IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-1042
L.T. No. 3D22-645

KEVIN VERICKER,

Petitioner,

v.

NORMAN C. POWELL,

Respondent.

On appeal of a non-final order of Fourth District Court of Appeal

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

Rachel E. Fugate
Florida Bar No. 0144029
rfugate@shullmanfugate.com
Deanna K. Shullman
Florida Bar No. 514462
dshullman@shullmanfugate.com
Minch Minchin
Florida Bar No. 1015950
mminchin@shullmanfugate.com
100 South Ashley Drive, Ste. 600
Tampa, FL 33602
Telephone: (813) 935-5098

Counsel for Amici Curiae

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IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

Amici are news and media organizations that publish, broadcast, and stream information throughout the United States, including Florida, and each amicus is a frequent target of strategic lawsuits against public participation, or "SLAPPs".[1] Specifically, amici include CMG Media Corporation; Fox Television Stations, LLC; Gannett Co., Inc.; Graham Media Group, Inc.; Gray Media Group; Hearst Properties Inc.; The McClatchy Company, LLC; NBCUniversal Media, LLC; Netflix, Inc.; The New York Times Company; Nexstar Media Inc.; Orlando Sentinel Media Group; Penske Media Corporation; the Reporters Committee for Freedom of the Press; Scripps Media, Inc.; Sinclair Broadcast Group, Inc.; Sun Sentinel Media Group; TEGNA Inc.; Times Publishing Company; and WFOR-TV (collectively, "Amici").[2]

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[1] The exception is the Reporters Committee for the Freedom of the Press, which is not itself a target of SLAPPs but is instead a nonprofit association that works to further First Amendment rights.

[2] A complete description for each amicus appears in Amici's June 12, 2023, Unopposed Motion for Leave to File Amici Curiae Brief and NBCUniversal Media, LLC's July 14, 2023 Unopposed Motion to Join Amici Curiae Brief.

Although Amici take no position on the underlying factual issues of the instant case, they possess a strong interest in seeing that courts quickly dismiss SLAPPs—i.e., meritless suits that target First Amendment rights—and that a remedy exists when trial courts erroneously permit such suits to proceed.

SUMMARY OF THE ARGUMENT

SLAPPs are meritless legal claims intended to chill the exercise of First Amendment rights. While SLAPPs lack merit, the threat of expensive, protracted litigation can discourage civil discourse and chill expression. The pendency of a SLAPP—even an ultimately unsuccessful one—leads to self-censorship and diminishes the marketplace of ideas.

Trial courts are typically quick to both recognize and dismiss SLAPPs. But trial courts sometimes err, and SLAPPs occasionally stumble their way into discovery and beyond, wasting significant amounts of time and resources for everyone involved.

Yet more important even than the mere waste of time and money in such cases is the attendant and perpetual constitutional harm that hovers over the defendant as long as such suits linger. Fortunately, a mechanism exists to account for these types of

harms: certiorari appeal. Certiorari jurisdiction is designed specifically to modify or reverse interlocutory orders that cause irreparable harm. Because the filing and perpetuation of genuine SLAPPs cause irreparable harm, certiorari provides the perfect remedy for defendants who file denied anti-SLAPP motions and are faced with burgeoning, meritless, and speech-chilling lawsuits.

The issue before the Court is how to best account for the harm caused by SLAPPs. As shown below, Amici believe that certiorari jurisdiction properly protects SLAPP defendants' right to expeditious dismissal of constitutionally infirm cases without creating any additional burdens or harms.

ARGUMENT

Certiorari jurisdiction is reserved for specific, limited circumstances. *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So. 2d 812, 822 (Fla. 2004). Yet certiorari jurisdiction provides the critical function of giving parties a remedy when a trial court enters an interlocutory order that causes harm that cannot be remedied on appeal. *See Keck v. Eminisor*, 104 So. 3d 359, 364 (Fla. 2012).

Certiorari review is proper when the petitioner establishes three elements: "(1) the order departs from the essential

requirements of the law, and (2) results in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Id.* (cleaned up; citation omitted). Elements two and three, which collectively constitute the jurisdictional elements of certiorari review, are often described as the element of "irreparable harm." *See Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012).

While assessing these elements, courts have granted certiorari review "in numerous cases" to evaluate "whether [a party] was afforded the proper process through procedural compliance with the statutory requirements." *Williams v. Oken*, 62 So. 3d 1129, 1134 (Fla. 2011). *See, e.g.*, *Lantana Ins., Ltd. v. Thornton*, 118 So. 3d 250, 251 (Fla. 3d DCA 2013) ("when an insurer demonstrates that the pre-suit requirements of section 627.4136 have not been met, certiorari review of an order denying a motion to dismiss is appropriate").

And certiorari review is always proper if an "order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review." *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1163 (Fla. 3d DCA 1999). *See, e.g.*,

Russell v. Pasik, 178 So. 3d 55, 58 (Fla. 2d DCA 2015) ("The State's interference with a constitutional right—here, the right to privacy—would *ipso facto* result in an injury that cannot be corrected on postjudgment appeal.").

As explained below, because the filing and perpetuation of SLAPPs constitutes irreparable harm, the denial of an anti-SLAPP motion should, in the discretion of the intermediate appellate court, constitute one of the "few categories of non-final orders [that] qualify for the use of this extraordinary writ." *See Citizens Prop. Ins.*, 104 So. 3d at 351–52.

I. A SLAPP causes irreparable harm.

The Florida Legislature designed the State's anti-SLAPP law (Section 768.295, Fla. Stat.; the "Statute") to both discourage plaintiffs from filing lawsuits that chill First Amendment rights and provide defendants to such suits an expeditious resolution.

The Statute defines a SLAPP as a suit that is (a) without merit and (b) filed primarily because the defendant exercised a First Amendment right. The Legislature explained that the Statute is designed "to protect the right in Florida to exercise the rights of free speech in connection with public issues, and the rights to

peacefully assemble, instruct representatives, and petition for redress of grievances." § 768.295(1) Fla. Stat. Thus, the Statute prohibits anyone from filing suit against a defendant who "has exercised the constitutional right of free speech in connection with a public issue." *Id.* § 768.295(3); *see also id.* § 768.295(4) (providing a mechanism for recovery of "reasonable fees and costs fees incurred in connection with a claim that an action was filed in violation of this section").

Invoking the Statute triggers the "right to an expeditious resolution" of the SLAPP, § 768.295(4), Fla. Stat., requiring that a hearing on an anti-SLAPP motion be held "as soon as practicable." *Id.*; *see also id.* § 768.295(1) ("It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.").

The Legislature fashioned these provisions because it recognized that the very filing and perpetuation of SLAPPs cause irreparable, constitutional harm. And, in turn, each DCA to substantively address the issue has agreed with the Legislature's assessment that SLAPPs cause harm that cannot be remedied on plenary appeal.

A. A SLAPP's harm: the Legislature's view.

A SLAPP, by its nature, is intended to squelch constitutional rights. A prototypical SLAPP is "ostensibly brought to redress a wrong . . . but actually brought to silence one or more critics." Fla. S. Comm. on Jud. CS/SB 1312 (2015), Bill Analysis and Fiscal Impact Statement (March 11, 2015) at 1.

SLAPP plaintiffs seek to chill speech on matters of public concern by imposing legal costs on defendants to such an extent that all but the best-funded defendants are forced to abandon the case and refrain from exercising their constitutional rights in the future. *See WPB Residents for Integrity in Gov't, Inc. v. Materio*, 284 So. 3d 555, 558 (Fla. 4th DCA 2019) (explaining that SLAPPs "are an abuse of the judicial process and are used to censor, intimidate, or punish citizens, businesses, and organizations for involving themselves in public affairs") (citation omitted). As one court explained: "Persons who have been outspoken on issues of public importance targeted in [SLAPPs] or who have witnessed such suits will often choose in the future to stay silent." *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 2d Dept. 1994).

When the Legislature adopted the Statute in 2000,[3] it crafted the right to expeditious dismissal (alongside the fee-shifting mechanism) to both limit the number of SLAPPs filed and ensure that SLAPPs linger on dockets no longer than necessary. Thus, the express supposition of the Statute is that because plaintiffs can employ meritless litigation as a weapon to suppress speech, SLAPPs directly infringe on the constitutionally guaranteed rights of speech, press, assembly, and petition. *See* § 768.295(1), (3), Fla. Stat. (explaining that because SLAPPs "are inconsistent with the right of persons to exercise such constitutional rights," then "prohibiting such lawsuits . . . will preserve this fundamental state policy," i.e., "the constitutional rights of persons in Florida").

In sum, the black-letter text of the Statute establishes that SLAPPs constitute *per se,* constitutional harm, and that to mitigate the harm, courts must expeditiously dismiss SLAPPs.

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[3] The Legislature modified the Statute to its current form—with bi-partisan and near-unanimous support—in 2015. *See* Samuel J. Morley, *Florida's Expanded Anti-SLAPP Law: More Protection for Targeted Speakers*, FLA. B.J., Nov. 2016, at 18 (providing a legislative history).

B. A SLAPP's harm: the judiciary's view.

Although the district courts of appeal disagree about how to best address the harm caused by improperly denied anti-SLAPP motions, they concordantly affirm both that the harm exists and that some measure of interlocutory review is necessary to address it. The appellate courts fall into two groups: (a) those advocating for certiorari jurisdiction and (b) those advocating for an appellate rule amendment.

The first appellate court to substantively address the issue is in the first camp. In *Gundel v. AV Homes, Inc.*, the Second DCA explained that once a SLAPP is litigated through discovery and into the later stages of the suit, the speech-suppressing effect of the suit cannot be mitigated or undone—even after the appellate court ultimately recognizes that the suit was meritless. 264 So. 3d 304, 309–11 (Fla. 2d DCA 2019).

In accepting certiorari jurisdiction in *Gundel*—and again in *Baird v. Mason Classical Academy, Inc.*, 317 So. 3d 264 (Fla. 2d DCA 2021) and *Davis v. Mishiyev*, 339 So. 3d 449, 453 (Fla. 2d DCA 2022)—the Second District explained that "the harm that results from the court's improper denial of a motion to dismiss . . . is

precisely the harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation." *Id.* at 311.

Absent interlocutory appealability, the court continued, "the substantive right created by the Anti-SLAPP statute is illusory and the very policy that animates the decision to prevent SLAPP suits is frustrated such that the statutory protection becomes essentially meaningless." *Id.* (quoting *Keck*, 104 So. 3d at 365–66). Thus, the court concluded, "the statutory protection cannot be adequately restored once it is lost through litigation and trial." *Id.*

The second appellate court to address the issue was the Fourth DCA in *Materio*, which denied certiorari because it found the appropriate remedy was a rule change. 284 So. 3d at 561 (opining that the harm caused by improvidently denied anti-SLAPP motions "might well convince the Supreme Court to amend Appellate Rule 9.130"). But the *Materio* court was unequivocal about the underlying harm:

> The harm the statute seeks to prevent is the *filing* of the lawsuit for the purpose of suppressing the exercise of First Amendment rights. The longer such suits linger, the greater the expense and interruption of the lives of the targets, the greater the threat of financial liability, and the greater the chill on the exercise of constitutional rights. When meritless lawsuits are not expeditiously disposed of,

> the SLAPP target will suffer precisely the sort of harm that the statute was designed to prevent.

Id. (quotation marks omitted).

The only other appellate court to substantively address the issue is in the instant case, in which the Third DCA sided with *Materio* regarding mandatory versus discretionary appealability.[4] *See Vericker v. Powell*, 343 So. 3d 1278, 1281 (Fla. 3d DCA 2022). Yet the entire *Vericker* panel agreed that it "is hard to conceptualize a procedure in which the legislature has created a substantive right to be free from meritless litigation—rooted in public policy meant to protect constitutional rights—while not allowing for interlocutory review of whether that substantive right is being violated." *Id.* at 1281 (Gordo, J., specially concurring, joined by Fernandez, C.J. and Scales, J.).

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[4] Except the cases cited above, the other DCA opinions to touch on the issue, without a substantive analysis, include *Univision Communications Inc. v. Lam*, 350 So. 3d 145 (Fla. 3d DCA 2022); *Bosshardt v. Drotos*, 351 So. 3d 257 (Fla. 1st DCA 2022); *Geddes v. Jupiter Island Compound, LLC*, 341 So. 3d 353 (Fla. 4th DCA 2022); *Novick v. Mango's Tropical Cafe, LLC*, 347 So. 3d 472, 473 (Fla. 3d DCA 2022); and *Holness v. Cherfilus-McCormick*, 355 So. 3d 939, 940 (Fla. 4th DCA 2023).

Thus, each appellate court to opine on the matter has recognized that the Statute, when properly invoked, engenders constitutional considerations that aren't present in ordinary circumstances and requires some form of interlocutory review. This is because the specific constitutional harm that the Statute was designed to address—meritless litigation that treads on First Amendment rights—cannot be remedied after discovery, additional motion practice, or trial. *Cf. Bongino v. Daily Beast Co., LLC*, 477 F. Supp. 3d 1310, 1324 (S.D. Fla. 2020) (granting an anti-SLAPP motion that both dismissed the suit without prejudice and stayed discovery because of the "powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation") (citation omitted).

C. A SLAPP's actual, constitutional harm.

It is not merely the "continuation of litigation and any ensuing costs, time, and effort in defending such litigation," *Rodriguez v. Miami-Dade Cnty.*, 117 So. 3d 400, 405 (Fla. 2013), that constitutes irreparable harm. It's also the chilling effect that such lawsuits foist on SLAPP defendants while they attempt to exercise their First Amendment rights.

The harm is not hypothetical. As the Legislature noted, SLAPPs "are typically dismissed as unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their duties." 2000 Fla. Laws Ch. 00-174, at 1. This has been Amici's experience. Fortunately, many SLAPPs are expeditiously dismissed.[5] Yet too often, SLAPPs slip past dispositive motions.

In *Davis v. Mishiyev*, for example, the trial court denied a radio station's anti-SLAPP motion via a single-page order that provided no analysis. 339 So. 3d at 451, 453–54 (granting certiorari petition

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[5] Amici have been party to many SLAPPs, most of which have been quickly dismissed—and, when appealed, affirmed. *See, e.g.*, *Rigmaiden v. NBCUniversal Media LLC*, 2019 WL 10252763 (Fla. 11th Jud. Cir. Dec. 31, 2019), *aff'd*, 307 So. 3d 918 (Fla. 3d DCA 2020) (dismissing a defamation suit because the at-issue statements merely re-stated public records); *Elias v. Frontier Media Group, Inc.*, 2021 WL 6145501 (Fla. 1st Jud. Cir. Dec. 2, 2021), *aff'd*, 353 So. 3d 572 (Fla. 1st DCA 2023) (dismissing a defamation suit because the plaintiff had already filed the same lawsuit—and lost—in Oklahoma); *Smikle v. WFTV, Inc.*, 2016-CA-006322 (9th Jud. Cir. Oct. 20, 2017), *aff'd*, 266 So. 3d 856 (Fla. 5th DCA 2019) (dismissing a defamation suit because the at-issue statements were non-actionable opinion); *Boling v. WFTV, LLC*, 2018 WL 2336159 (Fla. 9th Jud. Cir. Feb. 28, 2018), *aff'd*, 274 So. 3d 392 (Fla. 5th DCA 2019) (dismissing a defamation claim because the plaintiff failed to comply with Section 770.01, Florida Statutes).

challenging denial of anti-SLAPP motion). Yet on remand from the Second District, the trial court properly reviewed the defamation suit and found it entirely meritless for numerous reasons, such as the fact that the at-issue statements weren't defamatory, and most of the statements were barred by Florida's statute of limitations and not noticed under Florida's pre-suit notice statute. *Mishiyev v. Davis*, 20-CA-8301, Order Granting Defendants Dispositive Ant-SLAPP Motion and Dismissing First Amended Complaint with Prejudice (Fla. 13th Jud. Cir. May 20, 2023).[6]

Absent discretionary review, the *Davis* defendants would have faced unknown months of frivolous litigation and wasted considerable funds to protect their constitutional rights regarding—as the trial court ultimately determined—two decades' worth of typical banter between radio personalities. *See id.*

But where discretionary review is unavailable, SLAPP defendants face unnecessary litigation and, more importantly, continued chilled expression. As noted by Judge Gross's *Materio*

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[6] Copies of all circuit court orders not otherwise available in Westlaw are attached as an Appendix to this brief.

concurrence, for example, the trial court improperly denied the anti-SLAPP motion because the defendant's statements about the plaintiff-politician were based on public records and not published with actual malice. *Materio*, 284 So. 3d at 564 (Gross, J., concurring). The plaintiff in *Materio* ultimately withdrew the suit, but not until after discovery, 12 months after the Fourth District issued its opinion. *Materio v. WPB Residents for Integrity in Government, Inc.*, 4D2O-1222 (Fla. 4th DCA Oct. 30, 2020)

The difference between *Mishiyev* and *Materio* is certiorari appealability. Where it's unavailable, SLAPP defendants are forced to continue engaging in meritless suits that stifle their constitutional rights—frequently accompanied by expensive and protracted discovery—when the cases have no business remaining on the docket. Without discretionary review, SLAPP defendants must endure the very constitutional harm the Statute was designed to prevent.

II. Discretionary certiorari review is appropriate for the denial of anti-SLAPP motions.

The Statute presents a clear articulation of the harm caused by SLAPPs, a clear policy preference for preventing SLAPPs, and a clear procedure for quickly dismissing SLAPPs. *C.f. Univ. of Florida Bd. of Trustees v. Carmody*, SC2022-0068, 2023 WL 4359498, at *7 (Fla. July 6, 2023) (explaining that "the Legislature may generally limit what tort claims can be brought at state law, and how they are brought. . . . Where a statute does not violate the federal or state Constitution, the legislative will is supreme") (citations omitted).

When analyzing statutory directives, this Court is rightly sensitive to the Legislature's intent by providing interlocutory review of denied dispositive motions for statutorily disfavored lawsuits. Indeed, in establishing interlocutory appealability for denied motions to dismiss medical negligence suits, the Court noted that "[i]t is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims." *Compare id.* (quoting § 766.201(2), Fla. Stat.), *with* § 768.295(1), Fla. Stat. ("It is the intent

of the Legislature that [SLAPPs] be expeditiously disposed of by the courts.").[7]

The perpetuation of genuine SLAPPs violates the intent of the Legislature to expeditiously dispose of such claims and constitutes *per se* constitutional, irreparable damage. Thus, wrongly denied anti-SLAPP motions present a toothpaste-out-of-the-tube harm not found in ordinary interlocutory orders. Because the Statute protects the exercise of constitutional rights, the harm from continued litigation—though insufficient in other contexts—justifies interlocutory review. *See Rodriguez*, 734 So. 2d at 1163. *See also Carmody*, 2023 WL 4359498, at *7 ("While the burden of defending against litigation under ordinary circumstances does not constitute

[7] Analyzing similar statutory language as that of the Statute, the Court in *Carmody* amended Rule 9.130 to provide automatic medical negligence appealability. Amici humbly suggest that if the Court interprets a similarly worded statute as demanding that medical malpractice defendants receive interlocutory review as a matter of right, the Court should certainly permit SLAPP defendants with at least the opportunity for limited, discretionary review—especially in light of the Constitutional superiority of the interests involved.

irreparable harm, . . . the Legislature elected to treat differently the burden of defending against meritless medical negligence claims.").[8]

Despite the universal recognition that SLAPPS pose real constitutional harm, appellate courts have been reluctant to exercise certiorari jurisdiction because of this Court's general preference for amending the appellate rules instead of expanding certiorari jurisdiction when public policy favors interlocutory review. *See Materio*, 284 So. 2d at 560.

Earlier this year, however, the Court declined to adopt a proposed amendment to Rule 9.130 that would have automatically rendered denied anti-SLAPP motions immediately appealable. *In re Amendments to Florida Rule of Appellate Procedure 9.130*, SC2022-1084, 2023 WL 3151092 (Fla. April 28, 2023). At oral argument, the Court expressed concern that compulsory interlocutory review could incentivize dilatory, frivolous, or repetitive anti-SLAPP

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[8] At least 16 other states currently provide express interlocutory appealability for denied anti-SLAPP motions. *See* Dan Greenberg & David Keating, *Anti-SLAPP Statutes: A Report Card*, Institute for Free Speech (Feb. 28, 2022), https://www.ifs.org/anti-slapp-report/#_ftn5.

motions. Fla. S. Ct., *Oral Arguments*, YouTube (April 5, 2023), https://youtu.be/94c-gs4dUIc.

Given the Court's concerns, the denial of an anti-SLAPP motion presents a exceptional circumstance where—because the harm extends beyond mere public policy—the exercise of certiorari jurisdiction is proper. This approach conveys distinct advantages over compulsory appealability, which would leave no room for appellate discretion.[9] First, appellate courts can quickly determine if a lawsuit is an actual SLAPP. If so, the harm from the pendency of such suits is not merely a public policy concern; it engenders a constitutional harm that warrants interlocutory review. Second, the

[9] Discretionary review would not strain appellate courts' dockets and resources. Although SLAPPs are common for Amici, they do not clog the court system. To Amici's knowledge, the Second DCA has reviewed denied anti-SLAPP motions twice in the four years since *Gundel*. The court in *Baird*, 317 So. 3d at 264, affirmed the denial, and the court in *Davis*, 339 So. 3d at 453, reversed the denial. And the early disposition in *Davis* saved extensive judicial resources in the trial court and provided a more efficient review on appeal. *See* Fla. S. Comm. on Jud. CS/SB 1312 (2015), Bill Analysis and Fiscal Impact Statement (March 11, 2015) at 3 (explaining that "quicker, more efficient resolution of SLAPP suits . . . may reduce costs to the courts").

fact that SLAPPs lack merit more than offset any potential harms from the exercise of such review.

A. District courts of appeal are well equipped to identify SLAPPs.

Amici's proposal is modest: freeing DCAs to grant certiorari when, in the court's discretion, the petitioner can show irreparable harm: i.e., that the putative SLAPP is, in fact, a SLAPP. District courts—which evaluate irreparable harm on a near-daily basis—are well equipped to determine the threshold issue. As one court explained,

> [w]hen we receive a petition for common law certiorari to review a nonfinal order, we will initially study it only to determine if petitioner has made a *prima facie* showing of the element of irreparable harm. At this stage we will make no determination as to whether the order departs from the essential requirements of law. If petitioner has failed to make a *prima facie* showing of irreparable harm, we lack jurisdiction and will enter an order dismissing the petition.

Bared & Co., Inc. v. McGuire, 670 So. 2d 153, 157 (Fla. 4th DCA 1996).

Compulsory appealability would have mandated a full interlocutory review whenever a defendant affixed an anti-SLAPP label on its dispositive motion, regardless of the motion's merits. But under discretionary review, DCAs are freed to first ascertain

whether the suit is a SLAPP. This is not overtly difficult, as all SLAPPs feature the same two, easily ascertainable elements: (a) the suit was filed primarily because of constitutionally protected activity, and (b) the suit is meritless. *See* § 768.295(3) Fla. Stat.

The threshold element is whether the suit was brought primarily because a defendant "exercised the constitutional right of free speech in connection with a public issue," which the Statute defines, in relevant part, as "any written or oral statement that is protected under applicable law and is made . . . in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work." § 768.295(2), Fla. Stat. During oral arguments on the proposed rule change, this Court questioned whether appellate courts may struggle with this determination if the anti-SLAPP motion was brought as a motion to dismiss, without a factual record. *See* Fla. S. Ct., *Oral Arguments*, YouTube (April 5, 2023), https://youtu.be/94c-gs4dUIc.

Yet courts applying the statute have not experienced any such difficulties because ascertaining whether a plaintiff filed suit "primarily because" of a defendant's constitutionally protected

activity is typically apparent from the face of the complaint. Courts simply ask whether the defendant's allegedly actionable conduct falls within one of the enumerated categories of protected activity and, if so, whether the suit could have been filed in the absence of the protected activity. *See* § 768.295(2)(a), Fla. Stat. (listing protected types of expression). *See also* Morley, FLA. B.J., Nov. 2016, at 22 (explaining why the "primarily because of" language of the Statute is determined by looking at the "act of the defendant [that] is being challenged by the plaintiff[,] as revealed from reviewing primarily the complaint but also papers filed in opposition to the anti-SLAPP motion") (cleaned up).

Thus, the because-of-protected-expression inquiry is straightforward: assuming the defendant's activity is enumerated within the Statute, would the plaintiff's claim exist but for the defendant's constitutionally protected activity? Courts have no trouble with this determination. *See, e.g.*, *Loomer v. NY Magazine*, 19-CA-015123, 2021 WL 1748011, at *3 (Fla. 15th Jud. Cir. April 29, 2021) ("[This action seeks] redress for comments published by a journalist in connection with public issues. Thus, by definition, Plaintiff's claim implicates [defendant's] First Amendment rights . . .

[and was filed] primarily because [defendant] exercised its constitutional right to free speech in connection with a public issue"); *Carrol v. Gulf Breeze Police Dept.*, 18-CA-5688, Order of Dismissal Granting Dispositive Anti-SLAPP Motions, at *5 (Fla. 12th Jud. Cir. Sept. 19, 2019) ("It is clear to the court from the allegations in the second amended complaint and the record that the Plaintiff's claims are based primarily on protected news reports."), *aff'd*, *Carroll v. DeLeon*, 2D19-3897, 2021 WL 2224356 (Fla. 2d DCA June 2, 2021). *See also Klayman v. Politico LLC*, 50-2020-CA-011868, 2022 WL 1134304, at *5 (Fla. 15th Jud. Cir. March 22, 2022); *Mishiyev*, 20-CA-8301, Order at *6; *Martin v. Heidenreich*, 53-2021-CA-002521, 2022 WL 18781716, at *4 (Fla. 10th Jud. Cir. Dec. 12, 2022).[10]

When this threshold inquiry is met, the harm—as described by the Legislature, acknowledged by the appellate courts, and

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[10] Federal courts, too, have experienced no problems analyzing the Statute's "primarily because" element. *See, e.g.*, *Parekh v. CBS Corp.*, 618CV466, 2019 WL 2744552, at *1 (M.D. Fla. July 1, 2019), *aff'd*, 820 Fed. App'x 827, 831 (11th Cir. 2020); *Bongino*, 477 F. Supp. 3d at 1322; *Mac Isaac v. Twitter, Inc.*, 557 F. Supp. 3d 1251, 1261 (S.D. Fla. 2021).

explained above—is not merely a public policy issue or a concern about the pendency of generic litigation. It's a constitutional harm that warrants the exercise of certiorari.

B. The added layer that SLAPPs lack merit provides safeguards to quickly dispose of frivolous appeals without any attendant delay.

The latter element of a SLAPP—lack of merit—dovetails with the first element of certiorari jurisdiction: that the order below departed from the essential requirements of law. *See Keck*, 104 So. 3d at 364. In Amici's experience, SLAPPs typically feature obvious deficiencies. *See* Footnote 5, *supra* (citing to SLAPPs that sought defamation liability, for example, regarding non-actionable opinions and publications based on public records); *see also Mishiyev*, 20-CA-8301, Order at *1–8 (featuring a defamation suit that survived an anti-SLAPP motion even though, for the bulk of the statements, the plaintiff filed suit more than 10 years after the statute of limitations expired).

And DCAs are highly accustomed to applying *de novo* review to trial courts' rulings. There's little more natural for an appellate court than analyzing whether the trial court erred—which is all the court must do to simultaneously determine both whether a lawsuit

lacked merit and whether the trial court departed from the essential requirements of the law. Evaluating whether the suit is meritless conveys the additional benefit of mitigating against frivolous or duplicative anti-SLAPP appeals: if the underlying lawsuit is meritorious (i.e., not a SLAPP), the DCA can simply dismiss the petition.[11] *See Bared & Co.*, 670 So. 2d at 157.

This analysis also protects against any unwarranted delays from potential appeals of frivolous anti-SLAPP motions. Because the Statute contains no stay provision, cases appealed via certiorari proceed concurrently at the trial court unless a stay is expressly sought and granted. *See* Fla. R. App. P. 9.310(a). So if a court fears that a suit has merit or an anti-SLAPP motion is filed in bad faith, the court can simply deny a stay, eliminating any delay.

In sum, the likelihood of abuse or delay caused by discretionary appeal is very low, yet the harm caused by allowing

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[11] In *Baird*, the court accepted jurisdiction and found that the trial court did not depart from the essential requirements of law because the suit was meritorious. *Baird*, 317 So. 3d at 268. The court could have also declined to exercise jurisdiction because the suit was not a genuine SLAPP. Either way, the court was able to quickly dispose of the petition.

SLAPPs to continue is significant and universally recognized. Thus, the DCAs are perfectly positioned to exercise certiorari jurisdiction and ascertain whether trial courts wrongly permit SLAPPs to proceed.

CONCLUSION

The Legislature designed the Statute to expeditiously dispose of meritless, speech-infringing lawsuits. And courts unanimously agree that the filing and perpetuation of SLAPPs cause the harm the Statute was designed to prevent. Because certiorari exists to account for irreparable harm, and because permitting certiorari will not engender any additional harms, Amici respectfully ask the Court to let certiorari perform its intended function by giving appellate courts discretion to review wrongly denied anti-SLAPP motions.

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Respectfully submitted,

SHULLMAN FUGATE PLLC

/s/ Rachel E. Fugate
Rachel E. Fugate
Florida Bar No.: 0144029
rfugate@shullmanfugate.com
Deanna Shullman
Florida Bar No.: 514462
dshullman@shullmanfugate.com
Minch Minchin
Florida Bar No.: 1015950
mminchin@shullmanfugate.com
100 South Ashley Drive, Suite 600
Tampa, FL 33602
Telephone: (813) 935-5098

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document has been served through the Court's e-filing system this 24th day of July 2023, to:

For Petitioner:
Dwayne Robinson
Kozyak Tropin &
Throckmorton LLP
2525 Ponce de Leon Blvd.
Miami, FL 33134
drobinson@kttlaw.com
(305) 372-1800

Faudlin Pierre
600 SW 4th Ave
Fort Lauderdale, FL 33315-1012
fplaw08@yahoo.com
305-336-9193

For Respondent:
Andrew Feldman
Feldman Kodsi,
9100 S. Dadeland Blvd, Suite 1500, Miami, FL 33156
AFeldman@FeldmanKodsi.com
(305) 445-2005

/s/ Rachel E. Fugate
Rachel E. Fugate
Florida Bar No.: 0144029

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with the font type and volume limitations established in Florida Rules of Appellate Procedure 9.045 and 9.210. I am relying upon the word-count function of the word-processing system (Microsoft Word) used to prepare the brief, which indicates that approximately 4,900 words appear in the brief, plus the portions excluded from the word count pursuant to Rule 9.045(e). The brief is typed in 14-point, double-spaced, Bookman Old Style Font.

/s/ Rachel E. Fugate
Rachel E. Fugate
Florida Bar No.: 0144029