IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCABAMA

BREMERLEY FAMILY FARMS; WILLIAM BREMERLEY, *Plaintiffs,* v. ANIMAL ACTION NOW; BLAINE CARDILLO, *Defendants.*	Case No. 3:21-cv-86753-RWS

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Bremerley Family Farms and William Bremerley (collectively, "the Bremerleys") filed the present action against North Carolina-based nonprofit organization Animal Action Now (singularly, "AAN") and its agent, Blaine Cardillo (collectively, "Animal Action Now"). This matter comes before the Court on Animal Action Now's Motion for Summary Judgment pursuant to Wisca. Code § 19–5096, the Wiscabama Public Speech and Participation Act of 2018. Oral argument was heard on June 8, 2022.

Having carefully considered the law, evidence, and arguments of the parties, the Court **GRANTS** Animal Action Now's motion for summary judgment.

I. Background

Having reviewed Animal Action Now's Statement of Undisputed Material Fact and the Bremerleys' response thereto, the Court finds the following facts undisputed. Bremerley Family Farms is a commercial egg farm based in Leosville, Wiscabama, in Sharingsworth County. It has been in the Bremerley family for 130 years and is presently owned and operated by plaintiff William Bremerley. Mr. Bremerley's farm houses approximately 300,000 egg-laying hens, using a tiered cage system. The farm is audited by the American Humane Network and has never received anything less than a full satisfactory passing grade in its audits. Bremerley Family Farms has a long working relationship with

veterinarian Dr. Michael Zoolanger. Before Animal Action Now's investigation, Vegman's grocery stores was one of Bremerley's largest customers.

Mr. Bremerley posted an advertisement for a farmhand position, which was answered by Defendant Blaine Cardillo, who interviewed with Mr. Bremerley for the job. Ms. Cardillo did not disclose to Mr. Bremerley that she was also working for an organization based in North Carolina called Animal Action Now. Ms. Cardillo was hired and started her role as a farmhand at Bremerley Family Farms the following week, on April 26, 2021.

For the next six weeks, Ms. Cardillo worked in the egg barn alongside a Bremerley Family Farms supervisor and other unidentified employees. Her duties included assessing the condition of the hens, their food and water supply, and the egg collection machinery, and helping ensure that eggs were conveyed through the barn to go on for pasteurization, packaging, and shipment.

While working at Bremerley, Ms. Cardillo wore a small hidden camera that she used to record the surroundings and activities inside the barn. She recorded hours of video footage, capturing numerous incidents in which, she and AAN contend, Bremerley Family Farms violated the Wiscabama anti-cruelty law, including: leaving live hens in waste pits and in buckets meant to hold only dead animals; depriving hens of food; failing to provide necessary veterinary care to ill and injured hens; improper euthanasia of a hen (by stomping on her); and aggressive handling of hens in a manner likely to cause them unnecessary pain, including by pulling forcefully on them.

AAN is a non-profit animal advocacy organization that uses a variety of tools and programs to accomplish its mission of reforming animal agriculture. One such tool is what AAN calls "undercover investigations." This involves AAN working with an individual—an "investigator"—to document conditions inside a farm or slaughterhouse that the investigator gets a job in or otherwise gets access to, in the way Ms. Cardillo took a job at Bremerley Family Farms to document the conditions inside. AAN uses the video footage and information gained through its undercover investigations to call for enforcement of animal protection laws and reforms to laws pertaining to or protecting animals, to advocate for a vegan diet, and to call on companies to divest from animal products AAN believes are derived from cruel practices and poor conditions for the animals. Undercover investigations have motivated legislative, corporate, and institutional reforms in the manner of raising animals for food.

AAN used the video footage and information Ms. Cardillo acquired at Bremerley Family Farms in exactly this manner, first sending a letter to the Sharingsworth County District Attorney requesting enforcement of the Wiscabama anti-cruelty law against Bremerley

Family Farms and Mr. Bremerley. AAN then announced the results of its investigation publicly and made a public appeal to Vegman's grocery store to drop Bremerley Family Farms as a supplier. Animal Action Now spread their message about Bremerley Family Farms' alleged unlawful treatment of the hens via a news release, posts on AAN's website and social media pages, and in interviews with news media organizations including UBC News and the Associated Print. An Associated Print article about the investigation, in which AAN Executive Director Alexandra Finklesworth was quoted, was syndicated and appeared in media outlets nationwide.

After the release of Animal Action Now's investigation into Bremerley Family Farms, Vegman's grocery store did drop Bremerley as its egg supplier. Bremerley Family Farms lost a $1.8 million a year contract as a result and has not found a new customer to replace that revenue stream. Bremerley Family Farms and Mr. Bremerley, through counsel, sent a letter to AAN demanding the retraction of what they contended were false statements AAN and Ms. Cardillo had made about the farm and its treatment of the hens. After AAN refused to retract any of its statements, Bremerley Family Farms and its owner William Bremerley initiated the present lawsuit, asserting that AAN and Blaine Cardillo defamed the Bremerleys and their business, and asserting $8 million in damages.

II. Analysis

Animal Action Now invokes the Wiscabama Public Speech and Participation Act of 2018, Wisca. Code § 19–5096 (the "Public Speech Act"), while the Bremerleys contend the Act does not apply in this federal diversity action and that, even if it did, it would not apply to their lawsuit because Animal Action Now's conduct does not fall within the Public Speech Act's provisions and because the Bremerleys' suit has merit. The Court will begin by addressing the first of these questions.

a. *The Wiscabama Public Speech and Participation Act of 2018*

The Public Speech Act is one of a family of laws nationwide meant to combat the problem of "Strategic Lawsuits Against Public Participation"—SLAPPs. SLAPPs are unmeritorious lawsuits filed against people or entities because of their exercise of constitutional free speech and petitioning rights. Anti-SLAPP statutes vary widely, but their general aim is to deter and sanction the filing of these lawsuits.

Wiscabama's Anti-SLAPP law is of a relatively recent vintage. In 2018, the Wiscabama legislature "prohibit[ed]" lawsuits "brought primarily to chill the valid exercise of constitutional rights as established in the First Amendment." Wisca. Code § 19–5096(1). The statute states, in relevant part:

(1) The Legislature finds and declares that there has been an alarming increase in lawsuits brought primarily to chill the valid exercise of constitutional rights as established in the First Amendment to the United States Constitution. It is the intent of the Legislature to protect the freedom in Wiscabama 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 by prohibiting engaging in Strategic Lawsuits Against Public Participation. The Legislature finds and declares that prohibiting such lawsuits, as described in this section, will preserve this fundamental state policy. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts, and that this section be construed broadly.

(2) As used in this section, “free speech in connection with public issues” includes any written or oral statement that is protected under applicable law and is made (a) before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (b) in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (c) in or in connection with a play, movie, television program, radio broadcast, book, magazine article, musical work, news report, or other similar work.

(3) A person may not file or cause to be filed 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, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution.

(4) A person or entity sued in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's lawsuit has been brought in violation of this section. The claimant shall thereafter file a response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant's response. If the court finds that the person or entity was sued in violation of this section, the court shall award the person or entity reasonable attorney’s fees and costs incurred in connection with the claim or suit.

(5) All discovery proceedings are stayed upon the filing of a notice of motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. Notwithstanding this Paragraph, the court, on noticed motion and for good cause shown, may order that specified discovery be conducted during the pendency of a motion made pursuant to this section.

Wisca. Code § 19–5096. While it bears some common features of other similar acts, as discussed further below, the Public Speech Act is unique. Unlike other similar statutes, it contains no burden-shifting provision requiring plaintiffs to show a likelihood of success on the merits. However, like other statutes, it provides an accelerated timeline for resolving a suit alleged to be prohibited by its provisions, stays discovery, and provides for an award of attorney's fees and costs to the litigant sued in violation of the Act. *Id.* § 19–5096(4)–(5).

b. *Application of Wisca. Code § 19–5096 in Federal Diversity Actions*

Numerous circuits have addressed the question of whether anti-SLAPP statutes can be applied in federal diversity actions. While the question before us is familiar, the Public Speech Act is a relatively new statute that has not yet been interpreted by federal courts.

The Bremerleys argue that the Public Speech Act is purely procedural and thus that the Court must not apply it in this federal action. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Alternatively, the Bremerleys contend that if the Act is substantive, then it clashes with litigants' burdens and rights under Federal Rules of Civil Procedure 12 and 56 and the Act cannot be applied. *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,* 559 U.S. 393, 398–99, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010). The Bremerleys' contentions raise a question of first impression in this Circuit.

Our sister circuits' manner of deciding this question, and their conclusions, have been anything but consistent. The question seems to boil down to two related but distinct inquiries: First, whether the Court finds the anti-SLAPP action is mostly substantive or mostly procedural, for purposes of the *Erie* doctrine, in which "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (citing *Erie*, 304 U.S. at 78-79). And second, whether (1) a Federal Rule of Civil Procedure "answer[s] the same question" as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act. *Shady Grove,* 559 U.S. at 398–99 (citing *Hanna v. Plumer,* 380 U.S. 460, 463–64, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)); 28 U.S.C. § 2072. If the Federal Rules do "answer the same question" and do not violate the Rules Enabling Act, then courts have found they cannot apply the anti-SLAPP statute in federal court under S*hady Grove*.

The circuits do agree that this is not the "classic *Erie* question," and instead falls within that "special category concerning the relationship between the Federal Rules of Civil Procedure and a state statute that governs both procedures and substance in the state courts." *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010). However, that's where the agreement ends. Some courts have said anti-SLAPP statutes can be applied in federal diversity actions because

they create substantive rights that do not "answer the same question" as the federal rules. *See, e.g.*, *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009) (holding, without discussion, that Louisiana's anti-SLAPP statutes applied in a federal diversity case); *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (finding the application of the immunity and fee shifting provisions of Nevada's anti-SLAPP law was "unproblematic"); *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999) (allowing the application, in federal diversity suits, of California's anti-SLAPP motion to strike provision because doing so served the *Erie* doctrine's aim of discouraging forum shopping and avoiding inequitable administration of the law, and did not directly clash with the Federal Rules).

Other courts have disagreed and followed the logic of the D.C. Circuit (*Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015)) in finding that anti-SLAPP statutes cannot be applied in federal diversity actions, either because they are purely procedural under *Erie*, *see Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018), or because they clash with the Federal Rules of Civil Procedure*, see Carbone v. Cable News Network*, No. 1:16-CV-1720-ODE, 2017 WL 5244176, at * 5 (N.D. Ga. Feb. 15, 2017) (endorsing reasoning of *Abbas* to hold Rule 12(b)(6) answers "the same question" as the Georgia anti-SLAPP statute); *see also Makaeff v. Trump Univ. LLC*, 715 F.3d 254, 273–74 (9th Cir. 2013) (Kozinski J., concurring) (attacking the reasoning of *Newsham* on the basis that the California anti-SLAPP statute "creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights").

In this analysis, some courts have given the *Erie* questions relatively short shrift and skipped right to the *Shady Grove* test without much inquiry into whether an anti-SLAPP statute is substantive. For example, the *Abbas* court did not begin with a mention of *Erie*, but dove right into the *Shady Grove* test, and ultimately found that the D.C. anti-SLAPP act could not be applied in federal court, as explained further below. *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d at 1335-36. In contrast, the First Circuit's inquiry in *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010) centered around *Erie* concerns*.* Part of this can of course be attributed to the fact that *Shady Grove* was decided in 2010, and thus preceded several of the decisions that upheld anti-SLAPP acts' use in federal diversity actions. The Bremerleys urge us to view those pre-*Shady Grove* decisions skeptically and suggest they may no longer be good law, but the Court is not convinced that their logic is no longer sound.

It seems to this Court that whether the Public Speech Act can be applied in this action must hinge on how "procedural" the statute is. If it is purely procedural, then *Erie* answers the question and there is no need to proceed further. If it bears both procedural and substantive elements, then the Court will proceed to analyze it under *Shady Grove* and

examine its overlay with the federal rules governing dismissal of claims before trial, as did the D.C. Circuit in *Abbas*.

The Wiscabama statute is obviously procedural. The Public Speech Act lays out a procedure for filing a particular summary judgment motion for a particular class of cases, details the time in which courts should attempt to hear those motions, and provides rules about briefing and hearing such motions. It applies the procedural mechanism of staying discovery when such a motion is filed. In many ways, it mirrors provisions of Rule 56, but with notable differences, discussed further below.

But in other ways, the Public Speech Act could be said to create or recognize specific state rights, such as the *right* to the swift disposition of a "prohibited" lawsuit brought to chill one's exercise of constitutional free speech rights, and the right to attorney's fees and costs when such a lawsuit has been filed against a person. As is so often the case, the application of *Erie* is a fraught and "hazy" inquiry. *Shady Grove,* 559 U.S. at 419 (Stevens, J., concurring). The Court finds this is a case in which "procedure and substance are so interwoven that rational separation becomes well-nigh impossible." *Id*.

The Bremerleys urge us to agree with the D.C., Fifth, Tenth, and Eleventh Circuits. First, they urge us to follow the Tenth Circuit in *Los Lobos,* contending that the Public Speech Act is purely procedural exactly as was the New Mexico anti-SLAPP law, in that it governs procedure, does not create substantive rights, and merely restates existing constitutional First Amendment rights. Second, the Bremerleys contend that even if the Public Speech Act has substantive elements, any substantive rights the Act *does* create conflict with a litigant's burdens and rights under the Federal Rules of Civil Procedure, as the D.C. Circuit found in *Abbas* and the Eleventh Circuit found in *Carbone*.

The Court will take each argument in turn. First, the Court is not convinced that the Public Speech Act is purely procedural and does not create substantive rights. As the law's statement of purpose indicates, the Wiscabama legislature clearly *believed* it was creating new rights. The statute is framed as addressing an ongoing problem of frivolous lawsuits filed to chill constitutional free speech and petitioning activity, and remedies that problem by prohibiting such lawsuits, providing a special entitlement to their quick disposition, and awarding attorney's fees to those subjected to a SLAPP. These provisions are substantive, in the sense that they provide defendants with rights they previously did not enjoy. Before the passage of the Public Speech Act, for example, a Wiscabama newspaper could be sued for publishing an article about an issue of significant public concern, and although it would receive the First Amendment protections for libel defendants recognized in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), it had no entitlement to the swift disposition of such a speech-targeting lawsuit. Nor was there any deterrent against

filing such suits, because the legislature had not prohibited them, and because there would be no reward of attorney's fees to the person sued for their exercise of constitutional speech and petitioning rights.

That said, there are certainly crosscurrents that suggest the Public Speech Act, unlike other anti-SLAPP acts, *is* purely procedural. The circuits that have found state anti-SLAPP laws confer substantive rights that clash with the federal rules have done so primarily by focusing on the burden-shifting provisions of such statutes. The Tenth Circuit, for example, concluded that New Mexico's anti-SLAPP statute, N.M. Stat. Ann. § 38-2-9.1, was facially procedural because it simply allowed litigants to file a "special motion to dismiss" in any action "against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting." *Los Lobos*, 885 F.3d at 663. The court found New Mexico's statute was not aimed at "influenc[ing] the *outcome* of an alleged SLAPP suit but only the *timing* of that outcome," which made it "unlike many other states' anti-SLAPP statutes that shift substantive burdens of proof or alter substantive standards." *Id.* at 670. Because the statute was purely procedural, the Tenth Circuit found it could not be applied in a federal diversity action.

The Eleventh Circuit came to the same conclusion in *Carbone* with respect to the Georgia anti-SLAPP statute, but for the opposite reason—because that statute *was* meant to influence the outcome of an alleged SLAPP suit. 910 F.3d at 1351-52. There, the court found the statute "compromise[d] the joint operation of Rules 8, 12, and 56" by altering the standards under which motions to dismiss and motions for summary judgment would be considered. *Id.* at 1351. While "Rules 8, 12, and 56 express 'with unmistakable clarity' that proof of probability of success on the merits 'is not required in federal courts' to avoid pretrial dismissal, and that the evidentiary sufficiency of a claim should not be tested before discovery," the court said, "the relevant provisions of the Georgia anti-SLAPP statute explicitly require proof of a probability of success on the merits without the benefit of discovery." *Id.* (quoting *Hanna,* 380 U.S. at 463–64). Because the federal rules "create an affirmative entitlement to avoid pretrial dismissal that would be nullified by the Georgia anti-SLAPP statute if it were applied in a federal court," the act "answered the same question" as the federal rules and could not be applied in a federal diversity action. *Id.* at 1352.

These cases present a conundrum that suggests an anti-SLAPP statute can never be applied in federal court. Either an anti-SLAPP statute does not bear a burden-shifting feature and thus is purely procedural, or it does, and thus conflicts with the federal rules. This Court respectfully disagrees with our sister circuits' analyses. A burden-shifting feature is not the only aspect of an anti-SLAPP statute that makes it substantive. True, the Public Speech Act does not have such a feature. It provides litigants with no greater right to judgment in their

favor than does Federal Rule 56, albeit on an accelerated timeframe and contemplating no preceding discovery. However, the Court finds that there are other ways in which a statute can confer rights or change the legal rules that determine the outcome. The *Shady Grove* court recognized this as an important carveout to its inquiry regarding the clash between the Federal Rules of Civil Procedure and state laws and rules. When a state employs a "traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice." *Id.* The key question, in deciding whether to apply a state law in a federal diversity action, is whether "in a suit for the enforcement of state created rights the outcome would be 'substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court.'" *Berger v. State Farm Mut. Auto. Ins. Co.*, 291 F.2d 666, 668 (10th Cir. 1961) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945)).

The Bremerleys urge us to find that the Public Speech Act does not create any substantive rights. Like the Georgia anti-SLAPP law, they say, it "does not purport to alter a defendant's rights to petition and freedom of speech under the Federal" constitution. Animal Action Now counters that the contours of the Public Speech Act *are* meant to influence the outcome, because the provisions that a litigant can get a SLAPP dismissed quickly, with minimal or no discovery, and be awarded attorney's fees at the conclusion, are intended to influence the outcome of the suit. The outcome, Animal Action Now says, does not depend solely on the legal rules governing whether the plaintiff's claim has merit.

Animal Action Now has the better argument. The Public Speech Act does provide rights not otherwise afforded to litigants in federal court.[1] The Court finds the reasoning of the First Circuit in *Godin* persuasive. 629 F.3d at 92. There, the court found noteworthy that a Mainer sued for the exercise of her constitutional rights would be deprived of an important state remedy if the plaintiff sued in federal court rather than state court. *Id.* Because one of the key justifications for *Erie* is to prevent forum shopping, the First Circuit reasoned, then denying a litigant the application of a protective statute because of the opponent's forum choice would seem unjust. *Id.* It shouldn't be that an act passed to remedy a problem of abusive, speech-killing litigation provides no protections to a defendant when the plaintiff chooses a federal forum.

[1] It is worth mentioning that courts routinely apply state fee-shifting laws in federal diversity actions. *Schilling v. Belcher*, 582 F.2d 995, 1003 (5th Cir. 1978) ("[b]ecause this is a diversity case, the validity of the fee award must be tested under Florida law"); *Showman v. Pressdee*, 922 F.3d 1211, 1225 (11th Cir. 2019) (finding no conflict with Rule 11 in Georgia fee-shifting provision triggered when a party raises "a frivolous claim or defense").

That brings us to the Bremerleys' second contention: that the Public Speech Act clashes with plaintiffs' burdens and rights under the Federal Rules of Civil Procedure. An examination of the Act under the rubric applied by the D.C. and Eleventh Circuits illustrates why that is not so. Again, those courts' key hang-up with the D.C. and Georgia anti-SLAPP statutes, respectively, was that they altered the burdens of proof under Federal Rules 12 or 56. The Public Speech Act does not. It requires the dismissal of claims filed "without merit," but does not impose a likelihood of success standard. It does not change the standard that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The Bremerleys contend that the Public Speech Act "answers the same question" as the federal rules because whereas the federal rules allow plaintiffs to proceed with discovery and recognize a right to a jury trial, s*ee* Fed. R. Civ. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate."); Fed. R. Civ. P. 39(b) ("Issues on which a jury trial is not properly demanded are to be tried by the court."), the Public Speech Act does not. Instead, they say, it bars discovery and denies a plaintiff their right to a trial.

While the Act does envision an early summary judgment motion, and stays discovery after such a motion has been filed, it also provides a mechanism for the plaintiff to seek discovery for the limited purpose of adequately answering the Public Speech Act motion for summary judgment.[2] Because the Public Speech Act does not alter the pleading standards or burdens for the plaintiff, it does not deny them their entitlement to a trial on the merits in any different manner than do the federal rules. *See Abbas*, 783 F.3d 1334. This distinguishes the Wiscabama law from those that courts have found conflict with Federal Rules 8, 12(b)(6), and 56. *Carbone*, 910 F.3d at 1353-54.

In sum, this Court finds that the Wiscabama Public Speech and Participation Act is, as Justice Stevens described in his *Shady Grove* concurrence, "so intertwined with a state right or remedy that it functions to define the scope of the state created right," and is not displaced by Rule 12 or 56. *Shady Grove,* at 89. The Court may thus apply it in this federal diversity action.

c. *Application of Wisca. Code § 19–5096 to the Bremerleys' Suit*

The next question the Court will examine, then, is whether the Public Speech Act applies to this lawsuit. The Act bars the filing of a lawsuit "against another person or entity without

[2] Notably, that is not a remedy that the Bremerleys have sought here.

merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, as protected by" the First Amendment. Wisca. Code § 19–5096(3).

The Act defines "free speech in connection with public issues" as including:

> any written or oral statement that is protected under applicable law and is made (a) before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (b) in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (c) in or in connection with a play, movie, television program, radio broadcast, book, magazine article, musical work, news report, or other similar work.

Id. § 19–5096(2).

Animal Action Now contends that the Bremerleys sued them because Animal Action Now engaged in "free speech in connection with a public issue" and because Plaintiff AAN exercised its constitutional rights to petition the government. Specifically, Animal Action Now claims the Bremerleys' suit arises from two covered, protected activities: first, AAN's request for enforcement of the Wiscabama anti-cruelty law against the Bremerleys, via a letter to the Sharingsworth County District Attorney; and second, Animal Action Now's statements, videos, and related media activities for the release of their Bremerley Family Farms investigation. Animal Action Now says that all these statements and media pieces concern a significant public issue: the treatment of the hens and practices and conditions that Defendant Cardillo documented and uncovered inside egg producer Bremerley Family Farms. The Bremerleys contend that the Public Speech Act does not cover Animal Action Now's activities and that, even if it did, the Bremerleys' Complaint was not filed because of those activities.

The Court will take each of Animal Action Now's activities in turn, analyze whether it falls within the statute's coverage, and, if so, assess whether it can fairly be said that the Bremerleys' Complaint arises from or was filed because of it.

The Public Speech Act does not define the right to petition the government, but its scope is well established, and as noted in the statute, the right is coterminous with the

constitutional right to petition. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. Respectively, these are the Speech Clause and the Petition Clause.

The right to petition the government is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) (quoting *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967)). In *United States v. Cruikshank,* 2 Otto 542, 92 U.S. 542, 23 L.Ed. 588 (1876), the Court declared the right implicit in "[t]he very idea of government, republican in form," *id.* at 552, and more recently affirmed it is "high in the hierarchy of First Amendment values." *Lozman v. City of Riviera Beach, Fla.*, 585 U.S. ––––, ––––, 138 S. Ct. 1945, 1954–55, 201 L.Ed.2d 342 (2018) (internal quotation marks omitted) (quoting *BE & K Const. Co.,* 536 U.S. at 524). "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388, 131 S. Ct. 2488, 2495, 180 L. Ed. 2d 408 (2011). Petitions foster the "public airing" of disputes, the "evolution of the law," and the use of government as an "alternative to force." *BE & K Constr.*, 536 U.S. at 532, 122 S.Ct. 2390.

While a "personal grievance addressed to the government" is encompassed and protected, *Guarnieri,* at 394, 131 S.Ct. 2488, "[p]etitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole." *Id.* at 395, 131 S.Ct. 2488. A petition need not "take[ ] a specific form." *Mack v. Warden Loretto FCI*, 839 F.3d 286, 299 (3d Cir. 2016) (citation omitted). Neither does it matter what level or body of government a petition is addressed to; it enjoys constitutional protection all the same. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (petition and boycott directed at county officials); *Brown v. Louisiana*, 383 U.S. 131, 142, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (protest of segregated public library); *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010) (oral request to city councilperson); *Van Deelen v. Johnson*, 497 F.3d 1151, 1158 (10th Cir. 2007) (appeal of county property tax assessment). A petition may be directed towards any department of government, including the courts. *Guarnieri*, 564 U.S. at 387, 131 S.Ct. 2488; *BE & K Constr.*, 536 U.S. at 525, 122 S.Ct. 2390.

The Bremerleys contend that the Animal Action Now's activity does not fall within the constitutional right to petition because the letter AAN sent to the Sharingsworth County District Attorney was akin to a demand for criminal prosecution, and, the Bremerleys say, private citizens have no cognizable right to the criminal prosecution of other private citizens. The Bremerleys rely primarily on the Supreme Court cases *Leeke v. Timmerman*,

454 U.S. 83, 85–86, 102 S. Ct. 69, 70, 70 L. Ed. 2d 65 (1981) and *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) for this argument. The cases are inapposite. Both concern standing, and specifically, the right to challenge the actions of state officials in failing to issue arrest warrants for the prosecution of individuals the plaintiffs contended harmed them. In both cases the Supreme Court found a shaky nexus between the plaintiffs' injuries and their sought-after relief, because it was not guaranteed that an arrest warrant "would remedy claimed past misconduct . . . or prevent future misconduct" — or even that it would lead to a conviction. *Leeke,* 454 U.S. at 87. Both cases stand for the uncontroversial principle that "[a] private citizen therefore has no judicially cognizable right to" mandate the issuance of an arrest warrant. *Id.* at 86–87. But it does not follow, because AAN does not have a constitutional right to the Bremerleys' prosecution, that its letter requesting a government entity's (the Sharingsworth County District Attorney's) action in response to an alleged legal violation would not fall within the Petition Clause. The Court finds such an entreaty falls squarely within the activities constitutionally protected by that clause of the First Amendment.

This conclusion is further bolstered by the fact that Public Speech Act's definition of "free speech in connection with public issues" is also largely coextensive with and encompasses the right to petition the government. Indeed, the first two parts of the definition refer to petitioning activity. Wisca. Code § 19–5096(2) (covering statements "made (a) before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; [and] (b) in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"). The Court therefore finds that there is no dispute of material fact that Defendant AAN engaged in activities that fall within the right to petition the government as recognized under the Public Speech Act.

Our inquiry does not end there, however. Although AAN petitioned the District Attorney, to invoke the Public Speech Act's protections, Animal Action Now must show that the Bremerleys filed the lawsuit "primarily *because*" of that protected petitioning activity. Wisca. Code § 19–5096(3). Animal Action Now cannot meet that burden. Nothing in the affidavits they provided, or in the attachments thereto, indicates that Animal Action Now publicized the letter to the District Attorney—or even mentioned it publicly. There is no mention of a request to the District Attorney in any of the public media statements Animal Action Now put into evidence. While Animal Action Now may believe or suspect that the District Attorney contacted the Bremerleys concerning Defendant's request, Plaintiff William Bremerley maintains that he was unaware of the request for enforcement until after the filing of this action, and that he has heard nothing from the District Attorney or any of law enforcement officers. Animal Action Now has no answer to this testimony.

For the first time in their reply brief, however, Animal Action Now makes the argument that *other* parts of their public advocacy surrounding the Bremerley Family Farms investigation fall within the statutory and constitutional petitioning rights. Specifically, Animal Action Now contends that their condemnation of the alleged mistreatment of the hens at the farm and advocacy for greater protections for these animals constitute protected petitioning activity. The problem with this argument—other than its timeliness, *Carroll v. Lynch,* 698 F.3d 561, 564 n. 2 (7th Cir. 2012) (arguments raised for the first time in reply briefs ordinarily waived because they deprive the other party of the opportunity to respond to them)—is that Animal Action Now identifies no governmental body or entity to which they have directed this advocacy, and the record does not reveal any. Nor does the record show that Animal Action Now identified any specific policy request, bill, or other action they wish a governmental entity to take in response to the evidence they published concerning the farm. The record reflects that Animal Action Now's advocacy surrounding the Bremerley Family Farms investigation was directed not at a governmental entity, but a *private* one: Vegman's grocery stores.

While the First Amendment petitioning right is capacious, it is not unlimited, and it is demarcated from the free speech rights protected by the United States Constitution, as the Supreme Court explained in *Guarnieri,* 564 U.S. at 387-97, 131 S.Ct. 2488 (distinguishing the "special concerns" of the petition clause as fostering citizens' redress "*to their government and their elected representatives*," as compared with the Speech Clause's aim of "foster[ing] the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs" (emphasis added)). As the Court will next address, the Wiscabama Public Speech Act *does* protect expressive activity, covered by the Speech Clause. Animal Action Now's evidence concerning its public advocacy surrounding the Bremerley Family Farms investigation will be addressed within that context. In sum, because the Court cannot find that the Bremerleys filed their lawsuit because Defendant AAN engaged in protected petitioning activity, Animal Action Now cannot invoke the protections of the Public Speech Act with respect to this activity.

Animal Action Now also contends that their conduct falls within the Public Speech Act's definition of "free speech in connection with public issues" because their videos, news releases, social media posts, website postings, interviews, and related outreach constitute "written or oral statement[s] that [are] protected under applicable law and [are] made. . . (c) in or in connection with a play, movie, television program, radio broadcast, book, magazine article, musical work, news report, or other similar work." Wisca. Code § 19–5096(3). Animal Action Now argues that their activities—both the oral, written, and audiovisual statements they published, and the news reports they participated in—constitute a "movie, television program, . . . news report, or similar work."

The Bremerleys contend, by contrast, that this portion of the Public Speech Act's definition is a "media" provision meant to protect the news media and creative artists with respect to statements they make in their creative or journalistic works. The Bremerleys claim that similar protections in other anti-SLAPP statutes have been almost exclusively used by bona fide media defendants.[3] The Bremerleys contend that Animal Action Now are not journalists or authors, nor members of the news media, broadcasters, or filmmakers. The Bremerleys contend Animal Action Now are "spies" who wear the mantle of whistleblowers in order to "infiltrate reputable businesses" like Bremerley Family Farms, misconstrue their activities, and engage in social media "hit jobs" to tar companies' reputations and put pressure on their customers in order to advance the activists' agenda. Simply because one of Animal Action Now's tools is video, the Bremerleys say, this does not make their work a "movie, television program, [or] news report" for purposes of the Public Speech Act, which the Bremerleys contend was not meant to shield private citizens from the consequences of their false speech on social media and in self-published news releases.

Although the Bremerleys raise a difficult question about the scope of activities the legislature intended to cover in section (c) of the definition, the Court is convinced that Animal Action Now's speech activities are covered thereunder and within the Public Speech Act more broadly, for several reasons. First, the phrase "in or in connection with" is significant. It is not the case that the statement has to be made *within* "a play, movie, television program, radio broadcast, book, magazine article, musical work, news report, or other similar work" in order to qualify for protection under the Act. Statements made *in connection with* such works are also covered.

The Court finds that several of the Animal Action Now's statements were indisputably made in connection with a television program and news report. Specifically, Defendant Cardillo gave several interviews, including to television broadcaster UBC News, and local news outlets. Defendant AAN, through its executive director, made statements concerning Bremerley Family Farms to other news outlets, including the Associated Print. The Bremerleys say that their suit targets other allegedly false statements Animal Action Now made, including on their website and on social media pages. But the Court finds significant that Animal Action Now made these same offending statements across all the various media, and that Animal Action Now's statements in connection with the media broadcasts,

[3] The Bremerleys cite, for example, *Bongino v. Daily Beast Co., LLC*, No. 19-14472-CIV, 2021 WL 4976287, at *1 (S.D. Fla. Feb. 9, 2021), *report and recommendation adopted sub nom.* Bongino, v. Daily Beast Co., , No. 19-14472-CIV, 2021 WL 4316099 (S.D. Fla. Sept. 23, 2021) (applying Florida anti-SLAPP media provision in favor of news outlet); *Corsi v. Newsmax Media, Inc.*, 519 F. Supp. 3d 1110 (S.D. Fla. 2021), *appeal dismissed in part*, No. 21-10480, 2022 WL 3353776 (11th Cir. July 1, 2022), and *appeal dismissed in part*, No. 21-10480, 2022 WL 3350519 (11th Cir. July 7, 2022) (same).

and in particular, to UBC News and the Associated Print, received wide coverage and amplified Animal Action Now's message about Bremerley Family Farms—which is precisely what the Bremerleys say caused such devastating economic harm to their business.

Neither is the Court swayed by the Bremerleys' other argument, that the videos Animal Action Now published are meaningfully different from a movie, television program, or news report as contemplated in the Public Speech Act. The Court has watched the two short video clips that Animal Action Now produced and widely disseminated, and finds that they are akin to informal, citizen journalism-type works. They contain video evidence Animal Action Now asserts (without contradiction by the Bremerleys) was collected at Bremerley Family Farms, describe the conduct and conditions Defendant Cardillo witnessed there, and urge viewers to "take action."

Moreover, the Public Speech Act contains an important catch-all—"or similar work." Thus, even if the Court thought the videos and public statements Animal Action Now made weren't a "movie" or "television program," this aspect of the definition is meant to encompass other works of print and video content that convey thoughts, ideas, and arguments. Nothing in the Act suggests that publication by an established, credentialed member of the news media is required.

Finally, Animal Action Now argues that the Public Speech Act's definition of "free speech in connection with public issues" should be construed broadly for two additional reasons. First, because the legislature said so. *See* Wisca. Code § 19–5096(1) ("It is the intent of the Legislature . . . that this section be construed broadly."). Second, because the word "includes" in the definition is significant and suggests that the legislature intended the definition to be illustrative, not restrictive. Animal Action Now contends that if the legislature meant the definition to be exclusive, it would have used the word "means" or "is." The Court is moved by the first point, but not the second. Construing the word "includes" in the manner Animal Action Now urges would open the door to greater questions about what else the definition of "free speech in connection with public issues" might include, in addition to petitioning and speech activities as defined in the three provisions. The legislature chose to provide a specific definition, and the Court thinks it wise to interpret that definition, while keeping in mind the legislature's intent for a broad construction.

Finally, the legislature's intention to protect conduct protected under the First Amendment to the United States Constitution suggests to this Court that any doubt about the scope of the Public Speech Act's definition of "free speech in connection with public issues" should

be construed to favor Animal Action Now. Animal Action Now's statements are unquestionably protected expressive activity.

The Bremerleys make a halfhearted argument that their defamation lawsuit does not actually arise from Animal Action Now's speech activities, but instead from the actions of Defendant Cardillo in "infiltrating" and allegedly trying to destroy the Bremerleys' business. The Court can dispose of this argument easily, because the Bremerleys' Complaint focuses solely on Animal Action Now's *statements* about Bremerley Family Farms, which the Bremerleys contend are false. The Bremerleys did not bring a claim for trespass, tortious interference with business relationships, or any other claim aside from defamation. The damages they seek stem from the publication of what the Bremerleys contend is false information. Therefore, there is nothing to indicate that the Bremerleys' Complaint arose from anything other than Animal Action Now's speech.

Because Animal Action Now has shown that that speech is protected, covered activity under the Public Speech Act, the Court will proceed to analyze whether the Bremerleys' Complaint has merit.

d. *The merits of William Bremerley and Bremerley Family Farms' defamation claim*

[omitted]

In sum, the Court finds that the Bremerleys' defamation lawsuit is without merit.

III. Conclusion

For the reasons stated herein, the Court **GRANTS** Animal Action Now's motion for summary judgment. The court will consider the merits of any claim to attorney's fees and costs under the Public Speech Act upon Animal Action Now's filing of a motion requesting them.

Dated this 28th day of July, 2022

_____

Hon. Reginald W. Sillbird