

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS LIBERTY COUNSEL, MATHEW D. STAVER, AND RENA M.
LINDEVALDSEN'S AND LINDA M. WALL'S
SPECIAL MOTIONS TO STRIKE**

Defendants' special motions to strike, ECF Nos. 239, 243, should be denied for two reasons: First, Vermont's anti-SLAPP statute, on which the motions rely, is inapplicable in federal court. Second, Plaintiffs' action is not a suit subject to being stricken under the statute.

I. Introduction

Defendants mislabel this action a Strategic Lawsuit Against Public Participation (SLAPP), arising from their lawful exercise of the rights to freedom of speech and petition on a public issue, that must be stricken under the special procedures provided by Vermont's anti-SLAPP statute. That simply is not so. Plaintiffs' action arises not from Defendants' participation in government decision making on a public issue, but rather from their circumvention and contempt of a legal process governing a private custody dispute. Defendants, dissatisfied with the judiciary's respect for and protection of Janet Jenkins and Isabella Miller-Jenkins's parent-child relationship, successfully furthered a conspiracy to kidnap Isabella to a foreign country in order to keep her away from her mother and the reach of the courts. Defendants' extra-judicial

solution empowered one side of a private issue, giving it the unilateral ability to decide the result. No state procedure can rescue Defendants from legal liability in this Court.

SLAPPs “are not ordinary lawsuits”; “[t]hey are classic ‘dispute transformation’ devices, a use of the court system to empower one side of a political issue, giving it the unilateral ability to transform both the forum and the issue in dispute.” *Felis v. Downs Rachlin Martin PLLC*, 133 A.3d 836, 852–53 (Vt. 2015) (quoting George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 *Pace Envtl. L. Rev.* 3, 12 (1989)). Vermont’s anti-SLAPP statute “creates a two-step burden-shifting process,” *Ernst v. Kauffman*, 50 F. Supp. 3d 553, 558 (2014), *reconsidered by* No. 5:14-cv-59, 2016 WL 1610608 (D. Vt. Apr. 20, 2016) (denying motions to strike in all respects), that permits “the swift termination of” SLAPPs, *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, J., concurring) (discussing California’s anti-SLAPP statute). Codified among Vermont statutes governing “Court Procedure,” “Proceedings Before Trial,” and “Pleading and Practice,” the statute permits a defendant to “file a special motion to strike” within 60 days of the filing of the complaint. Vt. Stat. Ann. tit. 12, § 1041(a)–(b). The plaintiff’s response is due within 15 days after service of the motion. § 1041(b). Discovery proceedings in the action are automatically stayed upon the filing of the motion until the court rules on it, unless the court orders limited discovery to assist its decision on the motion. § 1041(c).

Defendants bear the initial burden of a prima facie showing that the “action aris[es] from the defendant’s exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution.” § 1041(a). Such exercise includes, for example, written or oral statements made in legislative, executive, or judicial proceedings, made in connection with an issue under consideration or

review in such a proceeding, or made in a public forum or place open to the public. § 1041(i)(1)–(3). The motion must be denied if the defendant fails to meet that burden. If successful, however, the burden then shifts to the plaintiff to make a prima facie showing that “the defendant’s exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law,” and that “the defendant’s acts caused actual injury to the plaintiff.” § 1041(e)(1).

The court must consider the pleadings and affidavits. § 1041(e)(2). If the court grants the motion, it must award costs and reasonable attorney’s fees to the defendant. § 1041(f)(1). If the court denies the motion and finds that it was frivolous or intended solely to cause unnecessary delay, then it must award costs and reasonable attorney’s fees to the plaintiff. *Id.*

Vermont’s swift process for disposing of a certain class of claims has no applicability in federal court, where Federal Rules of Civil Procedure 12 and 56 “establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court.” *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., dissenting from denial of rehearing en banc). The state’s procedures especially have no applicability to causes of action arising under the Constitution, laws, or treaties of the United States. Applying Vermont’s anti-SLAPP statute to Plaintiffs’ federal cause of action “would frustrate substantive federal rights,” *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.*, 448 F. Supp. 2d 1172, 1180 (C.D. Cal. 2006), and the “federal courts’ interest in prescribing rules of procedure applicable to federal claims, and in uniformity of federal law,” and “would permit state law to affect and alter the substance of federal claims in violation of the Supremacy Clause of the Constitution.” *Id.* at 1181.

Even if Vermont's anti-SLAPP statute applied in this case, Plaintiffs' action bears no resemblance to the class of claims that so concerned Vermont. The state's concerns leading to the enactment of its anti-SLAPP statute "reflect the broader national concerns that fueled the development of anti-SLAPP legislation," namely "the 'growing legal risk for ordinary citizens who speak up on community political issues.'" *Felis*, 133 A.3d at 852 (quoting *Pring*, *supra*, at 8). Anti-SLAPP statutes typically protect activities such as "[r]eporting violations of the law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts or demonstrations." *Id.* (quoting *Pring*, *supra*, at 5). During a hearing on Vermont's anti-SLAPP bill, "citizens and legal experts testified to the importance of protecting free speech in matters of 'public interest and government decisionmaking,' particularly in areas of land use and zoning, permitting and regulatory matters affecting communities, and public health and quality of life." *Id.* at 847 (citing *Hearing on S. 103 Before the S. Comm. on the Judiciary*, 2005–2006 Legis. Sess. (Vt. 2006)).

A particular case "represented the paradigm for the legislation." *Id.* at 848 n.9 (citing H. Judiciary Comm. Rep. on S. 103, 2005–2006 Legis. Sess., at 1 (Vt. 2006)); *see also Hearing on S. 103 Before the S. Comm. on the Judiciary*, 2005–2006 Legis. Sess. (Vt. 2006) (testimony by Barnard residents). In that case, several residents of Barnard, Vermont, signed a petition challenging the town zoning board's issuance of a conditional permit to an owner of land whose construction on the land discontinued a public right-of-way on the property. *See* Complaint at 2–3, *McAdams v. Rydjeski*, No. 1:03-cv-00330 (D. Vt. filed Dec. 3, 2003). Despite his ultimate victory on appeal, the owner sued the residents for signing the petition, seeking declaratory and

injunctive relief, compensatory and punitive damages, and attorney’s fees and costs. *Id.* at 2. Unable to afford the costs of litigation, the residents settled. H. Judiciary Comm. Rep. on S. 103, 2005–2006 Legis. Sess., at 1 (Vt. 2006).

Plaintiffs seek a remedy not for Defendants’ efforts to enforce or improve the law, but rather for their illegal and injurious workaround of law with which they disagreed. “[T]here is no evidence that the Vermont Legislature intended, or even foresaw, the expansive use of the anti-SLAPP remedy in circumstances far afield from the paradigm on which the statute was based.” *Felis*, 133 A.3d at 854. The statute “should be construed as limited in scope,” and “great caution should be exercised in its interpretation.” *Id.* at 851. Vermont has no interest in wresting this suit from this Court. For these reasons and those that follow, the motions should be denied.

II. Argument

A. Vermont’s Anti-SLAPP Statute Does Not Apply in Federal Court

This Court cannot apply Vermont’s anti-SLAPP statute to either of Plaintiffs’ claims without frustrating substantive federal rights, federal interests, and clearly applicable federal procedure.

1. Anti-SLAPP Statutes Do Not Apply to Federal Causes of Action

Vermont’s anti-SLAPP statute does not apply to Count II—a federal cause of action brought in federal court.¹ State anti-SLAPP statutes “do[] not apply to federal law causes of action” in federal court because they “would frustrate substantive federal rights,” “frustrate federal courts’ interest in prescribing rules of procedure applicable to federal claims, and in uniformity of federal law,” and “permit state law to affect and alter the substance of federal claims in violation of the Supremacy Clause of the Constitution.” *Bulletin Displays, LLC*, 448 F.

¹ Defendant Wall conceded as much in her reply to Plaintiffs’ response to her motion to stay discovery. *See* ECF No. 255, at 3 (“[I]t is true that the anti-SLAPP Act does not apply against Plaintiffs’ federal claim . . .”).

Supp. 2d at 1180–82 (RICO and Clayton Act claims)); *accord Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010) (Lanham Act claim) (citing *Bulletin Displays, LLC*, 448 F. Supp. 2d at 1180–82).

Courts within this Circuit have refused to apply state anti-SLAPP statutes to federal claims. *See, e.g., Douglas v. N.Y. State Adirondack Park Agency*, 895 F. Supp. 2d 321, 361 n.31 (2012) (claims under 42 U.S.C. §§ 1983, 1985, 1986), *reconsidered on other grounds*, No. 8:10-CV-0299, 2012 WL 5364344 (N.D.N.Y. Oct. 30, 2012) (holding that New York’s anti-SLAPP statute “does not bar Plaintiffs[’] federal claims”); *Ginx, Inc. v. Soho All.*, 720 F. Supp. 2d 342, 366 (S.D.N.Y. 2010) (claims under § 1981) (holding that New York’s anti-SLAPP statute does not apply to “a federal claim brought in a federal court”). “There is no reason why a federal claim, brought in a federal court for an alleged violation of the plaintiffs’ federal statutory or constitutional rights, should be subjected to different standards of pleading or proof than are called for under the Federal Rules.” *Ginx, Inc.*, 720 F. Supp. 2d at 366 (quoting *Yeshiva Chofetz Chaim Radin, Inc. v. Vill. of New Hempstead*, 98 F. Supp. 2d 347, 360 (S.D.N.Y. 2000) (claims under the U.S. Constitution, the Fair Housing Act, and the Civil Rights Act, including § 1985)).

Defendants move under Vermont’s anti-SLAPP statute to strike both counts of Plaintiffs’ Revised Second Amended Complaint (RSAC) (ECF No. 223). Count II alleges that Defendants are liable under federal law, namely 42 U.S.C. § 1985(3), by conspiring to violate Plaintiffs’ equal protection rights under the Fourteenth Amendment to the U.S. Constitution. Defendants’ motions should be denied with respect to Count II.

2. Vermont’s Anti-SLAPP Statute Does Not Apply to State Law Causes of Action in Federal Court

Vermont’s anti-SLAPP statute’s procedural mechanism for the quick dismissal of certain claims is preempted by the Federal Rules of Civil Procedure, which govern how a defendant may

seek the pretrial disposition of a claim brought in federal court. Vermont's exotic procedure cannot dictate how and when this Court must scrutinize Plaintiffs' claims before discovery or trial. This Court is not bound by any precedent to the contrary.

a. No Binding Precedent Has Held That Vermont's anti-SLAPP Statute Applies in Federal Court

The Second Circuit has addressed Vermont's anti-SLAPP statute only twice, but neither case decided the precise issue of whether that statute must apply in federal court. In the first case, the court declined to consider "whether the district court properly applied the anti-SLAPP, as [the plaintiff] . . . waived any arguments on appeal relating to that issue." *Haywood v. St. Michael's College*, 536 F. App'x 123, 124 (2d Cir. 2013). In the second, the court explicitly cautioned that it did "not reach the issue of whether Vermont's anti-SLAPP statute is applicable in federal court" because it concluded that it lacked appellate jurisdiction. *See Ernst v. Carrigan*, 814 F.3d 116, 119 n.1 (2d Cir. 2016). With that warning, it cited cases exemplifying the circuit split on this issue. *See id.* (comparing *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333–37 (D.C. Cir. 2015) (holding that a state anti-SLAPP statute is inapplicable), with *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999) (holding that a state anti-SLAPP statute is applicable)).

The Second Circuit addressed three other state anti-SLAPP statutes, but those decisions do not decide this issue either. First, the court applied New York's anti-SLAPP statute in *Chandok v. Klessig*, 632 F.3d 803 (2d Cir. 2011), but neither it nor the district court addressed this issue. *See* 648 F. Supp. 2d 449 (N.D.N.Y. 2009). Then, in *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138 (2d Cir. 2013), the court faced California's anti-SLAPP statute. The court addressed two specific questions: first, whether it had appellate jurisdiction (it did), and second, whether the district court erred by concluding that California's anti-SLAPP statute was

inapplicable because it determined that New York law governed the plaintiff's state law claim (it did). 718 F.3d at 143. On that second question, the court addressed only the issue of whether California's "rule of decision" "would apply to the suit if it were brought in state court" because it was the only issue "contested by the parties." *Id.* at 153. It did not address whether California's anti-SLAPP statute "is 'substantive' within the meaning if [sic] *Erie*" or whether it is "displaced by a valid federal law or rule governing the same issue." *Id.* The court held only that "California's anti-SLAPP rule would apply to this suit if the claim were proceeding in a California state court." *Id.* at 156.

It addressed yet another anti-SLAPP statute—Nevada's—in *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014). In a cursory analysis, the court held that "the *specific* state anti-SLAPP provisions applied by the district court"—Nevada's immunity, Nev. Rev. Stat. § 41.650, and mandatory fee shifting provisions, § 41.670—" (1) would apply in state court had suit been filed there; (2) is substantive within the meaning of *Erie*, since it is consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity; and (3) does not squarely conflict with a valid federal rule." 774 F.3d at 809 (emphasis added) (citing *Liberty Synergistics Inc.*, 718 F.3d at 153). Critically, the court did not address the statute's special motion to dismiss procedure. *See* § 41.660.

Nevada's anti-SLAPP statute differs from Vermont's in at least one material respect: Whereas Nevada's explicitly confers an immunity, *see* § 41.650, Vermont's only "create[s] 'a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.'" *Liberty Synergistics Inc.*, 718 F.3d at 148 n.9 (quoting *Flatley v. Mauro*, 139 P.3d 2, 9 (Cal. 2006)) (discussing California's anti-SLAPP statute, "upon which the Vermont statute is based," *Ernst*, 814 F.3d at 121); *see also 3M Co. v.*

Boulter, 842 F. Supp. 2d 85, 107 (D.D.C. 2012) (holding that, even if D.C.’s anti-SLAPP statute created a substantive right, its procedures could not apply in federal court, and noting that D.C. could have simply granted defendants an immunity).² Specifically, it “creates a two-step burden-shifting process,” *Ernst*, 50 F. Supp. 3d at 558 (citing Vt. Stat. Ann. tit. 12, § 1041(a)), whereby a defendant may file a special motion to strike, which the court must consider in a hearing within 30 days of its service and which the court must address in light of the pleadings and affidavits. Although it “share[s] in the ‘nature of immunity,’” it “is *not* ‘a substantive immunity from suit.’” *Liberty Synergistics Inc.*, 718 F.3d at 148 n.9 (quoting *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003)); accord *Ernst*, 814 F.3d at 121 (citing *Liberty Synergistics Inc.*, 718 F.3d at 148 n.9). It “neither constitutes—nor enables courts to effect—any kind of ‘immunity.’” *Liberty Synergistics Inc.*, 718 F.3d at 148 n.9 (quoting *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 743–44 (Cal. 2003)).

This District Court has addressed Vermont’s anti-SLAPP statute only three times.³ Because all three rely on a faulty decision of the Ninth Circuit, *see infra* Section II-A-2-b, none should persuade the Court. The first held that Vermont’s anti-SLAPP statute is applicable “for the same reason as the California anti-SLAPP statute.” *Bible & Gospel Trust v. Twinam*, No. 2:07-CV-17, 2008 WL 5216845, at *2 (July 18, 2008), *adopted in relevant part by* No. 1:07-cv-17, 2008 WL 5245644 (D. Vt. Dec. 12, 2008). It relied on the Ninth Circuit’s decision in *Newsham*, which held that California’s anti-SLAPP statute applies in federal court because it “does not constitute a ‘direct collision’ with the Federal Rules as there is ‘no indication that

² Nevada’s anti-SLAPP statute differs from Vermont’s in another material way: Whereas Nevada’s provides defendants with a separate cause of action, *see Nev. Rev. Stat. § 41.670(1)(c)*, Vermont’s does not. *See Adelson v. Harris*, 973 F. Supp. 2d 467, 493 n.21 (S.D.N.Y. 2013) (distinguishing Nevada’s statute from California’s).

³ District courts in this Circuit have addressed other anti-SLAPP statutes too. *See, e.g., Yeshiva Chofetz Chaim Radin, Inc.*, 98 F. Supp. 2d at 360 (holding that “there is no basis for applying the proof requirements of” New York’s anti-SLAPP statute to state law claims brought in federal court); *Douglas*, 895 F. Supp. 2d at 362–63 (holding that New York’s anti-SLAPP statute does not bar plaintiffs’ state claims “[e]ven assuming for the sake of argument that New York[’s] Anti-SLAPP suit rules are substantive in nature”).

[Federal] Rules 8, 12, or 56 were intended to occupy the field with respect to pretrial procedures aimed at weeding out merit less claims.” *Id.* According to the court, Vermont’s anti-SLAPP statute “confers one additional method to supplement” Federal Rules of Civil Procedure 12 and 56 and serves the same purpose as the California anti-SLAPP statute: preventing merit less suits from stifling constitutional rights.” *Id.*⁴

In the second case, the court relied on *Bible & Gospel Trust* when it applied Vermont’s anti-SLAPP statute without reconsidering this issue. *See Haywood v. St. Michael’s Coll.*, No. 2:12-CV-164, 2012 WL 6552361, at *13 (D. Vt. Dec. 14, 2012). And in the third, the plaintiffs did not raise the issue. *See* Plaintiffs’ Opposition to Special Motion to Strike, *Ernst*, 50 F. Supp. 3d 553 (D. Vt. 2014) (No. 5:14-cv-59), ECF No. 46; Plaintiffs’ Opposition to Defendant John and Linda Carrigans’ Special Motion to Strike, *id.*, ECF No. 54.

This Court may and should consider for itself whether Vermont’s anti-SLAPP statute applies in this case, and for the reasons that follow, hold that it does not.

b. Vermont’s Anti-SLAPP Statute Conflicts with the Federal Rules of Civil Procedure and Is Thus Inapplicable in This Case

Vermont’s anti-SLAPP statute cannot apply in this case because it conflicts with the Federal Rules of Civil Procedure. Where a Federal Rule of Civil Procedure is “clearly applicable,” the test is “whether the Rule [is] within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and if so, within a constitutional grant of power such as the Necessary and Proper Clause of Art[icle] I.” *Walker v. Amrmco Steel Corp.*, 446 U.S. 740, 748 (1980) (citing *Hanna v. Plumer*, 380 U.S. 460, 470–72 (1965)). The court must “determine whether the Federal Rule and

⁴ That said, the magistrate judge held that Vermont’s “hybrid” test, which “requires a plaintiff to show actual injury and that the defendant’s exercise of his rights was devoid of factual or legal basis,” “does directly conflict” with the Federal Rules of Civil Procedure. *Bible & Gospel Trust*, 2008 WL 5216845, at *3. The court therefore decided to “use the summary judgment standard in considering questions arising under” Vermont’s anti-SLAPP statute. 2008 WL 5245644, at *1.

the state law ‘attempt[] to answer the same question.’” *Retained Realty, Inc. v. McCabe*, 376 F. App’x 52, 55 (2d Cir. 2010) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010)). Relying upon the Ninth Circuit’s decision in *Newsham*, this District Court has held that the Federal Rules of Civil Procedure do not attempt to answer the same question answered by Vermont’s anti-SLAPP statute. But that conclusion has since been called into question. Respectfully, this Court should decline to continue that erroneous reliance upon it.

Several judges of the Ninth Circuit have called for the court’s en banc reconsideration of *Newsham*—“a big mistake.” *Makaeff*, 715 F.3d at 275 (Kozinski, J., with whom Paez, J., joins, concurring); *see also Makaeff*, 736 F.3d at 1188 (Watford, J., with whom Kozinski, Paez, and Bea, J.J., join, dissenting from denial of rehearing en banc). California’s anti-SLAPP statute—like Vermont’s—“creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights,” and “state procedural rules have no application in federal court, no matter how little they interfere with the Federal Rules.” 715 F.3d at 273 (Kozinski, J., concurring). As with Vermont’s,

[t]he language of [California’s] statute is procedural: Its mainspring is a “special motion to strike”; it contains provisions limiting discovery; it provides for sanctions for parties who bring a non-meritorious suit or motion; the court’s ruling . . . is not “admissible in evidence at any later stage of the case”; and an order granting or denying the special motion is immediately appealable. The statute deals only with the conduct of the lawsuit; it creates no rights independent of existing litigation; and its only purpose is the swift termination of certain lawsuits the legislators believed to be unduly burdensome.

Id. (internal citation omitted). And similarly to California’s statute, Vermont’s is codified in title 12 of the Vermont Statutes Annotated, which is entitled “Court Procedure.” *Cf. id.* (“[California’s] is codified in the state code of civil procedure . . .”).

Newsham erroneously “shrugged . . . off” the recognized “commonality of purpose” between California’s anti-SLAPP statute and Federal Rules of Civil Procedure 8, 12, and 56. *Id.* at 274 (quoting *Newsham*, 190 F.3d at 972). “Taken together,” Rules 12 and 56 “establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court.” 736 F.3d at 1188 (Watford, J., dissenting from denial of rehearing en banc). Anti-SLAPP statutes like California’s and Vermont’s “cut[] an ugly gash through th[e] orderly process” provided by the Federal Rules for “the just, speedy, and inexpensive determination of every action and proceeding.” 715 F.3d at 274 (Kozinski, J., concurring) (quoting Fed. R. Civ. P. 1). They “impermissibly supplement[] the Federal Rules’ criteria for pre-trial dismissal of an action.” *Id.* Whereas Rule 12, which “provides the sole means of challenging the legal sufficiency of a claim before discovery commences,” 736 F.3d at 1188 (Watford, J., dissenting from denial of rehearing en banc), requires Plaintiffs to “allege facts stating a claim that is ‘plausible on its face,’ *id.* at 1188–89 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), Vermont’s anti-SLAPP statute “effectively stiffens the Rule 12 standard for testing the legal sufficiency of a claim,” *id.* at 1189, by requiring Plaintiffs to also show that Defendants’ exercise of their First Amendment rights was devoid of any reasonable factual support and any arguable basis in law and that it caused actual injury to Plaintiffs, *see* Vt. Stat. Ann. tit. 12, § 1041(e)(1). And whereas Plaintiffs can avoid summary judgment under Rule 56 by “designat[ing] specific facts showing that there is a genuine issue for trial,” Vermont’s anti-SLAPP statute “eviscerates Rule 56 by requiring” more from Plaintiffs. 736 F.3d at 1189 (Watford, J., dissenting from denial of rehearing en banc) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). “Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme

embodied in the Federal Rules, . . . jurisdictional statutes and Supreme Court interpretations thereof.” 715 F.3d at 275 (Kozinski, J., concurring).⁵

The D.C. Circuit provides similar persuasive guidance. Like Vermont’s anti-SLAPP statute, the District of Columbia’s “makes it easier for defendants . . . to obtain quick dismissal of harassing lawsuits.” *Abbas*, 783 F.3d at 1332. It too creates a two-step burden-shifting process whereby the defendant bears the burden of showing that the plaintiff’s claim “arises from an act in furtherance of the right of advocacy on issues of public interest,” after which the burden shifts to the plaintiff. *See id.*; D.C. Code § 16-5502(b). The D.C. Circuit held that a federal court exercising diversity jurisdiction “must apply” Federal Rules of Civil Procedure 12 and 56, which “establish the standards for granting pre-trial judgment to defendants in cases in federal court.” *Abbas*, 783 F.3d at 1333; *accord 3M Co.*, 842 F. Supp. 2d at 98 (“[T]he Advisory Committee Notes to the 1946 Amendment clearly explain that Rule 12(d) links Rule 12 with Rule 56 to provide the exclusive means for federal courts to use to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint . . .”). Rules 12 and 56 “help form ‘an integrated program’ for determining whether to grant pre-trial judgment in cases in federal court.” *Abbas*, 783 F.3d at 1334 (quoting *Makaeff*, 715 F.3d at 274 (Kozinski, J., concurring)). They “‘answer the same question’ about the circumstances under which a court must dismiss a case before trial” as do Vermont and D.C.’s anti-SLAPP statutes. *Id.* at 1333–34. “[T]hose Federal Rules answer that question differently.” *Id.* at 1334. Unlike Vermont’s anti-SLAPP statute, “[t]hey do not require a plaintiff to show,” *id.*, “the defendant’s exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law; and the defendant’s acts caused actual injury to the plaintiff,” Vt. Stat.

⁵ Judge Paez raised “[y]et another reason to reconsider the application of state anti-SLAPP statutes in federal court”: “significant” state-by-state intra-circuit variations, which “play out in the availability of an appeal under the collateral order doctrine.” *Makaeff*, 715 F.3d at 275–76 (Paez, J., concurring).

Ann. tit. 12, § 1041(e)(1); accord *3M Co.*, 842 F. Supp. 2d at 93 (“The D.C. Anti-SLAPP Act mandates that a court resolve a ‘special motion to dismiss’ in a different manner than it would otherwise resolve a preliminary motion attacking the merits of a case under Rules 12 or 56.”).

“That difference matters.” *Abbas*, 783 F.3d at 1334. Under the Federal Rules, Plaintiffs are generally entitled to trial if they “meet the Rules 12 and 56 standards to overcome a motion to dismiss or for summary judgment.” *Id.* But Vermont’s anti-SLAPP statute “nullifies that entitlement in certain cases.” *Id.* Plaintiffs would “not [be] able to get to trial just by meeting those Rules 12 and 56 standards.” *Id.* Vermont’s statute, “in other words, conflicts with the Federal Rules by setting up an additional hurdle [Plaintiffs] must jump over to get to trial.” *Id.* Its standard “is different from and more difficult for [P]laintiffs to meet than the standards imposed by Federal Rules 12 and 56.” *Id.* “There is no question that” Vermont’s statute “operates greatly to” Defendants’ “benefit by altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of” Plaintiffs’ claim “and by setting a higher standard upon” Plaintiffs “to avoid dismissal. Indeed, that is the precise reason that [Vermont] enacted the statute and why Defendants so vigorously seek its protections.” *3M Co.*, 842 F. Supp. 2d at 102. “As such,” Vermont’s anti-SLAPP statute “restricts ‘the procedural right to maintain [an action]’ established by the federal rules and squarely conflicts with Rule 12(d) and Rule 56.” *Id.* at 103 (alteration in original) (quoting *Shady Grove Orthopedic Assocs., P.A.*, 559 U.S. at 401 n.4).

Rules 12 and 56 fall within the scope of the Rules Enabling Act. “[A]ny federal rule that ‘really regulates procedure’ is valid under the Rules Enabling Act.” *Abbas*, 783 F.3d at 1337 (quoting *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941)). “[P]leading standards and summary judgment rules are classic examples of appropriate procedural rules.” *3M Co.*, 842 F. Supp. 2d at 110 (citing *Shady Grove Orthopedic Assocs., P.A.*, 559 U.S. at 404) (holding that

Rules 12 and 56 do not “run afoul of the Rules Enabling Act or the Constitution”); *accord Abbas*, 783 F.3d at 1337 (same); *Scola v. Publix Supermarkets, Inc.*, 557 F. App’x 458, 464 (6th Cir. 2014) (holding that Rule 56 comports with the Rules Enabling Act); *Reinke v. O’Connell*, 790 F.2d 850, 851 (11th Cir. 1986) (same). Thus, the Federal Rules of Civil Procedure, and not Vermont’s anti-SLAPP statute, govern whether Plaintiffs’ case can proceed in this Court. The motions should be denied.

B. Even If Applicable, Defendants Fail To Meet their Burden Under Vermont’s Anti-SLAPP Statute

Defendants ask the Court to apply a state statute that would not spare them from this case. Vermont’s anti-SLAPP statute “creates a two-step burden-shifting process.” *Ernst*, 50 F. Supp. 3d at 558 (citing Vt. Stat. Ann. tit. 12, § 1041(a)). First, Defendants have failed to meet their initial burden by failing to “show that the case arises from [their] exercise of the right to freedom of speech or to petition the government.” *Id.* Second, Plaintiffs have shown and continue to show that Defendants’ purported “exercise of [their] right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law’ and that ‘[their] acts caused actual injury to’” Plaintiffs. *Id.* (quoting § 1041(e)(1)).

1. Plaintiffs’ Action Does Not Arise from Defendants’ Exercise of the Right to Freedom of Speech in Connection with a Public Issue

This action arises not from Defendants’ exercise of speech or petition in connection with a public issue, but from their actions to unlawfully circumvent court orders in a dispute between two private individuals over the custody of a child. Unlike some state anti-SLAPP statutes, which apply in cases that “involve” protected speech or conduct, *see, e.g.*, Ariz. Rev. Stat. Ann. § 12-752(A); Del. Code Ann. tit. 10, § 8136(b); Neb. Rev. Stat. § 25-21,243(1), N.Y. Civ. Rights Law § 70-a(1), Vermont’s anti-SLAPP statute protects defendants from legal actions “arising from” speech or conduct, concerning a public issue, that furthers their rights to free speech and

petition the government. *See* Vt. Stat. Ann. tit. 12, § 1041(a), (i); *cf. Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998) (holding that Massachusetts’s anti-SLAPP statute, which applies to claims “based on” a defendant’s exercise of the right to petition, requires defendant “to make a threshold showing through the pleadings and affidavits that the claims against it are ‘based on’ the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities”).

Defendants fail to show that Plaintiffs’ action “aris[es] from” any such speech or conduct. The claims against Defendant Wall arise not from, as she suggests, her inapt comparison of herself with Harriet Tubman, a tone-deaf yet otherwise protected exercise of speech, but from the unlawful actions that caused her to make that comparison at all, namely agreeing with Lisa Miller that Miller “should flee with Isabella,” advising “anyone with knowledge of Miller’s whereabouts not to reveal it,” and soliciting donations “to support Miller’s efforts to avoid complying with court-ordered visitation.” ECF No. 115, at 11; *see also id.* at 25–26; *id.* at 55 (holding that Plaintiffs adequately allege that Wall agreed to further the purpose of kidnapping Isabella and avoiding detection in order to continue to obstruct any parent–child relationship between Janet Jenkins and Isabella and to remain outside the jurisdiction of state and federal courts). Nor do Plaintiffs’ claims against Defendants Staver and Lindevaldsen arise from, as they suggest, their lawful representation of Miller or from Lindevaldsen’s book about Miller and homosexuality, but rather from their actions aiding in her unlawful contempt of court orders and the law, namely advising Miller that it would be in her best interests to disappear, packing Miller’s personal belongings, and delaying proceedings aimed at locating Isabella so that Miller could flee from the United States. *See* ECF No. 220, at 29–30; *see also id.* at 34–39 (holding that Lindevaldsen’s actions may be attributed to Staver).

“Despite the vigor with which” Miller contested Isabella’s custody while she remained in the United States, Isabella’s custody is not a public issue under Vermont’s anti-SLAPP statute. *Felis*, 133 A.3d at 854 (holding a divorce proceeding is not an issue of public interest for purposes of Vermont’s anti-SLAPP statute no matter how vigorously it is contested). Child custody disputes bear no resemblance to the matters that concerned Vermont when it enacted its anti-SLAPP statute, namely land use and zoning, permitting and regulatory matters, and public health and quality of life. *See id.* at 847. Whereas those matters “could affect the entire town,” *Ernst*, No. 5:14-cv-59, 2016 WL 1610608, at *1 (D. Vt. Apr. 20, 2016), Isabella’s custody does not. Defendants injected themselves into a private dispute between two private individuals over a child’s custody. They cannot by their own conduct create their own defense by making Isabella’s custody a public issue. *Cf. Ernst*, 50 F. Supp. 3d at 563 (holding that a defendant charged with defamation cannot, by their own conduct, create their own defense under Vermont’s anti-SLAPP statute by making the plaintiff a public figure).

Plaintiffs’ action does not arise from Defendants’ lawful speech or conduct “go[ing] to the appropriateness of the law with respect to” the custody of a child by her lesbian mother, but rather from Defendants’ unlawful circumvention of the law. *Felis*, 133 A.3d at 847. “While speaking out against [homosexuality and same-sex marriage] may constitute a public issue, there is no showing that [Plaintiffs’] suit ‘arises from’ [Defendants’] speaking out against [homosexuality and same-sex marriage].” *Bible & Gospel Trust*, 2008 WL 5216845, at *3. Vermont surely did not “intend[, or even fores[ee], the expansive use of the anti-SLAPP remedy” to protect the furtherance of a conspiracy to kidnap a child in contempt of lawful court orders. *Felis*, 133 A.3d at 854. The statute is “limited in scope,” and this Court should exercise “great caution” before interpreting it to protect such a conspiracy from legal liability. *Id.* at 851.

Defendants have failed to meet their initial burden under Vermont's anti-SLAPP statute. The motions should be denied.

2. Defendants' Purported Exercise of the Right to Freedom of Speech Was Devoid of Any Reasonable Factual Support and Any Arguable Basis in Law

It strains credulity to argue that acts in furtherance of a conspiracy to kidnap a child in contempt of lawful court orders have "any reasonable factual support" or "any arguable basis in law." Vt. Stat. Ann. tit. 12, § 1041(e)(1)(A). Only if the Court holds that Defendants have met their initial burden must the Court then consider Plaintiffs' opposition to the motions. *Cf. Gaudette v. Davis*, No. Yor-15-564, 2017 WL 1901707, at *5 (Me. May 9, 2017) (applying Maine's anti-SLAPP statute, Me. Stat. tit. 14, § 556).

Plaintiffs' burden is to establish only prima facie evidence that Defendants' exercise of their right was devoid of any reasonable factual support and any arguable basis in law. *See id.*⁶ Plaintiffs meet this burden if no reasonable person could conclude that there was a basis in law

⁶ Requiring Plaintiffs "to make more than a prima facie showing . . . would necessarily impinge on [their] Seventh Amendment right to a jury trial, inasmuch as it would require this Court to make factual findings and credibility determinations that the Constitution reserves to a properly constituted jury of the people." *Hi-Tech Pharms., Inc. v. Cohen*, 208 F. Supp. 3d 350, 355 (D. Mass. 2016) (applying Massachusetts's anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H, and rejecting the preponderance of the evidence standard adopted in *Baker v. Parsons*, 750 N.E.2d 953 (Mass. 2001)). "Imposing a low bar on [P]laintiffs at the second step of the anti-SLAPP analysis also comports with the purpose of such legislation," *id.* at 356, which is only "to discourage litigants from filing *baseless* lawsuits . . . with the goal of silencing speakers because they fear the expense and travails of litigation," *Ernst*, 50 F. Supp. 3d at 558 (emphasis added).

Defendants Liberty Counsel, Staver, and Lindevaldsen cite *Haywood*, 2012 WL 6552361, at *15, for the proposition that, under this prong, Plaintiffs bear the burden of demonstrating that their claims are legally sufficient. *See* ECF No. 239-1, at 10. Although *Haywood* applied Vermont's anti-SLAPP statute, it relied on a California case applying California's anti-SLAPP statute, *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 137 Cal. Rptr. 3d 455, 469 (Cal. Ct. App. 2012), which instead requires a plaintiff to "establish[] that there is a probability that the plaintiff will prevail on the claim," Cal. Civ. Proc. Code § 425.16(b)(1). Insofar as that standard would require more from Plaintiffs, Plaintiffs argue that it is incompatible with Vermont's anti-SLAPP statute and should not be applied by this Court. *See, e.g., Duracraft Corp.*, 691 N.E.2d at 943 n.18 (noting that Massachusetts's anti-SLAPP statute, like Vermont's, differs on this prong from California's). In any event, Plaintiffs' burden under that standard "is 'not high.'" *Hecimovich*, 137 Cal. Rptr. 3d at 470 (quoting *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 61 Cal. Rptr. 3d 29, 38 (Cal. Ct. App. 2007)). Plaintiffs need only show that their claims are supported by a sufficient prima facie showing, *id.*—a "minimum level of legal sufficiency and triability," *id.* (quoting *Linder v. Thrifty Oil Co.*, 97 Cal. Rptr. 2d 179, 186 n.5 (Cal. 2000)), "a case of 'minimal merit,'" *id.* (quoting *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 35 Cal. Rptr. 3d 31, 43 (Cal. Ct. App. 2005)). Plaintiffs incorporate by reference their response to Defendants' motions to dismiss to show that their claims are legally sufficient for purposes of Vermont's anti-SLAPP statute.

for the way Defendants purportedly exercised their right to free speech or petition. *See Baker v. Parsons*, 750 N.E.2d 953, 962 n.20 (Mass. 2001) (holding that the nonmovant satisfies this prong under Massachusetts’s anti-SLAPP statute by showing that no reasonable person could conclude that there was a basis in law for exercising the right to petition). “A prima facie standard is a low one, and requires only ‘some evidence’ on the required elements of proof and does not depend on the reliability or credibility of that evidence.” *Gaudette*, 2017 WL 1901707, at *4 (quoting *Nader v. Me. Democratic Party*, 41 A.3d 551, 562 (Me. 2012)). Plaintiffs need only meet this burden as to any one of Defendants’ acts at issue. *Id.* Because Vermont’s anti-SLAPP statute is “analogous to a motion for summary judgment,” *Bible & Gospel Trust*, 2008 WL 5245644, at *1, “the court is required to resolve all ambiguities and draw all factual inferences in favor of” Plaintiffs, *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)); *see also Chandok*, 632 F.3d at 805 (reviewing the record in the light most favorable to the nonmovant and drawing all reasonable inferences in the nonmovant’s favor).

Application of this prong in typical SLAPP suits is relatively straightforward. In the paradigm case that led to Vermont’s anti-SLAPP statute, for example, the question would have been whether the town residents had any arguable basis in law for petitioning for reconsideration of the zoning board’s issuance of a conditional permit. In defamation cases, the question is whether the defendant had “any reasonable factual support” for their allegedly defamatory statement. *See, e.g., Chandler v. Rutland Herald Publ’g*, No. 2015-265, 2015 WL 7628687, at *2 (Vt. Nov. 1, 2015) (plaintiff filed libel suit against newspaper publishing company for publishing an article about him); *Forras v. Rauf*, 39 F. Supp. 3d 45, 51 (D.D.C. 2014) (attorney and his

client filed defamation suit against another attorney and his client because of statements defendants made in a motion to dismiss in another case involving both parties).

Vermont's litmus test makes little sense in this case. No reasonable person could conclude that there was a legal basis for circumventing court orders on Isabella's custody by kidnapping the child simply because Defendants oppose same-sex marriage and homosexuality. Unlike in *Wenger v. Aceto*, 883 N.E.2d 262, 267–68 (Mass. 2008), in which the court held, under Massachusetts's anti-SLAPP statute, that defendant's exercise of the right to petition did not lack an arguable basis in law because "no definitive law" foreclosed the basis for his complaint, Defendants cannot seriously argue that unsettled law excuses their conspiracy to kidnap a child. Instead, just as in *Bible & Gospel Trust*, in which the court held that defendant's purported exercise of free speech by publishing copyrighted material was devoid of any reasonable factual support and any arguable basis of law because "there is no free speech protection for using copyright materials," 2008 WL 5216845, at *4, there is no free speech protection for furthering a conspiracy to kidnap a child in contempt of law, so Defendants' purported exercise of free speech too was devoid of any reasonable factual support and any arguable basis of law. Plaintiffs meet the low bar on this prong.

3. Defendants' Acts Caused Actual Injury to Plaintiffs

Defendants' acts caused Plaintiffs actual injury. "[A]ctual injury' means that the facts in the record must allow the amount of damages to be determined with 'reasonable, as distinguished from mathematical certainty.'" *Schelling v. Lindell*, 942 A.2d 1226, 1231 (Me. 2008). It neither requires "actuarial analysis," *id.* at 1232, nor is it "limited to out-of-pocket loss." *Desjardins v. Reynolds*, No. 15-365, 2017 WL 2180640, at *7 (Me. May 18, 2017) (Jabar, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974)) (calling for

the court to revisit and overrule *Camden Nat'l Bank v. Weintraub*, 143 A.3d 788 (Me. 2016), as inconsistent with common law).

Actual injury can include the loss of the ability to withhold publication of copyrighted documents, *Bible & Gospel Trust*, 2008 WL 5216845, at *4; embarrassment, *477 Harrison Ave., LLC v. Jace Boston, LLC*, 74 N.E.3d 1237, 1249 (Mass. 2017), *Lee v. Whalen*, No. CIV.A. 97-01277, 1998 WL 156993, at *5 (Mass. Super. Ct. Mar. 25, 1998); humiliation, emotional distress, and inability to perform one's job, *477 Harrison Ave., LLC*, 74 N.E.3d at 1249; the need to attend a hearing and fear for one's financial health, *Lee*, 1998 WL 156993, at *5; the loss of potential investors and marketing and distribution partners, *Gillette Co. v. Provost*, 74 N.E.3d 275, 282 (Mass. App. Ct. 2017); and the incursion of legal fees, acceleration in blood pressure, clinical depression, insomnia, and reduction in property values, *Peterson v. Eder*, No. BACV20000759, 2001 WL 1868822, at *7 (Mass. Super. Ct. Dec. 27, 2001).

Plaintiff Janet Jenkins alleges that Defendants' unlawful acts caused her extreme emotional distress, the loss of companionship with her daughter, the incursion of legal fees, lost business, and the inability to collect court-ordered fines. RSAC ¶¶ 68–69. On Isabella's behalf, Jenkins also alleges that Defendants' unlawful acts caused Isabella emotional distress, severe restriction of her freedom of movement, a severely low standard of living, loss of emotional and financial support from her mother, loss of child support, loss of an education, loss of medical and dental care, and loss of support from her extended family. *Id.* ¶¶ 70–71. Plaintiffs have suffered and continue to suffer actual injury by their separation, unlawfully caused by Defendants' furtherance of the conspiracy to kidnap Isabella. Plaintiffs meet their burden under this prong too. The motions should be denied.

III. Conclusion

For the foregoing reasons, the motions should be denied.

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Respectfully submitted.

/s/ Frank Langrock

Frank Langrock
LANGROCK SPERRY & WOOL, LLP
P.O. Drawer 351, 111 S. Pleasant Street
Middlebury, Vermont 05753
flangrock@langrock.com
(802) 388-6356

Sarah R. Star
SARAH STAR, ESQ., PC
P.O. Box 106
Middlebury, Vermont 05753
srs@sarahstarlaw.com
(802) 385-1023

David C. Dinielli*
Diego A. Soto*
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, Alabama 36104
david.dinielli@splcenter.org
diego.soto@splcenter.org
CMECFLGBT@splcenter.org
(334) 956-8200
**Admitted Pro Hac Vice*

Attorneys for Plaintiffs

703224.1