**No. SC2022–1042**

# In the Supreme Court of Florida

KEVIN VERICKER,
*Petitioner*,
v.

NORMAN CHRISTOPHER POWELL,
*Respondent*.

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL
DCA NO. 3D22–645

## INITIAL BRIEF FOR PETITIONER

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## STATEMENT OF THE ISSUES

1. Whether certiorari jurisdiction exists to review the improper denial of a motion for summary judgment submitted under section 768.295, Florida Statutes, which requires the expeditious resolution of meritless lawsuits filed primarily to chill First Amendment rights.

2. Whether the trial court's order denying summary judgment departed from the essential requirements of law by failing to employ the actual malice standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for defamation claims brought by public officials.[1]

3. Whether the trial court's order denying summary judgment complied with Florida Rule of Civil Procedure 1.510 when the order merely made the conclusory statement that "there are genuine issues of material fact in dispute."

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[1] Petitioner identified Issues 2 and 3 in the Statement of Issues contained in his Brief on Jurisdiction. *See* Fla. R. App. P. 9.120(f).

## INTRODUCTION

The State of Florida and a majority of states enacted measures expressly designed to curb infringement of First Amendment rights enshrined in the Constitution. "The framers designed the Free Speech Clause of the First Amendment to protect the 'freedom to think as you will and to speak as you think.'" *303 Creative LLC v. Elenis*, 600 U.S. —, — (2023) (slip op. at 6). "They did so because they saw the freedom of speech both as an end and as a means. . . . [I]f there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with 'an uninhibited marketplace of ideas.'" *Id.* at 6-7 (citations omitted).

But historically, litigants have used the organs of government—namely, the judicial system—to impair that marketplace of ideas. Styled as "strategic lawsuits against public participation," SLAPP suits intimidate, coerce, or punish citizens who have criticized public leaders and public figures. Anti-SLAPP statutes, like Florida's, immunize citizens from this abuse of the judicial process. But Florida's appellate procedure prevents citizens from obtaining

immediate appellate review to either safeguard their constitutional rights or enforce their statutory immunity from such suits.

Petitioner Kevin Vericker operates a blog that comments on the public affairs of a small Miami–Dade County municipality. The municipality's village attorney sued Vericker for defamation after the official took offense to Vericker's criticisms of him, his job performance, and his credentials. Vericker invoked his rights under the anti–SLAPP statute. But the trial court denied Vericker's summary judgment motion in a terse, unreasoned order that cannot be squared with the anti–SLAPP statute or the First Amendment.

The Third District Court of Appeal denied Vericker's petition for certiorari designed to vindicate his constitutional rights and statutory right to be immune from SLAPP suits. All three judges on the panel agreed, through a special concurrence, that Vericker had substantive rights worthy of protection. But they nonetheless deferred to this Court to expand certiorari jurisdiction or the list of appealable nonfinal orders denying motions premised upon the anti–SLAPP statute.

Vericker requests that this Court hold that certiorari jurisdiction exists to review nonfinal orders denying anti–SLAPP motions. In the alternative, he requests this Court amend rule 9.130 to allow interlocutory review of such nonfinal orders.

## STATEMENT OF THE CASE AND FACTS

A. In 2017, North Bay Village (the "Village"), a municipality of less than 9,000 people in Miami–Dade County, appointed Respondent Norman Christopher Powell as its Interim Village Attorney. R.239. Prior to his appointment, Powell never served as a municipal attorney. R.343:5–12. The Village later made his appointment official. R.239.

Vericker, a longtime resident of North Bay Village, regularly reported on the "issues facing North Bay Village, Florida." R.238. Vericker's reporting can be found on his Internet blog entitled "North Bay Village Reality Based Community."[2] *Id.* With few exceptions, the blog primarily focuses on what Vericker views as the corruption and mismanagement that plagues the Village. R.148–90. Naturally,

[2] The site is located at http://www.nbvreality.com/. R.238.

Vericker writes about the Village's employees and officials and has been critical of them.

Powell, as the Village Attorney, has been the subject of Vericker's criticisms. R.239. Vericker's articles have been nothing short of colorful in describing Powell. *Id.* However, Vericker relies on public records and journalistic sources in his opinion pieces, as the summary judgment record evidenced. R.239.

B. Nearly a year into his tenure, Powell filed a defamation suit against Vericker. R.38–127. Powell concedes that he is a public officer and that he filed the suit because of statements that solely concern his role as Village Attorney. R.429:10–13; R.523:1 –14.

Vericker filed a motion for summary judgment. R.224–429. Among other things, Vericker contended that Powell could not establish liability because his comments were opinion, hyperbole, substantially true, and fair comment and criticism. *Id.* Vericker also contended that under this Court's new summary judgment standard, Powell could not satisfy by clear and convincing evidence that Vericker acted with actual malice, as required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). R.227–31. *Sullivan* protects the First

Amendment right to comment on public issues by requiring public figures suing for defamation to establish actual malice—i.e., that the defendant knew of a statement's falsity or recklessly published without investigating its accuracy. *See Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984).

In support of his motion for summary judgment, Vericker introduced deposition testimony, exhibits, and a legal memorandum Powell authored as Village Attorney. R.236–429. The summary judgment record does not reflect that Vericker knew any of his comments were false.

Two examples are illustrative. First, Powell asserted that Vericker defamed him by giving him the moniker of a "registered strip club lobbyist," describing that as his "only known qualification," and accusing him of "ma[king] up a new law" permitting a commissioner's removal from office and his replacement by Commissioner Laura Cattabriga. R.203(¶57). But Powell admitted at deposition that he did work for strip clubs. R.359:20–24. Vericker introduced Powell's registration as a strip club lobbyist. R.331. Vericker also submitted

to the trial court a legal memorandum that Powell wrote justifying Commissioner Cattabriga's predecessor's removal. R.264–71. Among the other summary judgment materials was an order from a three-judge panel of the Miami-Dade County Circuit Court's Appellate Division that quashed the predecessor's removal as a violation of the Village Charter. R.256–58.

Powell also claimed defamation because Vericker wrote that a former police chief was fired for filing a complaint that the Village engaged in the illegal copying of confidential information at Powell's direction. R.202(¶49(c)). Vericker's summary judgment evidence included the former police chief's federal lawsuit. R.322–29.[3] The lawsuit alleged that the Village participated in unlawful "access/disclosure and improper handling" of confidential information "that had occurred at the direction of the Village Attorney, Norman Powell." R.326(¶¶25, 28), 327(¶33).

[3] *See* Compl. & Demand for Jury Trial, *Noriega v. N. Bay Vill.*, No. 1:18-cv-22172 (S.D. Fla. June 1, 2018).

The trial court, however, denied summary judgment without explanation. At the hearing, the trial court said: "There are not too many issues of fact and there are issues for the jury to determine. So, the motion is denied." R.1015:5–7. The trial court did not identify those issues. Its order similarly failed to provide a basis for its denial of summary judgment. The order stated, in conclusory fashion, that there was "substantial evidence" by which a jury may find "malice" by clear and convincing evidence—without discussing whether Powell established "actual malice," as required by *Sullivan*. R.1023.

C. Vericker petitioned the Third District Court of Appeal for a writ of certiorari. R.3–27. The Third District dismissed the petition and certified a conflict with the Second District Court of Appeal. R.1079–84.

Vericker timely invoked this Court's discretionary jurisdiction. The Court accepted jurisdiction but stayed the matter pending disposition of *In re: Amendments to Florida Rule of Appellate Procedure 9.130*, No. SC2022–1084, in which this Court considered a petition from The Florida Bar Appellate Court Rules Committee to amend rule 9.130 to provide for interlocutory review of nonfinal

orders granting or denying motions to dismiss or for summary judgment based on section 768.295, Florida Statutes. After oral argument, the Court "decline[d] to adopt the proposed amendments at this time[,]" *In re Amends. to Fla. Rule of App. Proc. 9.130*, ___ So. 3d ___, 2023 WL 3151092, at *1 (Fla. Apr. 28, 2023), lifted the stay in this case, and directed the parties to file briefs on the merits.

## STANDARD OF REVIEW

The issues in this case are purely legal issues subject to this Court's de novo review. *See Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022) ("The standard of review for . . . issues of statutory interpretation is de novo."); *M.M. v. Fla. Dep't of Child. & Families*, 189 So. 3d 134, 137 (Fla. 2016) (reviewing de novo whether a nonfinal order should be subject to certiorari review).

## SUMMARY OF ARGUMENT

The Court should hold that district courts of appeal have certiorari jurisdiction to review nonfinal orders denying motions asserting anti-SLAPP immunity under section 768.295, Florida Statutes. The Third District's decision should be quashed and remanded for further proceedings. In the alternative, the Court should retroactively amend rule 9.130 to add the denial of anti-

SLAPP motions as a matter of law to the list of appealable nonfinal orders.

In order to combat the threat posed to First Amendment free speech, petition, and assembly rights by SLAPPs, Florida and 31 other states have enacted anti–SLAPP statutes to provide for the expeditious resolution of these abuses of the judicial process. Like the anti-SLAPP statutes in other states, Florida's statute confers immunity from SLAPP suits. The statute therefore deters SLAPP suits by prohibiting them altogether, not just by allowing for attorney's fees. This reading is confirmed by the anti–SLAPP statute's plain text and fundamental canons of statutory interpretation.

In addition to providing for immunity from SLAPP suits, the statute also enforces constitutional defenses grounded in the First Amendment rights that it is designed to protect. The statute prohibits all suits that seek to attack speech that is constitutionally protected.

Because the anti–SLAPP statute implicates constitutional protections and secures immunity from suit, the failure to provide for immediate appellate review of nonfinal orders denying motions under section 768.295 results in irreparable harm that cannot be remedied on post–judgment appeal. Certiorari jurisdiction is thus warranted.

This Court's precedent recognizes that the denial of constitutional rights is, by its nature, an ongoing and irreparable harm warranting immediate appellate review. The Legislature recognized that SLAPP suits chill First Amendment rights. That chilling effect, even to a minimal degree or for a short period of time, is an irreparable harm.

Irreparable harm exists for a second reason. This Court has long recognized a right to interlocutory review where a party is entitled to immunity from suit. As Justice Canady has explained in several separate opinions over the years, the erroneous continuation of legal proceedings against a defendant who is immune constitutes irreparable harm because the full benefit of that immunity from suit cannot be restored on appeal. The Court should embrace Justice Canady's view that the loss of immunity amounts to irreparable harm warranting certiorari review.

Should this Court conclude that certiorari jurisdiction exists in this case, it should (but need not) proceed to hold that the trial court's order departed from the essential requirements of the law by, among other things, not following Florida's governing summary judgment standard and failing to apply the "actual malice" standard required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Finally, and in the alternative, to the extent the Court declines to extend certiorari jurisdiction, it should retroactively amend Florida Rule of Appellate Procedure 9.130 to permit immediate appellate review of orders denying as a matter of law anti-SLAPP motions. The Court has *sua sponte* amended rule 9.130 in this fashion many times over the years in cases involving statutory and immunity rights.

## ARGUMENT

Vericker is entitled to certiorari relief because, absent immediate review, his constitutional rights will be infringed and the immunity granted under the anti–SLAPP statute will be lost forever.

Below, Vericker explains that anti–SLAPP statutes are governing law in most states, including Florida. *See infra* Part I.A. Florida's statute "prohibits" anti–SLAPP suits, and its text and context—aided by canons of construction—confirm that it confers immunity from suit. *See infra* Part I.C. The act, however, only permits defenses to suit or claims grounded in constitutional law. *See infra* Part I.D. Accordingly, denials of anti–SLAPP motions implicate infringements on constitutional rights, the latter of which is sufficient to invoke certiorari jurisdiction.

The district courts of appeal are divided on whether certiorari review exists to consider denials of anti–SLAPP motions. *See infra* Part II. But this Court's precedent as well as opinions of Justice Canady reinforce that the jurisdictional requirements for certiorari relief are satisfied in the review of nonfinal orders denying anti–SLAPP motions. *See infra* Part III. The trial court's order also departed from clearly established law, another prerequisite to certiorari relief. *See infra* Part IV. In the alternative, this Court should amend rule 9.130 to permit interlocutory review of nonfinal orders denying anti–SLAPP motions. *See infra* Part V.

## I. An Overview Of Anti–SLAPP Statutes

### A. The Development Of Anti–SLAPP Statutes

The First Amendment to the United States Constitution, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Amend. I, U.S. Const. Throughout the nation's history, government officials and private citizens have sought to chill these fundamental constitutional rights through abusive litigation.

Beginning in 1989, acknowledging the threat such abuse of the courts poses to citizens' participation in our democracy, many states enacted legislation designed to curb "strategic lawsuits against public participation"—or SLAPPs.[4] These "anti–SLAPP" statutes are designed to address a structural problem within American law—namely, that an unscrupulous litigant can strategically use the judicial branch of government to suppress or punish speech they dislike.[5] Such a litigant would typically sue the speaker for defamation to silence or harass them by forcing them to bear significant litigation costs. The harm posed by SLAPPs can be grave, imposing a loss to—or, at least, a chilling effect on—one's constitutional right to speak freely and participate in American self–governance.

To date, Florida and 31 other states have passed anti–SLAPP statutes designed to strike a balance between robust protection of

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[4] The acronym "SLAPP" was first coined by Professors George W. Pring and Penelope Canan. *See* George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (1996).

[5] *See, e.g.*, *Cheng v. Guo*, 2022 WL 4237079, at *2 n.2 (S.D.N.Y. Sept. 13, 2022).

First Amendment rights, on the one hand, and the interests in remedying private injuries under state tort law, on the other.[6] While these anti–SLAPP laws take different formulations depending on the state, most anti–SLAPP laws provide SLAPP targets with an early opportunity to invoke immunity for their First Amendment–protected activity, thereby facilitating the expeditious disposition of unmeritorious SLAPPs.

Regardless of their scope, many state courts have broadly recognized that anti–SLAPP laws confer a form of immunity upon the litigant targeted with a SLAPP and have labeled or interpreted their anti–SLAPP laws as immunity statutes.[7] And at least five federal

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[6] The states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington. The District of Columbia also has an anti-SLAPP statute. *See* Reps. Comm. for Freedom of the Press, *Anti-SLAPP Legal Guide*, https://www.rcfp.org/anti-slapp-legal-guide/ (last visited July 14, 2023).

[7] *See, e.g.*, *Smith v. Supple*, 293 A.3d 851, 863–71 (Conn. 2023); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1229–30 (D.C. 2016); *Wright Dev. Grp., LLC v. Walsh*, 939 N.E.2d 389, 396 (Ill. 2010); *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 942–44 (Mass. 1998); *Smith v. Zilverberg*, 481 P.3d 1222, 1231 (Nev.

courts of appeals have held that state–law anti–SLAPP statutes confer a substantive immunity from suit warranting immediate interlocutory appeal under the collateral order doctrine.[8]

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2021); *Singer v. de Blasio*, 187 N.Y.S.3d 599, 601 (App. Div. 2023); *Anagnost v. Tomecek*, 390 P.3d 707, 712 (Okla. 2017); *Pennsbury Vill. Assocs., LLC v. McIntyre*, 11 A.3d 906, 912-13 (Pa. 2011); *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 752-53 (R.I. 2004); *Leishman v. Ogden Murphy Wallace, PLLC*, 479 P.3d 688, 690 (Wash. 2021).

[8] *See, e.g.*, *Franchini v. Investor's Bus. Daily, Inc.*, 981 F.3d 1, 7, 8 n.6 (1st Cir. 2020) (permitting interlocutory appeal of denial of motion to dismiss based on Maine's anti–SLAPP statute); *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) (same); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 (2d Cir. 2013) (allowing an interlocutory appeal from denial of relief under California's anti–SLAPP law); *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 750–52 (5th Cir. 2014) (allowing an interlocutory appeal from denial of relief under the Texas anti–SLAPP law); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 179-81 (5th Cir. 2009) (allowing an interlocutory appeal from denial of relief under the Louisiana anti–SLAPP law); *Schwern v. Plunkett*, 845 F.3d 1241, 1244 (9th Cir. 2017) (permitting an interlocutory appeal from a denial of a motion to dismiss under the Oregon anti–SLAPP law); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1014–15 (9th Cir. 2013) (allowing an interlocutory appeal from denial of relief under California's anti–SLAPP law); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (superseded in other parts by statute) (allowing an interlocutory appeal under an earlier version of the California anti-SLAPP law); *see also Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 663–68 (10th Cir. 2018) (permitting an interlocutory appeal from district court's finding that New Mexico's anti-SLAPP statute did not apply in federal court).

### B. Florida's Anti–SLAPP Statute

1. In 2000, the Florida Legislature unanimously passed,[9] and Governor Jeb Bush signed, Florida's anti–SLAPP law. Ch. 2000–174, Laws of Fla. The Legislature found that SLAPP "lawsuits 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 . . . ." *Id.* preamble, at 1.

The act prohibits a "governmental entity" from filing lawsuits against a person or entity that are "without merit" and doing so "solely because" the person or entity exercised their constitutional right "to petition for redress of grievances before the various governmental entities of this state." § 768.295(4), Fla. Stat. (2000).

The act provides for an "expeditious resolution of a claim that the suit is in violation of" the statute. § 768.295(4). Such a hearing "shall be held at the earliest possible time after the filing of the governmental entity's response." *Id.* The defendant who prevailed on an anti–SLAPP motion was entitled to an award attorney's fees and could obtain actual damages. *Id.*

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[9] The vote was 112 to 0 in the House and 40 to 0 in the Senate.

2. In 2015, the Florida Legislature passed, and Governor Rick Scott signed, amendments to the state's anti–SLAPP statute. Ch. 2015–70, Laws of Fla. The amendments received near–unanimous support.[10] The new law prohibited the scope of SLAPP suits to those brought by "persons," not just governmental entities. § 768.295(3)–(4), Fla. Stat. (2015).[11] But actual damages were not permitted against "persons," only against governmental entities, as in the previous version of the statute. § 768.295(4). It also extended the statute's protection beyond petitioning activities to "free speech in connection with a public issue," a broadly defined term. § 768.295(2)(a), (3). And now a SLAPP suit need not be "solely" designed to chill First Amendment rights, but "primarily" so.

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[10] The vote was 144 to 1 in the House and 40 to 0 in the Senate.

[11] The Legislature has adopted anti–SLAPP provisions in two other instances. At the time when the initial anti–SLAPP statute pertained only to government entities, the Legislature adopted similar restrictions against homeowner associations and condominium associations in 2004 and 2008, respectively. Ch. 2004–353, § 16, at 25, Laws of Fla. (amending § 720.304, Fla. Stat.); Ch. 2008–28, § 13, at 30–31 (codified at § 718.1224, Fla. Stat.).

In light of the 2015 amendments to section 768.295, the initial anti–SLAPP statute now applies "any person," not just "government entities." Thus, section 768.295 necessarily includes homeowner and condominium associations.

§ 768.295(3).

The statute is entitled "Strategic Lawsuits Against Public Participation (SLAPP) ***prohibited***." § 768.295 (emphasis added). The Legislature stated its intent as follows:

> It is the intent of the Legislature 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 before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. It is the public policy of this state that a person or governmental entity not engage in SLAPP suits because such actions are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues. ***Therefore, the Legislature finds and declares that prohibiting such lawsuits as herein described will preserve this fundamental state policy, preserve the constitutional rights of persons in Florida***, and assure the continuation of representative government in this state. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

§ 768.295(1) (emphasis added).

### C. Florida's Anti–SLAPP Creates Immunity From Suit

At the April 5, 2023, oral argument on the proposed amendment to Florida Rule of Appellate Procedure 9.130 involving the nonfinal orders denying motions under the anti–SLAPP statute, this Court raised questions whether the law was nothing more than a fee

shifting statute.[12]

If the statute were to be read as a fee shifting statute, the following modifications would be needed:

> **768.295 Strategic Lawsuits Against Public Participation (SLAPP)** ~~prohibited~~.—
>
> (1) . . . . Therefore, the Legislature finds and declares that discouraging ~~prohibiting~~ such lawsuits as herein described will preserve this fundamental state policy, preserve the constitutional rights of persons in Florida, . . . .
>
> . . . .
>
> (3) ~~A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue~~, . . . .

§ 768.295(1), (3) (modifications added).

The statute grants rights beyond merely attorney fees: it prohibits SLAPP suits and, thus, establishes immunity from such suits altogether (*see infra* Part I.C) to the extent the United States or Florida constitutions prohibit such claims (*see infra* Part I.D).

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[12] Video of Oral Arg., *In re: Amends. to Fla. Rule of Appellate Procedure 9.130*, No. SC2022–1084, at 3:58 – 4:15 (Apr. 5, 2023) https://www.youtube.com/live/94c-gs4dUIc?feature=share.

Under the rules and canons of statutory construction, Florida's anti-SLAPP statute is an immunity statute. "[J]udges must 'exhaust all the textual and structural clues' that bear on the meaning of a disputed text." *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) (quoting *Alachua Cnty. v. Watson*, 333 So. 3d 162, 169 (Fla. 2022)). "Viewed properly as rules of thumb or guides to interpretation, rather than as inflexible rules, the traditional canons of statutory interpretation can aid the interpretive process from beginning to end . . . ." *Id.*

Some canons remain inviolate. "Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done so." *Fla. Dep't of Rev. v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001) (footnote omitted). And the "'presumption against ineffectiveness' canon, . . . 'ensures that a text's manifest purpose is furthered, not hindered.'" *Thompson v. DeSantis*, 301 So. 3d 180, 185–86 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012) (hereinafter "Scalia & Garner")). Under that canon, "if the 'language is susceptible of two constructions, one of which will carry out and the other defeat its

manifest object, the statute should receive the former construction." Scalia & Garner, *supra*, at p. 63 (brackets omitted). "The prior construction canon teaches that, 'when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretation as well.'" *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) (quoting *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008)).

The title of a statute is also pertinent. When determining legislative intent, courts "must give due weight and effect to the title of the section." *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 25 (Fla. 2004); *see also* Scalia & Garner, *supra*, at p. 222 ("'If there is any uncertainty in the body of an act, the title may be resorted to for the purpose of ascertaining legislative intent and of relieving the ambiguity.'" (quoting and discussing *Bellew v. Dedeaux*, 126 So. 2d 249, 251 (Miss. 1961), in which the court determined whether a statute created a felony or misdemeanor offense based on the title of the provision)).

Here, the text reflects that section 768.295 prohibits SLAPP suits—it does not simply reimburse defendants who face them. No

court may re–write the anti–SLAPP statute: it is solely the prerogative of the Legislature, which has enacted and reenacted anti–SLAPP provisions four times. *Fla. Mun. Power*, 789 So. 2d at 324.

Between two competing constructions—one that posits the statute creates immunity and the other that it simply creates a new avenue for fees—this Court should avoid the construction that renders the statute ineffective. *See Thompson*, 301 So. 3d at 185–86. The latter construction would permit such actions to proceed and only penalize claimants monetarily at the end of proceedings. By then, the harm the statute seeks to curtail has already been inflicted: "censor[ship], initimdat[ion], or punish[ment] . . . for involving [one's self] in public affairs." Ch. 2000–174, preamble, at 1, Laws of Fla.; *see also* § 768.295(1) (2015) ("It is the intent of the Legislature to protect the right in Florida to exercise the rights of free speech in connection with public issues . . . ."). And attorney's fees do not remedy those harms, nor do actual damages, which the statute does not allow when persons—rather than governmental entities—file SLAPPs.

Monetary sanctions are also insufficient to prevent anti–SLAPP lawsuits. Section 57.105, Florida Statutes, already creates an avenue

for attorney's fees for claims with no basis in law or fact. § 57.105, Fla. Stat. (2022). The anti–SLAPP statute performs an additional function by prohibiting meritless lawsuits altogether. The Legislature surmised that certain plaintiffs, such as government entities or public figures, would view the attorney's fees associated with a SLAPP suit as a suitable price to pay to accomplish an unconstitutional end. Construing the anti–SLAPP statute as simply a fee–shifting provision does little more than duplicate section 57.105, except for section 57.105's notice requirements.

Other jurisdictions have deemed anti–SLAPP statutes to confer immunity from suit. Many of those rulings preceded the Legislature's conscientious decision to adopt the anti–SLAPP measures.[13] Those constructions are now transplanted into Florida's statutory regime. *See Jackson*, 288 So. 3d at 1183.

Beyond that, the best evidence of the statute's meaning is its words, including its title. The title of the statute reads: "Strategic

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[13] *See, e.g.*, *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 942-44 (Mass. 1998); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 61-63 (R.I. 1996); *Dixon v. Superior Ct. of Orange Cnty.*, 30 Cal. App. 4th 733, 745 (1994).

Lawsuits Against Public Participation (SLAPP) ***prohibited***." § 768.295, Fla. Stat. (emphasis added). And the text of the statute bolsters the title; it does not contradict it. Subsection (1) declares the Legislature is "prohibiting such lawsuits," and subsection (3) expressly identifies the types of lawsuits subject to that prohibition. § 768.295(1), (3). Merriam-Webster defines "prohibit" as "to forbid by authority" or "an order to restrain or stop." Merriam-Webster's Collegiate Dictionary (Merriam-Webster, Inc. 10th ed. 1994).

In sum, the anti–SLAPP statute creates immunity in addition to authorizing attorney's fees. The plain text aided by the canons of construction support that conclusion.

### D. The Anti–SLAPP Law Enforces Constitutional Defenses

Florida's anti-SLAPP statute provides a remedy only for those defenses grounded in the constitutional rights it seeks to protect. Accordingly, nonfinal orders denying a motion under section 768.295 implicate constitutional rights. That is pertinent to any certiorari analysis. *See, e.g.*, *Rodriguez ex rel. Posso–Rodriguez v. Feinstein*, 734 So. 2d 1162, 1163 (Fla. 3d DCA 1999) (explaining that that the court had certiorari jurisdiction to review violations of constitutional rights).

We begin with the statute's language. It reads in pertinent part:

> A person . . . may not file or cause to be filed . . . any lawsuit . . . against another person or entity ***without merit*** and ***primarily because such person*** . . . ***has exercised the constitutional right of free speech in connection with a public issue*** . . . ***as protected by the First Amendment*** . . . [and] **the State Constitution**.

§ 768.295(3), Fla. Stat. (emphases added).

The word "and," as used here, often signals a conjunctive requirement. *See, e.g.*, *United States v. Garcon*, 54 F.4th 1274, 1278 (11th Cir. 2022). Here, that may imply that the prohibited suits are those that are (a) without merit, (b) filed primarily because a person has exercised their right of free speech in connection with a public issue, (c) that is protected by the Constitution (federal or state). But that is not the best—or even a fair—reading of the statute. Instead, as detailed below, the Legislature's phrasing here amounts to doublets or triplets, conveying that only constitutional defenses are pertinent in anti-SLAPP motions.

To start, we explain why the statute may not be read in the conjunctive. The statute does not require that a defendant establish three distinct components to prevail on an anti–SLAPP motion. First, certain of those elements are redundant. A lawsuit challenging rights

that are actually protected by the federal and state constitutions necessarily lacks merits. And second, reading the statute as requiring three distinct elements is an undesirable, hyperliteral reading of the provision. *See, e.g.*, *USAA Cas. Ins. Co. v. Mikrogiannakis*, 342 So. 3d 871, 874 (Fla. 5th DCA 2022) ("[T]he 'fair reading' method does not countenance a hyperliteral reading of a legal text. . . . . [A] 'fair reading' considers the purpose of the text, 'gathered only from the text itself, consistently with the other aspects of its context.'" (quoting Scalia & Garner, *supra*, at pp. 33, 39)). "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text." Scalia & Garner, *supra*, p. 356 (emphasis in original). "The full body of a text contains implications that can alter the literal meaning of individual words." *Id.* As explained immediately above, the full body of the anti–SLAPP statute does not evince a three–part test where a defendant must prove that a lawsuit challenging speech that is protected by the Constitution also does not have merit. If the speech is protected, any attack on it must lack merit.

Another reason the statute should not be read in the conjunctive is that doing so presumes that the statute has a *mens*

*rea* requirement. *See, e.g.*, § 768.295(3), Fla. Stat. (discussing that a prohibited suit is one filed "primarily because" of the exercise of protected First Amendment rights). As a whole, the statute does not obligate an anti-SLAPP defendant to prove the intent of the claimant. For one, the statute contemplates an expeditious resolution of anti–SLAPP motions. § 768.295(4). Any inquiry into the thought process of the claimant is contrary to the text. Depositions, document productions, and other discovery would be required unless a defendant had a confession the moment a case commenced. Moreover, constitutional defenses—such as fair comment and criticism or pure opinion in defamation cases—are already dispositive of certain anti–SLAPP cases. *See, e.g.*, *infra* Part IV. It is contrary to the Legislature's attempt to expeditiously resolve such attacks on constitutionally–protected speech to read into the statute a new, amorphous, and undefined *mens rea* hurdle to dismissal.[14]

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[14] *Cf. Advisory Op. to Governor re Implementation of Amend. 4, The Voting Restoration Amend.*, 288 So. 3d 1070, 1079 (Fla. 2020) ("[I]t is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." (internal quotation marks omitted)).

Rather, the answer the text provides is quite different. It uses three descriptors to describe the same thing: a claim that is prohibited by First Amendment defenses. This manner of drafting legislation is not unusual. "'[S]ometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill–conceived but lamentably common belt–and–suspenders approach.'" *United States v. Bronstein*, 849 F.3d 1101, 1111 (D.C. Cir. 2017) (emphasis in original; quoting Scalia & Garner, *supra*, pp. 176–77); *see also In re Wild*, 994 F.3d 1244, 1268 n.22 (11th Cir. 2021) (en banc) ("We read section (c)(1) not as 'break[ing] out' three different phases, but rather as attempting to broadly cover all necessary government–employee participants—in short, to ensure that the Act's protection extends beyond prosecutors. 'Doublets and triplets abound in legalese,' especially given that Congress often uses a 'belt–and–suspenders' approach when drafting statutes." (quoting Scalia & Garner, *supra*, pp. 176–77)).

The descriptors in the anti–SLAPP statute's subsection (3) likewise broadly define lawsuits that are constitutionally infirm. A lawsuit that attacks speech which is protected by the Constitution

lacks merit, and it does so regardless of the motivations of the claimant. In any event, any such meritless suits must have been filed primarily because of the exercise of protected speech because constitutional defenses would bar any legitimate relief (i.e., damages or injunctions)—meaning the only motivation must be an illicit one.[15]

* * *

In sum, anti–SLAPP statutes are not unusual. They are the law of the land in Florida and 31 other states. The Legislature enacted versions of the act four times over 15 years—and it did so with near-unanimity. Florida's anti–SLAPP statute creates immunity. The immunity applies to any claim that the constitution (federal or state)

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[15] The California Court of Appeal adopted a contrary view of its state's anti–SLAPP statute after Florida's adoption of the anti–SLAPP act. *See Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (2004). That court rejected a trial court's view that the only defenses permitted in anti-SLAPP motions are "constitutional defenses." *Id.* (calling the reasoning atextual). California's version of the statute is distinct from Florida's. *See* Cal. Civ. Proc. Code § 425.16(b)(1) (West 2004) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."). That alone provides sufficient basis not to follow the California court's lead.

prohibits under its free speech, petition, or assembly protections.

## II. The District Courts Of Appeal Are In Conflict Over Whether Certiorari Relief Is Available To Review Nonfinal Orders Invoking The Anti–SLAPP Statute

Florida's district courts of appeal are in conflict over the availability of certiorari review of nonfinal orders denying anti–SLAPP motions. "Generally, an appellate court may not review interlocutory orders unless the order falls within the ambit of nonfinal orders appealable to a district court as set forth in Florida Rule of Appellate Procedure 9.130." *Keck v. Eminisor*, 104 So. 3d 359, 363–64 (Fla. 2012). Certiorari review is admittedly permitted in "very narrow circumstances." *Id.* at 364.

"[A] party may petition for certiorari to seek review of a nonfinal order not otherwise appealable when the petitioner can establish three necessary elements . . . ." *Id.* Those elements are: that "(1) the order 'depart[s] from the essential requirements of the law,' and (2) 'result[s] in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.'" *Id.* "The threshold question that must be reached first is whether there is a material injury that cannot be corrected on appeal, otherwise termed as irreparable harm." *Rodriguez v. Miami–Dade Cnty.*, 117 So. 3d 400,

404 (Fla. 2013). The First, Second, Third, and Fourth Districts have reached differing views on certiorari review in anti–SLAPP cases.

### A. Second District Court of Appeal

The Second District Court of Appeal recognizes that orders denying anti–SLAPP motions are subject to certiorari review. In *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019), residents protested a developer's plan to sell certain community amenities to two community development districts that developer established. *Id.* at 307. The residents exercised their First Amendment rights by circulating petitions, attending and commenting at local meetings, and posting on Internet blogs, among other things. *Id.*

In response to the residents' class action complaint opposing the sale, the developer filed counterclaims. *Id.* The developer sought "to hold the Residents liable for damages based on constitutionally protected conduct." *Id.* Invoking the anti–SLAPP statute, the residents moved to dismiss, for a judgment on the pleadings, and for summary judgment within the same motion. *Id.* at 308. The trial court treated the motion as solely a motion to dismiss. *Id.* The trial court denied that motion, and the residents petitioned for certiorari

relief. *Id.*

The Second District granted certiorari relief. *Id.* at 315. As pertinent here, the Second District held that the residents would suffer irreparable harm absent certiorari relief. *Id.* at 311. The court agreed that "'the very filing and continuation of' SLAPP suits has the chilling effect on constitutional rights that the Anti–SLAPP statute was enacted to prevent." *Id.* at 310. The court concluded that the anti–SLAPP statute bore similarity to statutes providing for immunity from suit, whose protections could not be restored once lost through litigation and trial:

> That is, if certiorari review is not available, 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 for the individual defendant."

*Id.* at 311 (quoting *Keck*, 104 So. 3d at 365–66).

### B. Fourth District Court of Appeal

The Fourth District Court of Appeal declined to expand certiorari relief to review the denial of an anti–SLAPP motion. In *WPB Residents for Integrity in Government, Inc. v. Materio*, 284 So. 3d 555 (Fla. 4th DCA 2019), a West Palm Beach city commission candidate

sued her opponent and other defendants. *Id.* at 556–57. Her defamation–related claims focused on a mailer that implied that she illegally claimed a second homestead exemption and obtained a federally–funded grant for low–income residents in St. Lucie County. *Id.* The defendants moved to dismiss and for summary judgment. *Id.* at 557. The trial court denied the motions, and the defendants sought certiorari relief. *Id.*

The Fourth District held that *Gundel* conflicted with this Court's handling of immunity–related issues. *Id.* at 559. While not addressing whether the anti–SLAPP statute establishes immunity, the court held that changing the appellate court rules was the preferred route, not the expansion of certiorari. *Id.* at 560. The Fourth District also concluded that the continuation of litigation was generally insufficient to constitute irreparable harm for purposes of certiorari review. *Id.* It did not characterize the rights at issue as constitutional rights and read the statute as seeking to prevent merely "the *filing* of the lawsuit." *Id.* at 561 (emphasis in original).[16]

[16] The First District, in a one-paragraph opinion, concluded that certiorari review is not available to review the denial of a motion to

### C. Third District Court of Appeal

The Third District followed the Fourth District view, certified conflict with the Second District, and referred the matter to The Florida Bar's Appellate Court Rules Committee. R.1082–84. In a special concurrence by Judge Gordo, in which Chief Judge Fernandez and Judge Scales concurred, the panel characterized the Second District's certiorari analysis as "compelling." R.1085 (Gordo, J., specially concurring). She further observed that if a meritless anti–SLAPP claim continues, "the expense or continuation of litigation is not the harm at issue." *Id.* "Rather it is the initiation ***and continuation*** of the litigation itself." *Id.* (emphasis added). Judge Gordo wrote that "[i]t 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." R.1086 (emphasis added). Indeed.

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dismiss based on the anti-SLAPP statute. *Bosshardt v. Drotos*, 351 So. 3d 257, 257 (Fla. 1st DCA 2022) (citing to *Materio*).

* * *

Judge Gordo's analysis is eminently correct. Although she and her colleagues deferred to this Court (and referred the matter to the Appellate Court Rules Committee), their analysis supports expanding certiorari or, alternatively, *sua sponte* amending the Rules of Appellate Procedure. The mere filing of a SLAPP suit is not solely what the Legislature sought to prevent, as the Fourth District surmised. The Legislature also sought to remedy the continuation of lawsuits that have no merit and infringe constitutional rights. An appeal from a final order cannot remedy that harm.

## III. Anti–SLAPP Defendants, Like Vericker, Will Suffer Irreparable Harm Absent Certiorari Relief

This Court should conclude that district courts of appeal have certiorari jurisdiction to review nonfinal orders denying anti-SLAPP motions as a matter of law. The presence of irreparable harm is a jurisdictional prerequisite for any certiorari petition. *See Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 351 (Fla. 2012); *see also Rodriguez*, 117 So. 3d at 406. "To demonstrate irreparable harm, the petitioner must show either that the injury cannot be

redressed in a court of law or that there is no adequate legal remedy." *Fuller v. Truncale*, 50 So. 3d 25, 27 (Fla. 1st DCA 2010).

Certiorari jurisdiction exists to review orders denying anti–SLAPP motions for two principal reasons. First, the denial of anti–SLAPP motions implicates violations of a party's constitutional rights, which cannot be remedied through a post–judgment appeal. *See infra* Part III.A. Second, as Justice Canady has contended for more than a decade, irreparable harm is present because, absent interlocutory review, the right to be immune from suit will be lost forever following a final judgment. *See infra* Part III.B.3–4.

### A. Constitutional Rights

Certiorari review exists when a petitioner's constitutional rights are implicated. By way of example, this Court approved of the First District Court of Appeal's decision in *Williams v. Spears*, 719 So. 2d 1236 (Fla. 1st DCA 1998), in which ongoing court proceedings threatened parents' constitutional rights to privacy. *See Belair v. Drew*, 770 So. 2d 1164, 1167 (Fla. 2000).

In *Williams*, divorced biological parents and a stepparent petitioned for certiorari relief following a summary judgment denial that allowed a grandparent's petition for child visitation to proceed.

719 So. 2d at 1237–38. The parents contended that a statute granting grandparents rights to petition for visitation of their grandchildren violated their right to privacy under the Florida Constitution. *Id.* at 1238; *see* art. I, § 23, Fla. Const. ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.").

The First District agreed that the parents would suffer irreparable harm to their constitutional right to privacy absent certiorari relief because Florida precedent "suggest[s] that certiorari is an appropriate remedy where constitutional rights are deprived ***or delayed*** during the pendency of a legal proceeding." *Williams*, 719 So. 2d at 1239 (emphasis added; collecting cases). "[T]he very continuance of these proceedings" would abridge the parents' privacy rights if the statute was unconstitutionally applied to them. *Id.* at 1238–39. Any appeal from a final judgment would be inadequate because "[t]he damage sought to be avoided by the parents would have already been done [by then], that being an inquiry into their private decision–making process concerning the best interests of their child." *Id.* at 1239.

This Court "agree[d] with the holding of *Williams* " in its review of an as–applied constitutional challenge to the same grandparent visitation statute. *Belair*, 770 So. 2d at 1166–67 (permitting certiorari review). In *Belair*, the trial court order granting temporary grandparent visitation "directly contravene[d the mother's] right to privacy and decision–making in rearing her child." *Id.* at 1167. A later determination of unconstitutionality would be inadequate: "The harm petitioner seeks to avoid would have been done." *Id.*

Other courts have recognized the right to immediate relief when constitutional rights are implicated. For instance, in *Feinstein*, the Third District granted certiorari relief where a trial court restricted the petitioners' First Amendment rights to comment on a case without any requisite findings and where the order was not narrowly tailored. *Feinstein*, 734 So. 2d at 1164. That court held: "We have jurisdiction to review this matter as the order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review." *Id.* at 1163. And the United States Supreme Court has repeatedly recognized that "'[t]he loss of First Amendment freedoms, ***for even minimal periods of time***, unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese of Brooklyn v.*

*Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (emphasis added; quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (enjoining a COVID–19–based restriction on religious observances that treated houses of worship more harshly than comparable secular facilities).

To the extent that the underlying defamation action is an illegitimate attack on Vericker's exercise of his constitutional rights, a later appeal cannot remedy the attendant harms to his First Amendment rights. Irreparable harm necessary to grant certiorari thus exists. *Rodriguez*, 117 So. 3d at 404.

Powell is using a branch of government—the judicial system—to intimidate Vericker and further censor (or attempt to censor) additional criticism where no basis in law exists for that lawsuit. *See infra* Part IV (discussing how the trial court departed from the essential requirements of the law as no legal basis exists for Powell's lawsuit). An appeal or final judgment might remedy some of Vericker's legal expenses. But neither would (or could) cure the chilling effect associated with the lawsuit as to either Vericker or third parties, who may also have designs to criticize the government. *See Bd. of Cnty. Comm'rs, Wabunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (stating that "'constitutional violations may arise from the

deterrent, or chilling, effect of governmental efforts that fall short of direct prohibition against the exercise of First Amendment rights'" (brackets omitted)).

If litigation were not a tool to punish speech, then SLAPP suits would not chill First Amendment rights. But SLAPP suits, as Florida and 31 other states have recognized, do chill speech. And the Legislature sought to prohibit such suits. *See* § 768.295 (title of section); § 768.295(1). By the time of a final appeal, the constitutional harm that the Legislature sought to avoid would have already been afflicted. *See Belair,* 770 So. 2d at 1167; *Williams*, 719 So. 2d at 1239. The chilling of speech, even to a minimal degree or for a short period, is an irreparable harm. *See Umbehr*, 518 U.S. at 674.

Accordingly, this Court should conclude that jurisdiction exists to consider Vericker's certiorari petition. He will suffer irreparable harm because of infringements on and punishments against his First Amendment rights that cannot be remedied in a final appeal.

**B. Rights to Immunity**

Vericker will also suffer irreparable harm if he is denied his statutory right not to be sued. *See* § 768.295(3). This Court has recognized the right to interlocutory review where a party was entitled

to immunity from suit. Although this Court has declined to extend certiorari jurisdiction in such instances, Justice Canady has correctly observed that no sound basis exists to preclude certiorari jurisdiction in instances, such as these, where a party cannot be re–immunized after a trial. This Court should accordingly recede from its prior decisions to the contrary or, as argued *infra* Part V, amend its rules to permit review of those interlocutory orders.

### 1. *Tucker* And *Keck*

In two decisions involving individual immunity, this Court recognized the right to interlocutory review when immunity interests were at stake.

In *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994), the Court considered the right to interlocutory review of orders denying qualified immunity as a matter of law. *Id. Tucker* held that "the qualified immunity of public officials involves '*immunity from suit* rather than a mere defense to liability.'" *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "The entitlement 'is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* (quoting *Mitchell*, 472 U.S. at 526). Further, "an order denying qualified immunity 'is effectively unreviewable on appeal from final judgment,

as the public official cannot be 're–immunized' if erroneously required to stand trial or face the other burdens of litigation." *Id.* (citation omitted). Society also faced "social costs" of such litigation, including deterring citizens from accepting public office. *Id.* at 1190. *Tucker* did not expand certiorari jurisdiction. But this Court held that orders denying qualified immunity on questions on law were "subject to interlocutory review" and requested an appellate rule change. *Id.*

*Keck v. Eminisor* had a similar outcome. There, a government agent facing a negligence action sought sovereign immunity under section 768.28(9)(a), Florida Statutes. *Keck*, 104 So. 3d at 360–61. That statute provided that "[n]o . . . agent of the state . . . shall be held personally liable in tort ***or named as a party*** defendant" in certain action unless the agent acted with bad faith, malicious purpose, or other prescribed manner. § 768.28(9)(a), Fla. Stat. (2005) (emphasis added). This Court analogized that case to *Tucker* and agreed to amend the rules to allow interlocutory review rather than allow certiorari review. 104 So. 3d at 365–66. But this Court also held:

> [I]f a defendant who is entitled to the immunity granted in section 768.28(9)(a) is erroneously named as a party defendant and is required to stand trial, that individual

> has effectively lost the right bestowed by statute to be protected ***from even being named as a defendant***. . . . [Absent interlocutory review], that statutory protection becomes ***essentially meaningless for the individual defendant***.

*Id.* at 366 (emphasis added).

### 2. *Citizens Property* And *Rodriguez*

This Court reached contrary conclusions when posed with questions of sovereign immunity for entities (as opposed to individuals) in a pair of cases, one of which was issued the same day as *Keck*.

Decided alongside *Keck*, *Citizens Property* considered whether to grant certiorari review for a nonfinal order denying a state–created insurer immunity under section 627.351, Florida Statutes. *Citizens Prop.*, 104 So. 3d at 346–47. That act provided that "[t]here shall be ***no liability***" for the insurer under the act except for "actions for breach of any contract . . . or any willful tort." § 627.351, Fla. Stat. (2009) (emphasis added). Citizens Property faced a first–party bad faith action for denying coverage. 104 So. 3d at 346.

The Court held that certiorari relief was unavailable. *Id.* at 355–56 (finding no irreparable harm). The Court explained that "[i]f we held that a party can show irreparable harm simply through the

continuation of defending a lawsuit, such harm would apply to a multitude of situations well beyond this type of lawsuit." *Id.* at 355; *see also id.* at 353 ("[T]his Court has never held that requiring a party to continue to defend a lawsuit is irreparable harm for the purpose of invoking . . . certiorari."). In light of the statute's waiver of immunity for certain type of claims, this Court stated that the "case does not involve absolute immunity where a party is protected from being involved in a lawsuit of any nature." *Id.* at 355.

*Rodriguez* had a similar outcome. That case reviewed the Third District's grant of certiorari relief to Miami Dade County's claim of sovereign immunity under the police emergency exception. *Rodriguez*, 117 So. 3d at 402–03. The county claimed immunity after its officer shot a business owner in an alleged emergency in which the officer and owner responded to a burglary alarm. *Id.* at 402. This Court found no irreparable harm warranting certiorari. *Id.* at 405. *Rodriguez* held "that the continuation of litigation and any ensuing costs, time, and effort in defending such litigation does not constitute irreparable harm." *Id.*

### 3. Justice Canady's Dissenting View

Justice Canady critiqued the holdings of both *Citizens Property* and *Rodriguez* as providing no principled basis to deny certiorari relief. In *Rodriguez*, Justice Canady explained that—akin to the reasoning adopted by this Court in *Keck* and *Tucker*—"the erroneous continuation of legal proceedings against the immune governmental entity constitutes irreparable harm ***because the full benefit of the legal immunity from suit cannot be restored on appeal***." *Rodriguez*, 117 So. 3d at 410 (Canady, J., concurring in result only) (emphasis added). Justice Canady added that "[t]he Court has never offered any cogent explanation of why the violation of *immunity from suit* does not constitute irreparable harm." *Id.* (emphasis in original). Similarly, in *Citizens Property*, Justice Canady dissented and endorsed the dissenting opinion from Judge Wetherell from the First District. 104 So. 3d at 358 (Canady, J., dissenting); *see Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 46 So. 3d 1051, 1054 (Fla. 1st DCA 2010) (Wetherell, J., dissenting) (explaining that "immunity from suit is lost if the party is forced to go through litigation").

### 4. The *Vericker* Case

This Court's precedent supports granting certiorari relief because, absent interlocutory review, Vericker's immunity will be lost forever. That material injury cannot be remedied on direct appeal for a defendant who is otherwise immune from facing litigation for the exercise of activity as protected by the U.S. or Florida Constitutions. As in *Keck* and *Tucker*, anti–SLAPP defendants cannot receive the benefit of their statutory immunity from suit after trial. The statutory entitlement "is effectively lost" if the case erroneously goes to trial. *See Tucker*, 648 So. 2d at 1189. Indeed, the non–monetary protections the anti–SLAPP statute provides "become[] essentially meaningless." *Keck*, 104 So. 3d at 366. Likewise, the instant case involves immunity from suit—not merely immunity from liability, a distinction this Court drew in *Citizens Property*. *See Citizens Prop.*, 104 So. 3d at 355.

In other regards, the present action also is dissimilar to the requests for interlocutory review from government entities in *Citizens Property* and *Rodriguez*. The present action does not merely involve the harm of continuing with litigation. *See, e.g.*, *id.* at 353. Vericker's First Amendment rights and his statutory rights under the anti-

SLAPP statute are implicated by the denial of his anti–SLAPP motion, neither of which may be remedied on appeal.

In any event, Justice Canady was correct that *Citizens Property* and *Rodriguez* establish no cogent basis not to allow interlocutory review. Indeed, this Court confirmed that fact by *sua sponte* expanding interlocutory review under rule 9.130 to include review of sovereign immunity orders in 2020. *In re: Amends. to Fla. Rule of Appellate Procedure 9.130*, 289 So. 3d 866 (Fla. 2020). As argued in the alternative below, this Court should also expand rule 9.130 in the anti-SLAPP context.

## IV. The Trial Court's Order Departed From The Essential Requirements Of The Law, Satisfying The Remaining Requirement To Grant Certiorari

This Court accepted jurisdiction to resolve a conflict between the district courts regarding whether certiorari jurisdiction existed for denials of anti–SLAPP motions. Because it determined that it lacked jurisdiction, the Third District did not consider whether the trial court's order departed from the essential requirements of the law. R.1084 & n.4. Vericker acknowledges that this Court may limit its review solely to whether certiorari jurisdiction exists, leaving the Third District to answer in the first instance whether the trial court's

order departed from the essential requirements of the law. *See, e.g.*, *Stewart v. Price*, 762 So. 2d 475, 475 n.1 (Fla. 2000) ("We decline to consider additional issues raised by petitioner that exceed the basis upon which we exercised the Court's jurisdiction."). In an abundance of caution, Vericker addresses that analysis here.

The trial court's order departed from the essential requirements of law and deprived Vericker of the process he was due under this Court's amendments to rule 1.510 governing summary judgment. Under that rule, "[t]he court shall state on the record the reasons for granting or denying the motion." Fla. R. Civ. P. 1.510(a). "To comply with this requirement, it will not be enough for the court to make a conclusory statement that there is or is not a genuine dispute as to a material fact." *In re Amends. to Fla. Rule of Civil Procedure 1.510*, 317 So. 3d 72, 77 (Fla. 2021). "The court must state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review." *Id.*

Here, the trial court's order failed to identify which, if any, genuine factual disputes existed on the summary judgment record as required by the procedural requirements of this Court. *See id.*; *see also* R.1023–24. The trial court stated in conclusory fashion that

"[t]here are not too many issues of fact and there are issues for the jury to determine." R.1015:5–7.

Beyond its procedural failures, the trial court's summary judgment order departed from the essential requirements of the law in other respects. Powell sued Vericker for comments that are facially protected by the U.S. Constitution. For instance, Powell took issue with Vericker saying that "Norman C. Powell, our Village Attorney who's [*sic*] only known qualification was his work as a registered strip club lobbyist in North Miami [B]each prior to his employment by our commission, made up a new law that got [Commissioner Laura Cattabriga] the seat." R.203(¶57). Powell admitted at deposition that he indeed worked for strip clubs in North Miami Beach to assist with their licensing. R.359:20–24 ("Yes. I have represented several strip clubs in their licensing capacity for their adult after hours licensing in the City of North Miami Beach. That has been such a minute part of my practice. It does not even appear in terms of my specialties, you know."); *see also* R.331 (summary judgment exhibit listing Powell as a registered North Miami Beach lobbyist for SMG Entertainment,

Inc.). Vericker's colorful language describing the strip club experience as Powell's "only known qualification" is protected speech.[17]

The summary judgment record also revealed that Vericker's charge that Powell "made up" a law that led to the appointment of Commissioner Cattabriga stemmed from a legal memorandum and legal interpretation by Powell that precipitated the removal of that commissioner's immediate predecessor. R.264–71. Vericker disagreed with Powell's legal analysis, and a three-judge panel of the Miami-Dade County Circuit Court's Appellate Division validated Vericker's skepticism. R.256–58 (quashing the decision removing Commissioner Cattabriga's predecessor as a violation of the Village Charter). At worst, Vericker engaged in hyperbole by characterizing

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[17] *See, e.g.*, *Logue v. Book*, 297 So. 3d 605, 618 (Fla. 4th DCA 2020) ("While his methods may be bombastic and extreme—particularly his many unfortunate and insulting references to Petitioner and her father—this type of political hyperbole does not take the communication out of the protections of the First Amendment."); *see also Nodar v. Galbreath*, 462 So. 2d 803, 810 & n.5 (Fla. 1984) (holding that the defendant's statements "were privileged" because "they were statements of a citizen to a political authority regarding matters of public concern, i.e., . . . the performance of a public employee" and holding that the defendant had the privilege of "fair comment and criticism").

Powell's analysis as "made up" law; that is not actionable. *See Logue*, 297 So. 3d at 618.

Finally, as to each of the alleged defamatory statements, the summary judgment record was devoid of clear and convincing evidence needed to establish actual malice under *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Compare, e.g.*, R.202(¶49(c)) (accusing Vericker of defamation for alleging the police chief's firing related to complaints of illegal copying at the Village at Powell's direction), *with* R.326(¶¶25, 28), R.327 (¶33) (former police chief's federal lawsuit alleging substantially the same thing). Indeed, the summary judgment order reflected that the trial court did not analyze the statements under the "actual malice standard" required as to critiques of matters of public concern. *Compare* R.1023 (summary judgment order contending that there was evidence of only "malice"), *with Sullivan*, 376 U.S. at 279–80 (requiring actual malice).

Accordingly, certiorari relief was available to address the trial court's clear departure from established requirements of law.

## V. In the Alternative, This Court Should Amend Rule 9.130 Retroactively To Permit Interlocutory Review

To the extent this Court declines to expand certiorari review, it can (and should) amend rule 9.130 to permit interlocutory review as it has done in similar circumstances. Vericker proposes a more limited rule change than the proposal the Court considered from the rules committee.

The Florida Constitution vests sole authority in this Court to adopt rules of procedure: "The supreme court shall adopt rules for the practice and procedure in all courts . . . ." Art. V, § 2(a), Fla. Const.; *see also* Fla. R. Gen. Prac. & Jud. Admin. 2.140(d). This Court need not wait for a motion to amend the rules. It has the power to amend rules of procedure *sua sponte* and with immediate application. Fla. R. Gen. Prac. & Jud. Admin. 2.140(d). This Court has done so repeatedly, especially in instances where it declined to expand certiorari review but saw the need for interlocutory review where statutory and immunity rights were at issue:

| Related Case | Interlocutory Matter for Review | Rule Amended (Date) |
|---|---|---|
| *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850 (Fla. 1992) | Worker's compensation immunity | Fla. R. App. P. 9.130(3)(C)(v) (1992) |
| *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994) | Denial of qualified immunity in civil rights cases | Fla. R. App. P. 9.130(3)(F)(i) (1994) |
| *Keck v. Eminisor*, 104 So. 3d 359 (Fla. 2012) | Government agent's immunity under section 768.28(9) | Fla. R. App. P. 9.130(3)(F)(ii) (2012) |
| *Fla. Hwy. Patrol v. Jackson*, 288 So. 3d 1179 (Fla. 2020) | Sovereign immunity | Fla. R. App. P. 9.130(3)(F)(iii) (2020) |
| *Univ. of Fla. Bd. of Trs. v. Carmody*, — So. 3d —, 2023 WL 4359498 (Fla. July 6, 2023)[18] | Allowing review of certain pre–suit requirements for medical malpractice actions | Fla. R. App. P. 9.130(3)(H) (2023) |

[18] In *Carmody*, this Court explained that "it is within our constitutional authority to ensure that Florida's procedural rules of court manifest the substantive legal enactments of the Legislature." *Carmody*, — So. 3d at —, 2023 WL 4359498, at *7. The same is principle applies here as to the anti-SLAPP statute, where the Legislature has prescribed causes of action that are contrary to that enactment and excluded them from Florida's courts. Moreover, the medical malpractice statutory language at issue in *Carmody* mirrors the anti-SLAPP statute's language. *Id.* ("'*no action shall be filed . . . unless*" (quoting § 766.104(1), Fla. Stat. (2019); emphasis in the original)). Just as the Legislature may restrict the tort suits that could be brought in Florida state courts asserting medical malpractice, it can limit tort suits infringing on constitutional rights.

The Court also can make its rules retroactively applicable to pending cases, but it must do so expressly. *See Fed. Express Corp. v. Sabbah*, 357 So. 3d 1283, 1288 (Fla. 3d DCA 2023) (Gordo, J., concurring).

This Court should amend rule 9.130 in the following fashion:

RULE 9.130. PROCEEDINGS TO REVIEW NONFINAL ORDERS AND SPECIFIED FINAL ORDERS

(a) Applicability.

(1)–(2) [No Change]

(3) Appeals to the district courts of appeal of nonfinal orders are limited to those that:

(A)–(B) [No Change]

(C) determine:

(i)–(x) [No Change]

(xi) as a matter of law, a party is not entitled to immunity[19] under section 768.295(3), Florida Statutes, based solely on constitutional defenses;

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19 To the extent this Court disagreed with the weight of authority that anti-SLAPP statutes confer immunity, it should amend this subdivision as follows:

(xi) as a matter of law, a party is not entitled to dismissal, judgment on the pleadings, or summary judgment under section 768.295(3), Florida Statutes, based solely on constitutional defenses[.]

This proposed rule change differs materially from the rule change the Appellate Courts Rule Committee proposed. One, the rule limits appellate review only to decisions that determine the validity of an anti–SLAPP motion as a matter of law. Where factual disputes exist, appellate review would be prohibited. That would significantly limit review of orders denying motions to dismiss. Two, the rule change only permits review to the extent an anti–SLAPP motion raises constitutionally–based defenses to immunity rather than run–of–mill defenses common in traditional actions.

## CONCLUSION

For the foregoing reasons, this Court should resolve the district court conflict and confirm that certiorari jurisdiction exists to consider denials of motions under section 768.295 asserting immunity as a matter of law for constitutional defenses. This Court should thus quash the Third District's decision and remand for further proceedings to ascertain if the other standards for certiorari relief have been met. Alternatively, this Court should retroactively amend rule 9.130 as proposed above.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served on July 14, 2023, via electronic mail using the Court's ePortal system upon Andrew Feldman, Feldman Kodsi, Datran Center, 9100 S. Dadeland Blvd, Suite 1500, Miami, FL 33156, *Counsel for Respondent*.

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## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that this brief was prepared in Bookman Old Style, 14–point font, and contains 11,118 words, in compliance with Rules 9.045(b) and 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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