**No. SC22-1042**

# In the Supreme Court of Florida

KEVIN VERICKER,
*Petitioner*,
v.

NORMAN CHRISTOPHER POWELL,
*Respondent*.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
DCA CASE NO. 3D22-645

## BRIEF ON JURISDICTION 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's federal summary judgment standard when the order merely made the conclusory statement that "there are genuine issues of material fact in dispute."

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[1] Petitioner identifies additional issues he submits for review in the event the present petition is granted. *See* Fla. R. App. P. 9.120(f).

## INTRODUCTION

Section 768.295 of the Florida Statutes prohibits meritless suits brought primarily because the defendant was exercising his constitutional rights, including his free speech rights. The legislature recognized that such strategic lawsuits against public participation—commonly known as "SLAPP" suits—chill the exercise of fundamental constitutional rights. The legislature thus created a statutory right for defendants in a SLAPP suit to seek an expeditious resolution of their case on the ground that the suit violates section 768.295.

In its decision below, the Third District joined the Fourth District in holding that its certiorari jurisdiction does not extend to review of non-final orders denying a motion asserting that the case is inconsistent with Florida's prohibition on SLAPP suits. The Second District has expressly and directly reached the opposite conclusion. So like the Fourth District before it, the Third District certified conflict with the Second District.

The decision below is at odds with both section 768.295's substantive legal right to be free from SLAPP suits and with the

Second District's precedent. The Second District has held that section 768.295 is akin to a "statute[] providing for immunity from suit where the statutory protection cannot be adequately restored once it is lost through litigation and trial." *Gundel v. AV Homes, Inc.*, 264 So. 3d 305, 311 (Fla. 2d DCA 2019) (authorizing certiorari review of non-final orders denying a section 768.295 motion). The record below established that under the federal summary judgment standard this Court recently adopted, Respondent, a former village attorney, cannot pursue a defamation case because he failed to demonstrate actual malice, as mandated by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Third District, however, concluded that certiorari would not lie for review of SLAPP motions, even though the trial court's decision is facially at odds with *Sullivan*.

The Court should accept jurisdiction and resolve the important issue presented by the certified conflict.

## STATEMENT OF THE CASE AND FACTS

Respondent Norman Powell sued Petitioner Kevin Vericker for defamation relatedly solely to comments about Respondent's duties

as the then-village attorney for North Bay Village. On his blog, entitled North Bay Village Reality Based Community, Petitioner accused Respondent of being incompetent, dishonest, unethical, and unqualified.

Petitioner filed a motion for summary judgment. Petitioner contended that Respondent could not establish by clear and convincing evidence that Petitioner acted with actual malice, as required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *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). Actual malice must be proven by clear and convincing evidence. *Id.* The summary judgment record does not reflect that Petitioner knew any of his comments were false. And Petitioner had traditional journalistic sources for his commentary, including sources within public records.

The trial court denied summary judgment under Florida's new summary judgment standard. The trial court's 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 Respondent established "actual malice."

Petitioner sought a writ of certiorari from the Third District. The Third District dismissed the petition and certified a conflict with the Second District. App.5, 9. In a concurring opinion, all three judges on the Third District panel acknowledged the discrepancy between the legislatively-created substantive right to be free from meritless SLAPP suits and the lack of an avenue for interlocutory review to vindicate it. App.10-11 (Gordo, J., joined by Fernandez, C.J., and Scales, J., specially concurring).

Petitioner timely invoked this Court's discretionary jurisdiction.

## ARGUMENT

### I. The Court Has Jurisdiction To Review The Certified Conflict

Jurisdiction exists to review the conflict certified by the Third District. In its decision below, the Third District joined the Fourth

District in holding that certiorari jurisdiction does not extend to the review of non-final orders denying motions invoking section 768.295. App.5, 7-8. The Second District, by contrast, has come out the other way, extending its certiorari jurisdiction to such non-final orders.

For two independently sufficient reasons, this Court has jurisdiction to review the Third District's decision: (A) the Third District certified conflict with the Second District, *see* art. V, § 3(b)(4), Fla. Const.; and (B) decisions of the Third and Fourth Districts expressly and directly conflict with decisions of the Second District on an important and recurring question of Florida law, *see* art. V, § 3(b)(3), Fla. Const.

A. This Court has jurisdiction because the Third District certified conflict between its decision below and the Second District's decisions in *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019), *Baird v. Mason Classical Academy, Inc.*, 317 So. 3d 264 (Fla. 2d DCA 2021), and *Davis v. Misheyev*, 339 So. 3d 449 (Fla. 2d DCA 2022). "[C]ertification of conflict provides [the Court] with jurisdiction per se." *State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007).

The decision below is one of at least five district court decisions to have certified conflict on the issue of whether certiorari jurisdiction extends to review of non-final orders denying motions asserting that a lawsuit is barred by section 768.295. Following the decision below, the Third District again certified conflict with *Gundel*, *Baird*, and *Davis*. *See Novick v. Mango's Tropical Café, LLC,* — So. 3d —, —, 2022 WL 3903529, at *1 (Fla. 3d DCA Aug. 31, 2022). The Fourth District has twice certified conflict with the Second District. *See Geddes v. Jupiter Island Compound, LLC*, 341 So. 3d 353, 353 (Fla. 4th DCA 2022); *WPB Residents for Integrity in Gov't, Inc. v. Materio*, 284 So. 3d 555, 561 (Fla. 4th DCA 2019). And before the decision below, the Second District certified conflict with the Fourth District. *See Davis*, 339 So. 3d at 452.

That the Third District joined the Second and Fourth Districts in certifying conflict on the same question of law is reason enough to accept jurisdiction in this case.

B. In addition to the certified conflict, this Court has jurisdiction based on the express and direct conflict between decisions of the Second District, on the one hand, and the Third and

Fourth Districts, on the other. "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

In *Gundel* and later cases, the Second District held that its certiorari jurisdiction extends to review of non-final orders denying a motion for summary judgment or a motion to dismiss on the ground that the plaintiff's suit violates section 768.295's prohibition on SLAPP suits. *Gundel*, 264 So. 3d at 309-11; *see also Baird*, 317 So. 3d at 267-68 (applying *Gundel* to an order denying summary judgment).

The Second District explained in *Gundel* that "the very filing and continuation of" a SLAPP suit has a "chilling effect on constitutional rights" and that "the harm that results from the . . . improper denial" of a motion for summary judgment "is precisely the harm that [section 768.295] seeks to prevent—unnecessary litigation." 264 So. 3d 310, 311. In that way, the Second District held, section 768.295 is akin to a "statute[] providing for immunity from suit whether the statutory protection cannot be adequately restored once it is lost through litigation and trial." *Id.* at 311. Without

certiorari review of non-final orders denying such motions, the Second District concluded, "the substantive right created by [section 768.295] 'is illusory,' the policy underlying the creation of the statute is frustrated, and the protection afforded by the statute is rendered meaningless for defendants." *Davis*, 339 So. 3d at 452 (quoting *Gundel*, 264 So. 3d at 311).

The Second District continues to follow *Gundel*. *See Baird*, 317 So. 3d at 267-68; *Davis*, 339 So. 3d at 451-52.[2]

Not long after *Gundel*, the Fourth District reached the opposite conclusion, holding that its denial of a pre-trial motion asserting that a case violates section 768.295's prohibition on SLAPP suits does not amount to irreparable harm sufficient to invoke certiorari jurisdiction. *Materio*, 284 So. 3d at 560-61; *see also Geddes*, 341 So. 3d at 353.

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[2] Although it did not directly address whether certiorari jurisdiction exists to review non-final orders addressing anti-SLAPP motions, the First District has indicated its agreement with *Gundel*. *See ANS, Inc. v. Off. of Att'y Gen., Dep't of Legal Affs.*, 319 So. 3d 1289, 1290 (Fla. 1st DCA 2021) ("[B]ecause protection against unnecessary litigation is the very reason for the anti-SLAPP statute, certiorari is authorized to prevent that unnecessary litigation. The same is true for a denial of a pretrial motion on the grounds of immunity.").

And in the decision below, the Third District explicitly "adopt[ed] the rationale of the Fourth District," holding that "a party's having to defend against a lawsuit, even if meritless, does not constitute sufficient irreparable harm to invoke . . . certiorari jurisdiction." App.7, 8. The Third and Fourth Districts' decisions expressly and directly conflict with the Second District's decisions.

## II. The Court Should Accept Jurisdiction Because The Certified Conflict Involves An Important And Recurring Issue Of Statewide Importance

The certified conflict presents a paramount issue for this State that continues to divide the district courts of appeal.

Section 768.295 creates a substantive legal right to be free from meritless SLAPP suits that infringe upon fundamental First Amendment rights. Whether interlocutory review is available impacts the viability of this statutory protection of First Amendment rights and the legislature's judgment that SLAPP suits chill the exercise of those fundamental rights. Indeed, the three judges that made up the majority below concluded in a concurring opinion 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 the substantive right is being violated." App.11 (Gordo, J., joined by Fernandez, C.J., and Scales, J., specially concurring).

Only this Court may prescribe the bounds of appellate jurisdiction. *See Parvin v. Valhalla Props. on Sand Key, LLC*, 949 So. 2d 1167, 1168 (Fla. 2d DCA 2007) (Canady, J.) ("Under article V, section (4)(b)(1) of the Florida Constitution, jurisdiction of the district courts to consider appeals of nonfinal orders may not be established by statute."). Petitioner does not dispute that the legislature has prescribed mechanisms for judicial review of government matters through certiorari in either the district courts of appeal, *see, e.g.*, § 601.152(5), Fla. Stat., or in the circuit courts, *see, e.g.*, §§ 171.081, 125.018, 163.3215(4), 165.081, 190.046(6), 212.16(9), 320.781(7), 321.051(2), 322.2615(13), 322.2616(14), 322.27(7), 322.31, 322.64(13), 327(7), 333.11(1), 337.404(3), 723.0612(5), Fla. Stat. But that is quite different than authorizing appellate review of non-final orders of a trial court. The latter is strictly within the province of this Court. *See Parvin*, 949 So. 2d at 1168. No inference may thus be

made by section 768.295's lack of a provision for interlocutory review. The decisions of the Third and Fourth Districts demonstrate the deference district courts are placing on this Court to resolve the question. And given the conflict among the districts, this Court should do so, as it is the only branch of government that may.

Although the Third District referred this issue to The Florida Bar's Appellate Court Rules Committee (App.8, 9), and the Committee had already taken up the issue (*In re Amends. to Fla. R. App. P. 9.130*, No. SC22-1084), that will not be dispositive of this petition. This Court may determine that rule 9.130's schedule of appealable non-final orders should not extend to cover any order facially addressing section 768.925. More study may thus be required.

A rule adoption may not provide relief here in any event. *Cf. Sarasota Cnty. Pub. Hosp. Dist. v. Venice HMA, LLC*, 325 So. 3d 334, 346 n.8 (Fla. 2d DCA 2021) (recognizing that an amendment to rule 9.130 did not apply retroactively where this Court declined to expressly deem the amendment retroactive). Petitioner has fundamental rights that the legislature has buttressed through statute. His petition should be heard. Absent which he will lose

section 768.295's substantive protection of his fundamental First Amendment rights.

## III. This Case Is An Ideal Vehicle To Address The Important Issue Presented By The Certified Conflict

The present action is best suited to resolve the important issue presented by the certified conflict. The case arises from a summary judgment proceeding with a fully developed record that raises a pure question of law: whether the plaintiff established actual malice at summary judgment by clear and convincing evidence. That rule of law was clearly established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984). And the Third District set forth its reasons for denying certiorari jurisdiction.

The Florida legislature has determined that SLAPP suits "are inconsistent with the right of persons to exercise . . . constitutional rights of free speech in connection with public issues." § 768.295(1), Fla. Stat. So the legislature created a substantive right to be free from meritless litigation designed to chill fundamental First Amendment rights. § 768.295(3). The Second District has held that section 768.295's substantive right would be lost absent interlocutory

review. The Third District disagreed and certified a conflict. The issue is therefore squarely presented in this case.

## CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction and resolve the certified conflict.

Dated: September 28, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served on September 28, 2022, 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 2,400 words, in compliance with Rules 9.045(b) and 9.120(d) of the Florida Rules of Appellate Procedure.

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