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IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. ROSALIE JEAN CHILCOAT, Defendant.	**MOTION TO CHANGE VENUE** Case Number: 171700041 Judge: Anderson

San Juan County is no stranger to land disputes. Frequent battles have arisen regarding the proper use of land in the region. Time and again, these disputes have pitted many of the residents of San Juan County against environmental organizations. And that is to say nothing of the enmity built up over recent years between San Juan County and federal agencies, including the Bureau of Land Management. It is against this backdrop—one of mutual distrust, dislike and even disdain—that another land dispute comes to this Court. But this time lives instead of land are at stake.

* This daytime business address is provided for identification and correspondence only and is not intended to imply institutional endorsement by the University of Utah for this private representation.

Because of the need to protect the defendants' right to a fair trial by an impartial jury, the defendants jointly move this Court for a change of venue. This motion is made pursuant to Utah Rule of Criminal Procedure 29(d), Article I, section 12 of the Utah Constitution, and the Fifth and Sixth Amendments of the United States Constitution.

BACKGROUND

William Faulkner once quipped that the past isn't dead, it isn't even past. So it is with the recent land disputes in San Juan County, all of which have generated persistent tension between residents and "radical environmental groups[] and well-to-do outsiders."[1] Although the use of public lands has long generated disagreements between individuals and governments, the tension in San Juan County has risen considerably in the past few years. Roughly four years ago, San Juan County Commissioner Phil Lyman led an illegal ATV ride up Recapture Canyon, protesting public land management in the region. After a highly publicized trial, Lyman was convicted of two misdemeanors and sentenced to ten days in jail.[2]

Following the trial, Rose Chilcoat applauded the conviction. Condemnation of Chilcoat soon followed, as Lyman blamed Chilcoat for his conviction.[3] Lyman, an elected official

[1] *See Hopi Tribe et. al v. Donald J. Trump et. al*, 1:17-cv-02590-TSC (D.C.), Doc. 41-5 (Declaration of San Juan County Attorney Kendall Laws).

[2] *United States v. Philip Kay Lyman*, 2:14-cr-00470-DN (D. Utah).

[3] *See Reply in Support of Mot. to Quash* at 9-10. In order to avoid undue redundancy, defendants incorporate by reference the contents of previously-filed pleadings in this case, including in particular the facts recounted in the Motion to Quash Bindover and the pending Motion to Disqualify the San Juan County Attorney's Office and supporting affidavits.

representing San Juan County, also publicly branded Chilcoat "a manipulator and a reprobate" and characterized her as "evil."[4] Lyman was not the only elected official in San Juan County to comment publicly about those in the environmental community who were critical of Commissioner Lyman's unlawful ride. San Juan County Attorney Kendall Laws also chimed in, posting to social media that "if you would like spew your blind hate about Phil [Lyman] and Monte [Wells] (*my friends*) and ignore what this case could mean for you then take that crap somewhere else and leave it off my page."[5]

Shortly after charges were filed in this case, Lyman—an elected representative of the County—again took to social media to voice his vitriol, remarking that it was "[i]nteresting that even after being caught red-handed in criminal destruction of cattle Rose is still proselytizing for the annihilation of other people's livestock."[6]

Further furor over public lands has been ignited by the controversy surrounding the Bears Ears National Monument. Heated and often inflammatory debate preceded President Obama's designation of the monument in December 2016. And the debate raged yet again in December 2017 when President Trump shrank the monument by roughly 85%. Numerous lawsuits, filed or joined by environmental groups, soon followed. Unsurprisingly, the residents of San Juan County have supported the reduction and assailed the efforts of environmentalists to challenge

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[4] *See* Affidavit of Greg Rogers (Exhibit 1). Lyman's comments were detailed more thoroughly in the disqualification motion previously filed in this case. *See Motion to Disqualify the San Juan County Attorney's Office* at 2-6.

[5] *See* Rogers Affidavit (emphasis added).

[6] *Id.*

the reduction. San Juan County Attorney Kendall Laws aptly described the County's position in a declaration filed just two days ago, noting that:

> San Juan County vehemently opposed President Obama's Proclamation 9558 designating the Bears Ears National Monument. County officials publicly criticized the decision, and local residents protested the fact that their voices were ignored in favor of *radical environmental groups, well-to-do outsiders*, and Native American groups deceptively claiming to speak for impacted Native Americans despite the fact that the local tribes who actually live in San Juan County opposed the Monument.[7]

That Laws' declaration pits local residents against "radical environmental groups" should come as no surprise: many San Juan County residents have long reviled environmentalists, their disdain made manifest by the following examples:[8]

In 2012, a group of about 50 members of Great Old Broads for Wilderness spent the weekend camping in San Juan County. "On Sunday morning, a member of the group who awoke very early to leave the campsite and return to work found the exit gate padlocked shut and an old hag Halloween mask, doused in fake blood, hung in effigy on a fencepost nearby. Underneath the mask was a milk jug with the threat 'Stay out of San Juan County. No last chance' inked onto it."[9]

A few years later, copies of a phony news release were placed at the post office and several gas stations around the county. In an effort to scare Navajos, the release falsely claimed

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[7] *See Hopi Tribe et. al v. Donald J. Trump et. al*, 1:17-cv-02590-TSC (D.C.), Doc. 41-5 at ¶ 9 (Declaration of San Juan County Attorney Kendall Laws) (emphasis added).

[8] These examples are, of course, just a small sampling of the antipathy many in San Juan County have for environmentalists. The public opinion survey discussed below provides empirical data from San Juan County residents themselves, much of which confirms the general dislike of environmentalists.

[9] *See* Stephanie Paige Ogburn, *Fear and Loathing in San Juan County*, High Country News, Oct. 8, 2012, *available at* https://hcn.org/blogs/goat/fear-and-loathing -in-san-juan-county.

that the Department of Interior was poised to take over four million acres of the Navajo reservation.[10] In addition, at least two other fraudulent letters were circulated in an attempt to undermine support for Bears Ears. But the harassment did not end there. Posters were put up advertising "an open hunting season on southeast Utah backpackers, with no harvest limits and all weapons permitted."[11]

Lest one think that enmity towards environmentalists was merely a passing fancy, Commissioner Lyman has dispelled such a thought. Less than two weeks ago, he told a reporter:

> "I detest these people. I detest these groups. I think they're a disease and at some point people are going to recognize them for what they are and we'll see things change and get rid of them. I'm talking about the environmental groups."[12]

And just yesterday, numerous comments were posted to an online article appearing on The Petroglyph.[13] The comments including the following:

- Nothing silly about this. They [i.e., Chilcoat and Franklin] new [sic] exactly what they were doing. Get a rope.
- This lady is such a crook, lock her up!
- Old hag is the terrorist. Duh.
- She deserves 21 years, putting livestock in danger is wrong.

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[10] Paul Rolly, *Bears Ears opponents posting phony fliers, letters to scare Utah Navajos*, Salt Lake Tribune, May 24, 2016.

[11] Phil Taylor, *Threats of Violence, Fake Land Grabs Proliferate in Utah*, Greenwire, June 10, 2016, *available at* https://eenews.net/stories/1060038637.

[12] Interview of Phil Lyman on April 20, 2018, *available at* http://fourcornersfreepress.com/?p=6366.

[13] The Petroglyph provided a link to a recent Huffington Post article, adding to its own post the comment: "Wow…Rose lives in her own make believe world."

Another Facebook group, the Free Range Report, provided a link to a recent article about this case published in the Salt Lake Tribune. Among the comments to the link included the following, the first listed below apparently coming from the editor of The Petroglyph:

- Her actions violated state laws which are classified as a felony. Not long ago she would have been hung from the nearest tree for trying to harm cattle. So she should feel lucking. [sic].
- Play stupid games, win stupid prizes! String that bitch up!
- Get a rope..[14]

Lastly, on April 27th, Phil Lyman provided a link to an article from FREERANGEREPORT.com. Comments posted to the Phil Lyman for Utah House of Representatives Facebook page contained the following:

- Hang em. M [sic]
- Lynch THEM …

Given that the case has generated recent media attention, much of which has prompted responses like those referenced above, it is quite likely that more attention—and sadly, more threatening posts—will only further taint the jury pool in the weeks before trial.

[14] When another commenter criticized the threat of violence, Monte Wells—Lyman's co-defendant in the federal trial and publisher of The Petroglyph, responded by noting that "Your comment is fine Terry Lance." Lance appears to have posted the "Get a rope" comment at least twice.

ARGUMENT

"All looks yellow to the jaundiced eye."

–Alexander Pope

"Jurors must decide a case solely on the basis of the evidence presented in the courtroom, and not on the basis of community feeling, or the opinions or accounts of those who publish news in the mass media."

–*Codianna v. Morris*, 660 P.2d 1101 (Utah 1983) (Stewart, J., concurring).

At the heart of any motion to change venue is the concern over the fundamental constitutional guarantee that an accused receives a fair trial. Indeed, the right to a fair trial is "the most fundamental of all freedoms." *Estes v. Texas*, 381 U.S. 532, 540 (1965).[15] The right to trial by an impartial jury is explicitly guaranteed by both the United States and Utah Constitutions. *See* U.S. Const. amend. VI; Utah Const. art. I, § 12. It is thus unsurprising that trial courts must consider a change of venue when circumstances raise a "reasonable likelihood"[16] that a fair trial cannot take place in the venue where the alleged crime took place. *See State v. James*, 767 P.2d 549, 552 (Utah 1989). Significantly, "a reasonable likelihood of

[15] *See also People v. Yoakum*, 53 Cal. 566, 571 (1879) (noting that "[t]he prisoner, whether guilty or not, is unquestionably entitled by the law of the land to have a fair and impartial trial. Unless this result be attained, one of the most important purposes for which Government is organized and Courts of Justice established will have definitively failed").

[16] The "reasonable likelihood" standard stems from the Supreme Court's discussion in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), which noted that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."

prejudice does not mean that the prejudice must be more probable than not." *Id.*[17] And in reaching its decision, the trial court should "err on the side of fairness." *State v. Stubbs*, 123 P.3d 407, 412 (Utah 2005); *Maine v. Superior Court*, 68 Cal.2d 375, 388-89 (1968) ("Any lingering doubt about the effectiveness of a continuance [to dissipate potential prejudice] should be resolved in favor of a venue change").[18]

Because this motion is raised prior to trial, the four-factor test set out in *James* should inform this Court's analysis. Those factors include, but are not necessarily limited to: (1) the standing of the victim and the accused in the community; (2) the size of the community; (3) the nature and gravity of the offense; and (4) the nature and extent of publicity. *James*, 767 P.2d at 552. More generally, the trial court must "undertake a prospective analysis evaluating 'demographic, geographic, and cultural evidence unrelated to the identity and potential for bias of an actual jury venire.'" *Butterfield v. Sevier Valley Hosp.*, 2010 UT App 357, ¶ 14 (citation omitted).

[17] The Utah Supreme Court's analysis of "reasonable likelihood" comes from *Martinez v. Superior Court of Placer County*, 174 Cal.Rptr. 701 (1981), which relied heavily on the reasoning set forth in *Maine v. Superior Court*, 68 Cal.2d 375 (1968), which noted that "[t]he phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.' ... Further, when the issue is raised before trial, any doubt as to the necessity of removal to another county should be resolved in favor of a venue change."

[18] *See also Singer v. State*, 109 So.2d 7, 14 (Fla. 1959) (court "must liberally resolve in favor of the defendant any doubt as to the ability of the state to furnish a defendant a fair trial by a fair and impartial jury.").

I. Analysis of the Traditional *James* Factors Requires a Change of Venue to Ensure a Fair Trial.

Size of the Community

As this Court is well aware, San Juan County is a small county. The last census indicated that there were 14,745 people residing in the county.[19] "[T]he smaller the community, the more likely there will be a need for a change of venue[.]"[20] While a "populous metropolitan community will decrease the need for a change of venue," *James*, 767 P.2d at 553, "[i]n a small town, a major crime is likely to be embedded in the public consciousness with greater effect and for a longer time than it would be in a large, metropolitan area." *Id*.

One commentator noted the unique problems with conducting a trial in a small jurisdiction, observing that:

> Smaller jurisdictions also become more saturated with pretrial publicity than larger jurisdictions. Jurors in those jurisdictions have fewer media outlets, which results in less dilution of the prejudicial publicity. Moreover, potential jurors in relatively small jurisdictions tend to be more cohesive. This is due to low migration, greater knowledge and curiosity of the crime due to the existence of less criminal activity, and the existence of a relatively small range of cultural views in the community.[21]

It is worth noting that roughly 80% of the San Juan County residents surveyed have resided in the county for more than a decade, and nearly two-thirds have resided there for more than 20 years. *See* Survey Results at Question 31. The concerns articulated above are present here, and they support a change of venue under this *James* factor.

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[19] Census data taken from www.census.gov.

[20] *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 599-600 n.22 (1976) (Brennan, J., concurring).

[21] Vineet Shahani, *Change the Motion, Not the Venue: A Critical Look at the Change of Venue Motion*, 42 Am. Crim. L. Rev. 93, 114 (2005).

Standing of the Accused and the Victim in the Community

The standing of a defendant in the community can support a change of venue. *James*, 767 P.2d at 552. In *James*, the circumstances of the defendant "tend[ed] to depict him as being different from most residents in Cache County." *Id*. So too with the defendants in this case. It is easy to see that both defendants, "having a lifestyle different from most of [San Juan County's] residents, suffer[] from a lack of standing in the community." *Id*.

As detailed more fully below, it is safe to say that environmentalists like Rose Chilcoat are disliked in San Juan County. Although the survey did not specifically ask about Chilcoat and Franklin because of concerns that doing so might taint a small jury pool, the generalized questions revealed a pervasive dislike of environmentalists. In addition, the survey demonstrated very favorable opinions of Phil Lyman and his protest ride. To the extent that the community is aware of Lyman's public comments, Chilcoat's standing in the community is likely further imperiled as Lyman has directed much of his ire at Chilcoat and environmental groups. In addition, the alleged victim in this case is a rancher. There is a significant risk that San Juan County residents could see this trial as one pitting the traditional ranching interests of San Juan County against the progressive (and widely disliked) environmentalists.

While one person does not necessarily represent the views of an entire county, the opinions expressed by County Commissioner Phil Lyman—an elected official widely popular in San Juan County—dramatize how the defendants are likely to be viewed as outsiders endangering the interests of San Juan County residents themselves. As Lyman stated just two weeks ago:

> I detest these people. I detest these groups. I think they're a disease and at some point people are going to recognize them for what they are and we'll see things change and get rid of them. I'm talking about the environmental groups.[22]

The very real danger, of course, is that Lyman speaks for the residents of San Juan County.

In some cases, it might be possible for courts to simply regard Lyman's comments as those of an outlier, someone unconnected to the proceedings. Such an approach is impossible here. As detailed in the disqualification motion, Lyman and San Juan County Attorney Kendall Laws have a close professional relationship. By statute, Laws "receives direction from the county through the county elected officers in accordance with the officer's duties and power in accordance with law." U.C.A. § 17-18a-802(c). One of those officers who provides direction is County Commissioner Lyman. But the connection does not end there. Laws has unambiguously and publicly supported Lyman, calling him a good friend and posting on his publicly-accessible Facebook page that he hoped "people in this country could see past their nose and view the broader issues and implications on their lives and the lives of their children" rather than "spew blind hate about Phil [Lyman] and Monte (my friends) and ignore what this case could mean for you." Rogers Decl. at 3.

It is clear that, given the hatred and threats directed towards environmentalists like Chilcoat detailed above and the prevalent anti-environmentalist sentiment detailed below, this *James* factor alone justifies a change of venue.

[22] Lyman Interview, *supra.*

Nature and Gravity of the Offense

The prosecution has alleged that the conduct in this case imperiled not just the lives of cattle, but the livelihood of Zane Odell. While the gravity of the alleged offense is certainly not as tragic as the homicides in other change of venue cases, the nature of this alleged offense—one that certainly resonates with rural, ranching interests in a rural county whose economy depends on ranching—nonetheless presents a risk of prejudice. Jurors in San Juan County, many of whose daily lives revolve around ranching, are likely to consider the alleged conduct particularly serious. And, of course, the allegations are considered extremely serious by Chilcoat and Franklin, who each face twenty years in prison on a second-felony charge of attempted wanton destruction of livestock and a third-degree felony charge of criminally trespassing on state lands.

Nature and Extent of Publicity

News of this case has been widespread and uninterrupted. The newspapers in Southeastern Utah ran articles about the case immediately after the Chilcoat and Franklin were charged. Even statewide and national media outlets have covered the case, including an article just this week in The Huffington Post.[23] While stories or opinion pieces are unlikely to have significant impact on readers in faraway counties, they are much more likely to pique the interest of the community where the conduct allegedly took place. *Cf. Skilling v. United States*, 561 U.S. 358, 384 (noting that "Houston's size and diversity diluted the media's impact."). In addition, this Court should not be blind to the fact that a government official has caused some of the adverse pretrial

[23] A more detailed summary of the media coverage is found in the affidavit submitted with this motion.

publicity, characterizing environmentalists as "disease" roughly one month before a trial involving a prominent environmentalist. *See United States v. Sabhnani*, 599 F.3d 215, 232-33 (2nd Cir. 2010) (remarking that a court "may consider [a party's] role in generating adverse publicity in deciding a motion to change venue").[24]

In addition, the recent publicity has bordered on the criminal. As detailed above, the last few days have seen a torrent of threats towards Chilcoat. And these threats were neither generic nor anonymous like many threats in the age of the Internet. Instead, they were direct threats to Chilcoat's life. At their core, change of venue motions exist to avoid the lynch-mob mentality of a community that—rightly or wrongly—feels aggrieved. The recent threats alone provide ample justification for a change of venue in this case. But the *James* factors are not intended to be exhaustive; that is, other factors—such as the public opinion survey detailed below—provide further support.

II. Surveys Conducted by Dan Jones & Associates Reveals a Pervasive Disdain for Environmentalists Generally and Great Old Broads for Wilderness Specifically.

Courts and commentators alike have recognized the value of a scientifically valid public opinion survey to help detect bias in connection with a motion to change venue.[25] Since such surveys are "conducted in an atmosphere free from the pressure and regimentation of the jury selection process," people are much more inclined to be honest "when questioned by

[24] The defendants recognize that Lyman is not a party to this prosecution, but his potential influence as an elected official cannot be overstated.

[25] *See, e.g., United States v. Maad*, 75 Fed. Appx. 599 (9th Cir. 2003); *State v. Erickstad*, 620 N.W.2d 136 (N.D. 2000) (holding that "[m]ere quantity of media coverage is not the focus; rather, … defendants [must] submit qualified public opinion surveys, other opinion testimony, or any other evidence demonstrating community bias …").

unintimidating, unnamed and relatively uninstrusive, neutral researchers, in the comfort of their home, and where there is no 'wrong' answer that will lead to dismissal."[26] The results of the polling conducted by Dan Jones & Associates – Utah's most respected and well-known public polling organization – strongly suggests that a change of venue is necessary to ensure a fair trial in this case.

Because the issue of public land rights and the standing of environmental organizations and the Bureau of Land Management will play a large role in the trial, a public opinion survey conducted by Dan Jones was done "to assess how the opinions of San Juan County, Utah residents compare to the opinions of residents in Grand County, Utah and Carbon County, Utah regarding issues in local public lands debate and media consumption."[27] In order to assess those opinions, just over 200 residents from each of those counties were interviewed. Significantly, no information regarding the client or the objective of the survey was given to the participants. Nor was any financial or non-pecuniary consideration given to induce or reward participation in the survey. The topics of the questionnaire included: (1) Feelings about public lands and BLM policies; (2) Opinions regarding public lands decisions that affected Southeastern Utah in the past several years; and (3) Feelings about about environmentalists in general and the Great Old Broads for Wilderness specifically.[28] It should also be noted that during a phone conference

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[26] Rich Curtner & Melissa Kassier, "*Not in Our Town" Pretrial Publicity, Presumed Prejudice, and Change of Venue in Alaska: Public Opinion Surveys as a Tool to Measure the Impact of Pretrial Publicity*, 22 Alaska L.Rev. 255, 289 (Dec. 2005) (quoting Peter O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls: A Theory of Procedural Justice*, 65 U.Det.L.Rev. 169, 183 (1988).

[27] A copy of the report prepared by Dan Jones & Associates is attached as Exhibit 2.

discussing the potential polling, this Court asked the County if it wished to review the proposed questions in advance of the survey. The County stated that it did not need to do so.

Great Old Broads for Wilderness

One of the most polarizing facts at trial will be Chilcoat's and Franklin's connections to Great Old Broads for Wilderness ("GOB"). The State has already indicated that it intends to prove its case by referring to Chilcoat's membership in the organization. *See* Transcript of Preliminary Hearing at 63 (State arguing that Franklin's reason for closing gate connected to Chilcoat's membership in GOB). As this Court is likely aware, the environmental organization is strongly disliked by many in San Juan County. One need not look to the vitriolic criticism of GOB levied by County Commissioner Phil Lyman or the seemingly fervent hatred of GOB pervading the social media posts of prominent members of the San Juan County community to confirm this disdain. Instead, one need only look to the polling conducted by Dan Jones & Associates.

According to the polling, nearly three-quarters of San Juan County residents polled were aware of GOB. Of those who were aware, nearly 70% indicated that they held very unfavorable views of the organization.[29] These figures stand in stark contrast to the results from Carbon County and Grand County, respectively. A majority of Carbon County residents (64%) had never heard of GOB, and only a small fraction held unfavorable views of the organization. Grand County residents expressed similar feelings, as almost half (49%) had never heard of

[28] *See* Survey Analysis at 1.

[29] Roughly 75% of San Juan residents who expressed opinions about GOB informed the pollsters that they had "somewhat unfavorable" or "very unfavorable" opinions about the organization, though the vast majority expressed "very unfavorable" opinions.

GOB and few held unfavorable opinions of the group. What's beyond dispute is that not only is GOB well known in San Juan County, it's also largely unpopular, a troubling conclusion given that a central issue in this case will be Chilcoat's connection to GOB.

Environmentalists

Similar to the findings relating to GOB, the survey demonstrated considerable animosity towards environmentalists in general. Just over 60% of those surveyed in San Juan County indicated that they held unfavorable opinions about environmentalists. Significantly, the number of individuals who held very unfavorable opinions dwarfed those who held very favorable opinions. In comparison, those surveyed in Grand County revealed markedly different opinions, as roughly 60% held favorable opinions. Again, the prosecution has placed Chilcoat's membership in GOB and status as an environmentalist at issue in this case, causing concern that the survey results would seem to predict a venire largely hostile to the defendants.

Bureau of Land Management

Given the recent events surrounding Bears Ears and Lyman's ATV ride, it is perhaps unsurprising that many in San Juan County hold unfavorable opinions about the BLM. What is striking, however, is that nearly twice the number of people surveyed in San Juan County compared to Grand County and Carbon County held unfavorable opinions. It is expected that the prosecution will elicit evidence regarding Odell's BLM allotment as well as a complaint that Chilcoat purportedly sent to the BLM about Odell's actions.

Phil Lyman

One of the major sources of pretrial publicity in this case as well as other recent events relating to public lands in Utah is Phil Lyman. As detailed above, Lyman has not been shy about expressing his opinion about the BLM, environmentalists, and Rose Chilcoat. His trenchant and persistent criticism of all three has been the only constant in the dispute over public lands. And the survey suggests that his opinion matters. Not only is he an elected official, but he is well known in the county. And well liked.

Over 90% of the San Juan County residents know of Lyman, compared to 42% in Carbon County and 56% in Grand County. Of those who know of Lyman—an elected official who has publicly called a BLM Agent "a thug," characterized Chilcoat as "manipulator and reprobate" and "evil," and diagnosed environmentalists as a "disease"—roughly 70% hold favorable opinions of him. Contrast that with Carbon County residents, who were largely unaware of Lyman, and Grand County residents, who held more unfavorable views towards Lyman.

The Petroglyph

In addition to measuring individuals for their opinions, Dan Jones & Associates also asked questions to ascertain media exposure. Because the online publication The Petroglyph[30] had published articles highly critical of Chilcoat shortly after the alleged incident, the survey attempted to gauge the potential impact of the publication. Although the vast majority of residents in both Carbon County and Grand County were unfamiliar with The Petroglyph,

[30] The Petroglyph's website notes that it is "[s]etting the record straight on wilderness, environmental, political, and recreation focused news in Utah and the Western States." *See* https://thepetroglyph.com

roughly 40% of San Juan County residents were aware of the site. In addition, approximately 40% of those who were aware of the site read its content. In total, The Petroglyph's readership in San Juan County was more than double its readership in Carbon County and Grand County combined. To the extent that readers of The Petroglyph perceive it as a neutral source of local news, its potential for prejudicing prospective jurors in particularly acute. Indeed, social science research reveals that information from sources perceived to be neutral has a greater prejudicial effect than other sources.[31]

One commentator has noted that public opinion surveys "must carry paramount importance in a change of venue motion."[32] The survey conducted by Dan Jones should carry paramount importance in this case. As a whole, the survey paints a troubling picture of the defendants' opportunity for a fair trial. It is beyond dispute that Rose Chilcoat's environmental activism and her involvement in Great Old Broads for Wilderness will play a central role in this case. Both environmentalists and GOB are widely disliked by San Juan County residents. In addition, given his popularity and his outspoken criticism of environmentalists—virulent criticism that is both longstanding and recent—it is quite possible, if not probable, that the sentiments of County

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[31] *See* Christina A. Studebaker, Jennifer K. Robbennolt, Maithilee K. Pathak-Sharma & Steven D. Penrod, *Assessing Pretrial Publicity: Integrating Content-Analytic Effects*, 24 L. & Hum. Behav. 317, 326 (2000).

[32] Shahani, *supra*, at 117.

Commissioner Phil Lyman will further taint the jury pool.[33] The survey results provide further support for the need to change venue in this case.

III. Voir Dire Cannot Adequately Assure a Fair Trial.[34]

Courts have long held that a change of venue is necessary when the community reaction is "so hostile and pervasive as to make it apparent that even the most careful voir dire process would be unable to assure an impartial jury." *Flamer v. Delaware*, 68 F.3d 736, 754 (3d Cir. 1995) (Alito, J.) (en banc) (quotation omitted). Indeed, when "adverse pretrial publicity" combines with the "added pressure of a huge wave of … public passion" to create an "atmosphere corruptive of the trial process," the Supreme Court "will presume a fair trial could not be held, nor an impartial jury assembled." *Mu'Min v. Virginia*, 500 U.S. 415, 448-50 (1991) (Kennedy, J., dissenting).[35] And while voir dire "usually identifies bias," in certain situations it is nonetheless "inadequate," because prejudice can be such that jurors' claims that they can be impartial should not be believed"). *Patton v. Yount*, 467 U.S. 1025, 1038 & n.13 (1984).

The Supreme Court's precedents recognize several reasons why even careful and extensive voir dire cannot ensure an impartial jury in certain circumstances. First, potential jurors can

[33] *See, e.g.*, Shahani, *supra*, at 116 ("Inflammatory media sound bytes from government officials can become focal points during the court's analysis of the prejudicial effect of pretrial publicity.").

[34] Counsel has adapted many of the following arguments from a motion brought by Mark Shapiro in unrelated proceedings.

[35] *See also Irvin*, 366 U.S. at 720,724-28 (holding that voir dire would not suffice even when each juror gave assurances of fairness to the trial court during the four-week voir dire process, one that produced a 2,738-page transcript).

become infused with biases they cannot recognize or will not disclose. *See Estes*, 381 U.S. at 545; *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1961). Indeed, a "juror may have an interest in concealing his own bias," or "may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring). Several studies have shown that jurors are likely to exhibit either conscious or unconscious dishonesty during open court questioning.[36] Such conclusions are hardly surprising, as "practically speaking, it is rare to find a juror willing to openly and honestly discuss his or her beliefs and biases."[37]

Juror responses during voir dire are influenced by various social factors, including the need to conform to a group dynamic or the desire to present themselves as model citizens harboring no bias.[38] In particular, jurors are much less candid when they are questioned by judges rather than attorneys—often in deference to an authority figure and a desire to provide answers they believe the judge wants to hear.[39] The "psychological impact" of requiring each juror to declare his fairness "before [his] fellows" can engender bias, provoke false assurances, or result in sincere

[36] *See* Richard Seltzer, Mark A. Venuti & Grace M. Lopes, *Jury Honesty During Voir Dire*, 19 J. Crim. Justice 451, 452, 460 (1991) (citing various studies and concluding from an independent study of jurors that "to a significant degree, []jurors withhold information or lie during voir dire."); Dale Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S.Cal.L.Rev. 503, 506 (1965) ("The data contain numerous instances of conscious concealment and lack of candor.").

[37] Newton Minow & Fred Cate, *Who is an Impartial Juror in an Age of Mass Media*, 40 Am. U. L. Rev. 631, 650 n.123 (1991).

[38] Minow & Cate, 40 Am.U.L.Rev. at 650 n.123 (citing David Suggs & Bruce D. Sales, *Juror Self-Disclosure in Voir Dire: A Social Science Analysis*, 56 Ind.L.J. 245, 259 (1981)).

[39] Susan E. Jones, *Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & Hum. Behav. 131, 143-45 (1987); Minow & Cate, *supra*, at 651 (citing Neal Bush, *The Case for Expansive Voir Dire*, 2 L. & Psychol. Rev. 9, 17 (1976)).

expressions of impartiality that are fleeting at best. *Irvin*, 366 U.S. at 728.[40] These risks are particularly acute in cases where jurors may believe the can achieve notoriety or standing in the community through their service, or they wish to punish a particular defendant and purposefully attempt to serve on a jury.[41]

Social science studies are replete with evidence suggesting that voir dire is generally ineffective at determining which jurors are prejudiced by pretrial publicity. Indeed, studies have shown that voir dire is "grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'"[42] One prominent study found that "[c]hallenged jurors exposed to the publicity were just as likely to convict as those not challenged, but both were more likely to convict than those never exposed to pretrial publicity," and therefore "the net effect of judges', defense

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[40] *See also United States v. Dellinger*, 472 F.2d 340, 375 (7th Cir. 1972) ("natural human pride" may compel juror to assert his fairness).

[41] Jerry Markon, *Jurors with Hidden Agendas*, Wall St. J., July 31, 2001; *see also Miller-El v. Dretke*, 545 U.S. 231, 267-68 (2005) (Breyer, J., concurring); *Pennekamp v. Florida*, 328 U.S. 331, 359 (1946) (Frankfurter, J., concurring).

[42] Broeder, *supra*, 38 S.Cal.L.Rev. at 505. *See also* Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 Psychol. Reps. 1299, 1301 (1975) (jurors who claimed they could disregard pretrial publicity were far more likely to convict than jurors not exposed); Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity*, 40 Am.U.L.Rev. 665, 695 (1991) (jurors who claimed they could be impartial after being exposed to pretrial publicity were as likely to convict as jurors who doubted impartiality); Dexter et al., *A Test of Voir Dire as a remedy for the Prejudicial Effects of Pretrial Publicity*, 22 J.Applied Soc. Psychol. 819, 839 (1992) ("publicity increased perceptions of defendant culpability and a proposed remedy, extended voir dire, failed to qualify the effect of pretrial publicity").

attorneys', and prosecutors' combined challenges was effectively nil."[43] This proposition is true even with extensive voir dire.[44] In fact, even asking jurors about their exposure to pretrial publicity increases the prejudicial effects of such publicity.[45] Put bluntly, empirical evidence suggests voir dire may actually undermine its fundamental purpose.

Those who have studied the effects of pretrial publicity largely agree that voir dire does little to ensure unbiased jurors and fair trials. A meta-analysis of several studies on pretrial publicity concluded that expanded voir dire—along with continuances, judicial instructions and jury deliberation—"do[es] not provide an effective balance against the weight of [pretrial publicity]."[46] As the author of one study concluding that voir dire was ineffective in combatting pretrial publicity commented, "it is not disturbing that voir dire accomplishes so little. What is disturbing is that we expect voir dire to accomplish so much."[47] Given the problems highlighted by the social science studies, voir dire—even when extensive—is not an adequate substitute for a change of venue in this case.

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[43] Kerr et al., 40 Am. U. L. Rev. at 687-88 (emphasis added).

[44] Hedy R. Dexter, Brian L. Cutler & Gary Moran, *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity*, 22 J. App. Soc. Psych. 819, 830 (1992).

[45] Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psych. Pub. Pol. & L. 677, 682 (2000) (citing study).

[46] Nancy Mehrkens Steblay, Jasmina Besirevic, Solomon M. Fulero & Belia Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 L. & Hum. Behav. 219, 229 (1992).

[47] Kerr et. al, 40 Am. U. L. Rev. at 699.

Nor should this Court conclude that judicial instructions or admonishments suffice to dissipate potential bias. Although judicial admonitions to ignore pretrial publicity are often regarded as sufficient to counter preconceptions and pretrial publicity, they fail to achieve their aim. In a study of the efficacy of voir dire where most in the community had been exposed to pretrial publicity, "reliance of standard cautionary instructions as a remedy for prejudicial pretrial publicity appear[ed] to be unwarranted."[48] In fact, judicial admonitions may actually *heighten* the effect of pretrial publicity by reinforcing the bias they seek to avoid.[49] Unsurprisingly, researchers have suggested that admonitions designed to counteract bias draw attention to the material they should be disregarding.[50] Justice Jackson stated long ago that "the naïve assumption that prejudicial effects can be overcome by instructions to the jury … all practicing lawyers know to be unmitigated fiction."[51] What Justice Jackson intuitively understood more than a half-century ago, we now know empirically—judicial instructions to ignore something are likely to be ignored themselves.

Lastly, this Court should not overlook the very real danger that jurors in a small community will feel compelled to conform to the community's viewpoint. Even if a juror

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[48] Kramer et. al, 14 L. & Hum. Behav. at 430. *See also* Minow & Cate, 40 Am. U. L. Rev. at 648, 675 ("there has not been a single study which indicates that judicial instructions limit the effects of jury bias" and [j]udicial admonitions had no effect on individual jurors or jury verdicts.").

[49] Kramer, *supra*, at 430; *see also* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psych., Pub.Pol & L. 677, 691 (2000) (discussing studies).

[50] Kramer, *supra*, at 412 (citing studies).

[51] *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

honestly believes that he can objectively hear the evidence at trial, he may come to fear "return[ing] to his neighbors" with anything other than a guilty verdict. *Estes,* 381 U.S. at 545; *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). Once again, empirical evidence on jury bias confirms the effect of community pressure on jury verdicts. Studies show that "when the juror perceives that there is such strong community reaction in favor of a particular outcome of a trial [] he or she is likely to be influenced in reaching a verdict consistent with the perceived community feelings rather than an impartial evaluation of the evidence."[52]

In light of the empirical evidence, traditional precautionary measures such as voir dire, admonitions, and jury instructions are insufficient to assure a fair trial in this instance.

CONCLUSION

If the public is to place its faith in the justice of the verdict in this case, it must likewise be assured of the fairness of the process that lead up to that verdict. The importance of reaching the appropriate outcome based solely on the evidence presented, free from the constraints and limitations of jurors' preconceptions, has long been recognized. As Justice Holmes observed,

> The theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. When a case is finished courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied.

[52] *See* Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 L. & Hum.Behav. 73, 81-82 (2002).

Patterson v. People of State of Colorado, 205 U.S. 454, 462-63 (1907). Courts must be ever mindful of the powerful constitutional guarantee of a fair trial and strive to ensure that the right is scrupulously protected. And courts must not abdicate their responsibility to ensure that justice in all cases is served because of the nature of the criminal allegations. As Justice Brennan astutely observed,

> Our commitment to these values requires fidelity to them even when there is temptation to ignore them. Such temptation is especially apt to arise in criminal matters, for those granted constitutional protection in this context are those whom society finds most menacing and opprobrious.

McClesky v. Kemp, 481, U.S. 279, 339 (Brennan, J., dissenting). The only manner in which the defendants' right to a fair trial in this case can be assiduously and vigilantly protected is to change the venue of this trial. Similarly, in evaluating the merits of the defendants' motion, this Court should consider the ease with which the risk of infringing upon the defendants' fundamental right to a fair trial may be avoided.[53]

Most residents of San Juan County have long ago taken sides in the ongoing strife between ranchers and environmentalists. The very real danger that they would continue to do so

[53] In most cases there is little, if any, harm caused to the State when a change of venue is granted. *See Singer v. State*, 109 So.2d 7, 14 (Fla. 1959) ("A change of venue may sometimes inconvenience the state, yet we can see no way in which it can cause any real damage to it."); *Martinez v. Superior Court of Placer County*, 174 Cal.Rptr. 701, 707 (1981) (noting that threat to impartial trial could be avoided by "the simple expedience of a change of venue."). In addition, to the extent that this Court is not firmly convinced that a motion to change venue is appropriate, it must still "err on the side of caution, … so that fairness can better be ensured in a different venue." *State v. Stubbs*, 123 P.3d at 412.

regardless of any instruction or admonition exists in this case. The grave potential for partiality demands a change of venue to ensure Rose Chilcoat and Mark Franklin an impartial trial.

DATED this 3rd day of May, 2017.

/s/ Jeremy Delicino
_____
JEREMY DELICINO
Attorney for Defendant

/s/ Paul G. Cassell
_____
PAUL G. CASSELL
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was electronically served on this 3rd day of May, 2018, to:

San Juan County Attorney
Via Green File

/s/ Ysabel Lonazco
_____