeals would impose delays and costs on plaintiffs whose suits were already found to plead valid causes of action by a Florida trial court; (4) the proposed rule would reverse the presumption that merely facing litigation costs after losing a motion to dismiss is not a sufficient ground for an immediate appeal; and (5) the Anti-SLAPP Statute restricts relief to suits brought "primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue," a factual issue that is difficult for an appellate court to evaluate based on only a complaint and motion to dismiss papers.

Petitioner's proposed rule change suffers from all of the same defects. First, it says that an appeal will be available from a determination that "a party is not entitled to immunity" under the Anti-SLAPP Statute. However, for reasons previously stated, the statute does not create any such immunity.

Second, Petitioner's purported limitation of an appeal to a legal determination "based solely on constitutional defenses" is not a realistic restraint because, every defendant making an anti-SLAPP motion will claim they have "exercised the constitutional right of free speech in connection with a public issue" or another First Amendment right referenced in the Anti-SLAPP Statute.

Petitioner's proposed language to limit appeals to nonfinal orders "based solely on constitutional defenses" is also unworkable even from a defendant's perspective. Trial courts could easily prevent appellate review merely by articulating an alternate, non-constitutional, ground for relief. Indeed, it is unclear if even the order at issue in this case would be reviewable under Petitioner's proposed rule change, because the trial court's summary judgment order was based in part on common law, **non**-constitutional, doctrines of falsity and defamatory meaning. It would be pointless to create a right to appeal that a trial court could easily pretermit by providing an alternate ground of decision.

Third, Petitioner's proposed rule change would delay cases and increase plaintiffs' costs while (often meritless) appeals are prosecuted, and despite the fact the trial court has already determined that the action was not "without merit." Evidence could go stale and witnesses disappear, due to delays in discovery and litigation during the pendency of the appeal.

Finally, while Petitioner's proposed rule change would on its face limit itself to purely legal issues, the purpose clause of the Anti-SLAPP Statute inarguably presents a factual issue of whether the suit was brought "primarily" because of speech in connection with a public issue or other First Amendment right referenced in the statute. Under Petitioner's proposed

rule, it would be unclear whether appellate courts could review this factual issue; if not, any trial court could insulate its decision from review simply by finding that the case was not brought primarily for that reason.

Petitioner's proposed rule change thus solves none of the problems that caused this Court to reject the original proposed rule change, while introducing a new set of problems.

CONCLUSION

For the reasons stated herein, Pastor Luna and the Church respectfully request that this Court approve the decision below, disapprove *Gundel*, and hold that orders denying Anti-SLAPP motions are not immediately reviewable by common law certiorari.

Respectfully submitted,

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I HEREBY CERTIFY that the foregoing Amicus Brief in Support of Respondent was filed with the Court through the Florida Statewide E-Filing Portal, which will serve all counsel named below by e-mail service, this 2nd day of October, 2023:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font and word limit requirements of Fla. R. App. P. 9.045 and 9.370(b) in that it contains 4,506 words (fewer than 5,000) omitting those sections that need not be counted, and is prepared in Arial 14-point font

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