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6 Great Old Broads for Wilderness,
7 Advocates for the West,
8 Alliance for a Better Utah,
9 Center for Biological Diversity,
10 Grand Canyon Trust,
11 Grand Staircase Escalante Partners,
12 Sierra Club,
13 Torrey House Press,
14 Western Watersheds Project,
15 Wild Earth Guardians,
16 Wild Utah Project,
17 Wilderness Watch,
18 Wildlands Defense, and
19 Wildlands Network

20 **IN THE UTAH COURT OF APPEALS**

21
22

16 STATE OF UTAH,
17 v.
18 Plaintiff/Respondent,
19
20 ROSALIE JEAN CHILCOAT and,
21 MARK KEVIN FRANKLIN,
22 Defendants/Petitioners.

16 PROPOSED AMICUS BRIEF IN
17 SUPPORT OF DEFENDANTS'
18 PETITION FOR INTERLOCUTORY
19 REVIEW

20 APPELLATE CASE NOS.
21 20180335 AND 20180336

22 DISTRICT COURT NOS.
171700040 AND 171700041

1 *Amicus Curiae* Great Old Broads for Wilderness, Advocates for the West,
2 Alliance for a Better Utah, Center for Biological Diversity, Grand Canyon Trust, Grand
3 Staircase Escalante Partners, The Sierra Club, Torrey House Press, Western Watersheds
4 Project, Wild Earth Guardians, Wild Utah Project, Wilderness Watch, Wildlands
5 Defense, and Wildlands Network hereby submit this *Amicus* Brief in Support of
6 Defendants' Petition for Interlocutory Review. *Amici* are described more fully in their
7 Motion for Leave to File an *Amicus* Brief.

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1 This case involves San Juan County’s prosecution of two retirees based on their
2 affiliation with an organization with which county political leaders disagree. If San Juan
3 County’s plan to prosecute the defendants is upheld, *amicis*’ members would reasonably
4 fear similar efforts to prosecute them for innocent behavior while in the County and this
5 would ultimately chill their First Amendment right to association and free speech. The
6 County’s unconstitutional acts would have repercussions far beyond its borders, however,
7 as other like-minded counties would be incentivized to engage in similar acts of
8 intimidation. *Amici* therefore encourage this Court to grant interlocutory review.

9

10 **I. Introduction and Summary of Relevant Facts**

11 Ms. Chilcoat and Mr. Franklin each face felony charges for “attempted wanton
12 destruction of livestock,” stemming from an incident that occurred on state trust lands
13 within San Juan County. Mr. Franklin closed a gate to a corral, thereby allegedly
14 depriving livestock of access to water.¹ But as the County concedes, there was a ten-foot
15 wide hole in the fence near the gate. *See* County’s Response in Opposition to
16 Defendants’ Motion to Quash Bindover at 2: 9 (“Approximately fifty yards from the gate,
17 there was a temporary opening in the fence . . .”). Mr. Franklin “saw the opening in the
18 fence,” Transcript of Preliminary Hearing 40: 24, and he saw that “the cows were fine,
19 they were going in and out . . .” *Id.* at 41: 5-6. Closing the gate could therefore have

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21 ¹ Mr. Franklin contends that he closed the gate in an effort to help the rancher and not to
22 harm livestock. Transcript of Preliminary Hearing at 16: 3-4.

1 been done with intent to deprive livestock of access to water only if Mr. Franklin also
2 intended to somehow prevent the cows from continuing to walk through the ten-foot wide
3 hole in the fence—and there is absolutely no evidence of that.

4 There is also, at best, only circumstantial evidence that Ms. Chilcoat was even at
5 the corral at the time of the gate closure, and there is no evidence that Ms. Chilcoat
6 played any role whatsoever in the gate closure.

7 San Juan County, however, appears to be vigorously prosecuting both petitioners
8 for second-degree felony crimes based on Ms. Chilcoat’s advocacy for improved
9 management and protection of public lands, and for her affiliation with Great Old Broads
10 for Wilderness. The County went to great lengths to highlight both Great Old Broad for
11 Wilderness’ advocacy for public land stewardship, and Ms. Chilcoat’s connection to that
12 organization, in an effort to establish criminal intent. Transcript of Preliminary Hearing
13 at 59-61.

14 The District Court accepted this rationale, denying petitioners’ Motion to Quash
15 the bindover in part because, as the court explained, “Ms. Chilcoat’s position with Great
16 Old Broads for Wilderness, as well as her letters to the [Bureau of Land Management
17 (BLM)], show that she thinks the world would be a better place if Odell’s cattle were
18 gone.” Ruling on Motion to Quash Bindover at 4; *see also*, Transcript of Preliminary
19 Hearing at 82: 24-25 (where the court discussed “her views about grazing *implied* from
20 her association with Great Old Broads against for Wilderness” as tying her to the alleged
21 crime (emphasis added)).

22 There is, however, no evidence of Ms. Chilcoat’s personal animus towards

1 livestock grazing anywhere in the record. Nor is there any evidence that Great Old
2 Broads for Wilderness ever advocated for or condoned injuring livestock.² Any inference
3 drawn to reach such a conclusion depended entirely on Ms. Chilcoat's association with
4 Great Old Broads for Wilderness, and on prejudicial and inaccurate assumptions about
5 that organization.

6 The County's theory of Mr. Franklin's intent to harm livestock is even more
7 attenuated and alarming. As the County conceded at the Preliminary Hearing:

8 The State's position is that at the time that the gate was closed, Mr.
9 Franklin had no reason, no practical, no reasonable reason to close that gate
10 other than, based on testimony that you've heard, his connections with Ms.
Chilcoat as well as the organization that she belongs to, that would be to
cause injury or the death of these livestock.

11 Transcript of Preliminary Hearing at 63: 16-21.

12 To be clear, the County relies on inaccurate and unsupported assumptions about
13 Great Old Broads for Wilderness and Ms. Chilcoat's association with that organization to
14 gin up their theory of criminal intent and justify charging her with a crime. The County
15 then, unable to find any reason for Mr. Franklin to close the gate, imputes motive based
16 on incorrect and unsupported assumptions about an organization to which Mr. Franklin

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19 ² Great Old Broads for Wilderness does not advocate for harming animals. Rather,
20 "Great Old Broads for Wilderness is a national grassroots organization, led by women,
21 that engages and inspires activism to preserve and protect wilderness and wild lands.
Conceived by older women who love wilderness, Broads gives voice to the millions of
22 Americans who want to protect their public lands as Wilderness for this and future
generations. We bring knowledge, commitment, and humor to the movement to protect
our last wild places on earth." <http://www.greatoldbroads.org/about-us/>.

does not even belong, and to which he is connected only through his wife, in order to justify felony charges against him.

On April 9, 2018 Ms. Chilcoat and Mr. Franklin moved to Quash the District Court's Order Binding both defendants' over for trial. Ms. Chilcoat and Mr. Franklin's Motion to Quash was based in part on constitutional prohibitions against criminal prosecutions that are based on an individual's beliefs or organizational affiliation. *See* U.S. Const., amend. I; Utah Const., art. I, § 1. The District Court denied Defendants' Motion to Quash on April 24, 2018, subjecting both Defendants to a costly and emotionally draining multi-day criminal trial unless this Court intervenes.

II. Argument

To proceed with a multi-day trial without first resolving potentially dispositive constitutional claims would send a strong warning to those holding minority viewpoints and have a profound chilling effect on speech and association within San Juan County and beyond.

Under the Utah Rules of Appellate Procedure, “[a]n appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice.” Utah R. App. Pro. 5(g).

There can be little doubt that this case involves substantial and constitutionally protected rights. It is a matter of black letter law that:

1 The right of ‘association,’ like the right of belief, . . . includes the right to
2 express one’s attitudes or philosophies by membership in a group or by
3 affiliation with it or by other lawful means. Association in that context is a
4 form of expression of opinion; and while it is not expressly included in the
5 First Amendment its existence is necessary in making the express
6 guarantees fully meaningful.

7 *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (citations omitted). “The First
8 Amendment protects the right of an individual to speak freely, to advocate ideas, to
9 associate with others, and to petition his government for redress of grievances The
10 government is prohibited from infringing upon these guarantees . . . by a general
11 prohibition against certain forms of advocacy.” *Smith v. Arkansas State Highway Emp.,*
12 *Local 1315*, 441 U.S. 463 (1979). The Constitution thus “protects expression and
13 association without regard to the . . . political . . . affiliation of the members of the group
14 which invokes its shield, or to the truth, popularity, or social utility of the ideas and
15 beliefs which are offered.” *Nat'l Ass'n for Advancement of Colored People v. Button*,
16 371 U.S. 415, 444–45 (1963). It follows, then, that “the First Amendment’s protection of
17 association prohibits a State from . . . punishing [a person] solely because [she] is a
18 member of a particular political organization or because [she] holds certain beliefs.”
19 *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6, 9 (1971); *see also, Williams v. Rhodes*, 393
20 U.S. 23, 30 (1968) (extending the Fourteenth Amendment to freedom of association and
21 thereby prohibiting infringement upon association by states).

22 The Utah Supreme Court has also been clear, “[i]ndividuals who are
23 contemplating participating in protected speech may choose to avoid possible prosecution
24 or litigation by refraining from the constitutionally protected activity.” *Provo City Corp.*
25

1 *v. Thompson*, 2004 UT 14, ¶ 11, 86 P.3d 735, 739, citing *Provo City Corp. v. Willden*,
2 768 P.2d 455, 457 (Utah 1989). Accordingly, when construing a state statute that creates
3 the risk of criminal prosecutions, courts must be mindful of any ““chilling effect’ on
4 protected activity.” *Provo City Corp. v. Thompson*, 2004 UT at ¶ 11, citing *Provo City*
5 *Corp. v. Willden*, 768 P.2d 455, 457 (Utah 1989); see also *Eldridge v. Johndrow*, 2015
6 UT 21, ¶ 44, 345 P.3d 553, 561 (expressing concern over any doctrine that “would chill
7 speech, discouraging the free spread of information and opinion.”), and *Cassidy v. Salt*
8 *Lake Cty. Fire Civil Serv. Council*, 1999 UT App 65, ¶ 19, 976 P.2d 607, 612, (holding
9 an action that chills free speech warrants First Amendment scrutiny).

10 Yet in denying Ms. Chilcoat and Mr. Franklin’s Motion to Quash, the District
11 Court explained that “Ms. Chilcoat’s position with Great Old Broads for Wilderness, as
12 well as her letters to the BLM, show that she thinks the world would be a better place if
13 Odell’s cattle were gone.” Ruling on Motion to Quash Bindover at 3. Those beliefs,
14 whether portrayed accurately or not, do not provide an adequate legal basis for criminal
15 prosecution.

16 The First Amendment issues that were raised but ignored in the Defendants’
17 Motions to Quash are precisely the type of questions regarding “substantial rights” that
18 “may materially affect the final decision” and which therefore justify interlocutory
19 review. It is hard to imagine rights more substantive than those protected by the First
20 Amendment of the U.S. Constitution. The Supreme Court has made clear that free
21 speech and free association are ““indispensable liberties.” *Nat'l Ass'n for Advancement of*
22 *Colored People v. State of Ala.*, 357 U.S. 449, 461 (1958). “[T]he vitality of these

1 constitutional principles cannot be allowed to yield simply because of disagreement with
2 them.” *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

3 Determining the correctness of the Order Denying Defendants’ Motion to Quash
4 before proceeding with a costly trial “will better serve the administration and interests of
5 justice.” Indeed, “[t]he purpose . . . [of] an interlocutory appeal is to get directly at and
6 dispose of the issues as quickly as possible consistent with thoroughness and efficiency in
7 the administration of justice.” *Houghton v. Dep’t of Health*, 2008 UT 86, ¶ 14, 206 P.3d
8 287, 291 (internal citations omitted). There can hardly be a better way to serve the
9 interests of justice than to protect the rights afforded to minority viewpoints under our
10 federal and state constitutions and to avoid a potentially unnecessary trial with its
11 attendant costs and inconvenience to witnesses.

12 While the court below may eventually acquit Ms. Chilcoat and Mr. Franklin of all
13 wrongdoing, the decision to bind both petitioners over for a multi-day trial in the face of
14 serious unresolved constitutional questions sends a clear message to all those within San
15 Juan County who hold minority viewpoints—speak out at your own peril.

16 Tensions over management of our public lands have grown to an almost deafening
17 level over the last few years, and those tensions are especially acute in San Juan County.
18 On May 10, 2014, County Commission Phil Lyman led an illegal all-terrain vehicle
19 (ATV) ride through Recapture Canyon to protest federal public land management—a ride
20 for which he was subsequently found guilty of two misdemeanors,³ and sentenced to ten
21

22 ³ 18 U.S.C § 371, Conspiracy to Operate Off-Road Vehicles on Public Land Closed to

1 days in jail and required to pay over \$97,000 in fines and restitution. Judgement in a
2 Criminal Case, *United States v. Philip Kay Lyman*, No. 2:14-cr-00470-DN, 2015 WL
3 11198786 (D. Utah, Dec. 29, 2015), *affirmed*, *United States v. Wells*, 873 F.3d 1241
4 (10th Cir. 2017).⁴ Ms. Chilcoat publicly supported the conviction in local news media,
5 leading to a series of Facebook posts in which Commissioner Lyman blamed Ms.
6 Chilcoat as being directly responsible for his criminal conviction. Reply in Support of
7 Mot. to Quash at 9-10.

8 Mr. Laws, the San Juan County Attorney, has been quite clear about where he
9 stands on the case against Commissioner Lyman and those in the environmental
10 community who have been critical of Commissioner Lyman’s unlawful protest ride. Mr.
11 Laws posted to social media that “if you would like to spew your blind hate about Phil
12 and Monte (my friends) and ignore what this case could mean for you then take that crap
13 somewhere else and leave it off my page.”⁵ Rogers’ Decl., Ex. 1 at 2. San Juan County
14

15 Off-Road Vehicles; and 43 U.S.C § 1702 Operation of Off-Road Vehicle on Public
16 Lands Closed to Off-Road Vehicles.

17 ⁴ Notably, Commissioner Lyman, one of the most influential public officials in the
18 County, has been a vocal and public critic of Ms. Chilcoat. His statements, which are
19 unmoored from fact, appear calculated to sway public opinion against the Defendant.
20 “Interesting that even after being caught red-handed in criminal destruction of cattle Rose
21 is still proselytizing for the annihilation of other people’s livestock.” Rogers’ Decl., Ex.
22 1 at 1. Commissioner Lyman also publicly described Ms. Chilcoat as a “manipulator and
a reprobate” and as “evil.” *Id.*

21 ⁵ In mentioning “Monte,” Commissioner Lyman is referring to his co-defendant Monte
22 Wells, who was charged with Conspiracy to Operate Off-Road Vehicles on Public Land
Closed to Off-Road Vehicles in connection with the ATV ride. Like Commissioner
Lyman, Mr. Wells was found guilty on both counts. *See United States v. Wells*, 873 F.3d

1 officials' hostility towards those who profess a commitment to environmental protection
2 could not be clearer.

3 San Juan County is also home to the Bears Ears National Monument. Rancorous
4 debate led up to President Obama's designation of the 1.35-million-acre monument on
5 December 28, 2016. Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016). And
6 on December 4, 2017 President Donald Trump shrank the same monument by eighty-five
7 percent. Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 4, 2017). Three lawsuits
8 followed almost immediately, challenging the President's authority to reduce the
9 monument. Courtney Tanner, *Utah Dine Bikeyah, Patagonia and Others File Latest*
10 *Lawsuit Challenging Trump's Authority to Shrink Bears Ears*, THE SALT LAKE TRIBUNE,
11 Dec. 7, 2017, <https://www.sltrib.com/news/politics/2017/12/07/utah-dine-bikeyah-patagonia-and-others-file-latest-lawsuit-challenging-trumps-authority-to-shrink-bears-ears/>.⁶ Notably, Great Old Broads for Wilderness is a plaintiff in that litigation. *Nat. Res. Def. Council v. Trump*, 1:17-cv-02606 (D. D.C. Dec. 7, 2017).

15 But the vitriol directed at environmental activists is more telling than these
16 controversial land management actions. In June of 2016 for example, “[a] phony news
17 release purportedly from the Department of Interior was posted at the post office in Bluff
18 and in several gas stations in the county, saying the Interior Department was poised to

19 _____
20 1241 (10th Cir. 2017) (upholding conviction).

21 ⁶ The lawsuits are: *Hopi Tribe v. Trump*, 1:17-cv-02590 (D. D.C. Dec. 4, 2017); *Utah Diné Bikéyah v. Trump*, 1:17-cv-02605 (D. D.C. Dec. 6, 2017); and *Nat. Res. Def. Council v. Trump*, 1:17-cv-02606 (D. D.C. Dec. 7, 2017).

1 take over more than 4 million acres of the Navajo Nation Reservation.” Paul Rolly,
2 *Bears Ears Opponents Posting Phony Fliers, Letters to Scare Utah Navajos*, SALT LAKE
3 TRIBUNE, May 24, 2016,
4 <http://archive.sltrib.com/article.php?id=3928251&itype=CMSPID>, At least two other
5 fraudulent letters were also circulated in an attempt to undermine support for establishing
6 the monument. *Id.* Worse still were the posters advertising “an open hunting season on
7 southeast Utah backpackers, with no harvest limits and all weapons permitted.” Phil
8 Taylor, *Threats of Violence, Fake Land Grabs Proliferate in Utah*, GREENWIRE, June 10,
9 2016 <https://www.eenews.net/stories/1060038637>, attached as Exhibit A.

10 Threats are nothing new to environmentalists in San Juan County. In 2012 a
11 group of about fifty members of Great Old Broads for Wilderness spent the weekend
12 camping in San Juan County. “On Sunday morning, a member of the group who awoke
13 very early to leave the campsite and return to work found the exit gate padlocked shut
14 and an old hag Halloween mask, doused in fake blood, hung in effigy on a fencepost
15 nearby. Underneath the mask was a milk jug with the threat ‘Stay out of San Juan
16 County. No last chance’ inked onto it.” Stephanie Paige Ogburn, *Fear and Loathing in*
17 *San Juan County*, HIGH COUNTRY NEWS Oct. 8, 2012,

18 <https://www.hcn.org/blogs/goat/fear-and-loathing-in-san-juan-county>, attached as Exhibit
19 B. Great Old Broads for Wilderness, of course, is the organization Ms. Chilcoat is
20 associated with, and it is that affiliation which is being used to justify her prosecution.
21 The message could not be clearer—in San Juan County, environmental advocacy or
22 affiliation with an environmental organization will not go unpunished.

1 Environmentalists are not the only minority group whose viewpoint has been
2 suppressed within San Juan County. The Navajo Nation, whose members make up the
3 majority of San Juan County's residents, has had to sue repeatedly to obtain adequate
4 representation on the San Juan County Council and San Juan County School Board.
5 *Navajo Nation et al v. San Juan County*, No. 2:12-cv-00039 (D. Utah, filed Jan 12,
6 2012); and *United States v. San Juan County*, No. 2:83-cv-01286 (D. Utah, filed Nov 22,
7 1983).⁷ The coalition of Native American tribes that advocated so hard for the protection
8 of the Bears Ears landscape has become so frustrated with opposition to their efforts to
9 advance cultural and environmental protections that they recently took their concerns to
10 the United Nation Human Rights Council. Amy Joi O'Donoghue, *Group Appeals to*
11 *United Nations on 'Human Rights' Violations at Bears Ears*, DESERET NEWS, April 24,
12 2018 [https://www.deseretnews.com/article/900016710/group-appeals-to-united-nations-](https://www.deseretnews.com/article/900016710/group-appeals-to-united-nations-on-human-rights-violations-at-bears-ears.html)
13 [on-human-rights-violations-at-bears-ears.html](https://www.deseretnews.com/article/900016710/group-appeals-to-united-nations-on-human-rights-violations-at-bears-ears.html).

14 This is the backdrop against which Ms. Chilcoat and Mr. Franklin are poised to go
15 to trial. The County is relying on Ms. Chilcoat's environmental beliefs and
16 organizational affiliations to establish criminal intent, and they concede that Mr. Franklin
17 had "no reason, no practical, no reasonable reason to close that gate other than, based on
18 testimony that you've heard, his connections with Ms. Chilcoat as well as the

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⁷ Systematic suppression of Navajo voting rights and underfunding of public education
21 for Navajos in San Juan County are discussed in detail in Professor Charles F.
22 Wilkinson's book FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN
SOUTHWEST (Island Press, 2004).

1 organization that she belongs to, that would be to cause injury or the death of these
2 livestock.” Transcript of Preliminary Hearing at 63: 16-21. Reliance on environmental
3 values and association with environmental organizations to establish criminal intent is
4 constitutionally impermissible in any arena, and it takes on a uniquely troubling hue in
5 San Juan County where prosecution appears to be intended to send a chilling message to
6 all those who hold similar views—stay home and keep quiet or face the consequences.

7 *Amici* and their members, like Ms. Chilcoat and Mr. Franklin, care deeply about
8 the manner in which our public lands are managed. Like the petitioners, *amici* and their
9 members advocate for protection of public lands and the environment. Also, like the
10 petitioners, *amici* and their members visit public lands within Utah for the spiritual,
11 emotional, and recreational benefits those lands provide. To sanction the prosecution of
12 the petitioners based largely on their beliefs and organizational affiliation sends a
13 powerful message to all those share views that are similarly unpopular with political
14 leaders—stay away and stay quiet or face the consequences. Such a chilling effect on
15 First Amendment rights should not be allowed to stand.

16 We urge this Court to review the District Court’s decision to bind the Defendants
17 over for trial based on their constitutionally-protected activities like membership in
18 organizations or expression of opinion. To allow this case to proceed to trial without
19 interlocutory review would have a profound chilling effect on the First Amendment rights
20 of *amici* and anyone within San Juan County who represents minority views.

21
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III. Conclusion

2 Ms. Chilcoat and Mr. Franklin’s Motion for Interlocutory Review raises issues
3 involving substantial First Amendment rights and may materially affect the final decision
4 in Defendants’ criminal trial. Resolution of these matters before trial serve the
5 administration and interests of justice. *Amici* therefore ask this Court to grant
6 Defendants’ request for interlocutory review.

Dated this 7th day of May, 2018.

Respectfully submitted,

Patrick A. Shea, UT Bar No. 2929