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IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, -vs- ROSALIE JEAN CHILCOAT, Defendants.	**REPLY IN SUPPORT OF MOTION TO QUASH BINDOVER** Case Number: 171700041 Judge: Lyle R. Anderson

INTRODUCTION

It has now become clear that the State (more precisely, San Juan County, hereinafter "the County") intends to pursue Second Degree and Third Degree felony charges against Rose Chilcoat (and her husband Mark Franklin) because they have the temerity to be, respectively, a conservation advocate and the husband of such an advocate. When confronted with a well-founded motion to quash the bindover demonstrating that these serious criminal charges rest on Ms. Chilcoat's and Mr. Franklin's possible beliefs about the best use of public lands, the County

[1] 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.

does not retreat but, instead, doubles down. The County affirmatively argues that these conservationist opinions somehow provide the motive that supports such felony charges as Attempted Wanton Destruction of Livestock – and somehow justify potentially sending Ms. Chilcoat and her husband both to prison for more than twenty years. And the County has even "tripled down," by continuing its pursuit of an additional charge felony charge for Retaliation Against a Witness because, it claims, Ms. Chilcoat has reported possible illegal behavior regarding cattle operations to the federal Bureau of Land Management (BLM).

To speak plainly, this apparently politically-driven prosecution must be quashed in a nation and State that identifies among its core values rights of freedom of belief, expression, and association. The obvious effect – if not. indeed, the actually-announced intent behind – such draconian criminal charges is to send a message to those who believe that public lands in the San Juan County should be conserved and protected for the public: Dare to set foot here and you may find yourself sent to prison for two decades.

Utah's criminal justice system cannot be used for such purposes. Given the weakness in the County's response to the motion to quash, this reply makes clear that all charges against Ms. Chilcoat (and, as noted in a parallel filing, Mr. Franklin) must be immediately dismissed for multiple reasons.

For starters and most obviously, in its briefing the County has failed to provide *any* evidence to support the allegations in the Amended Criminal Information. Confronted with a well-founded defense motion to quash bindover for failure to provide sufficient supporting evidence – which included citations to the transcript of the hearing -- the County merely "summarizes" its alleged "notes" of the evidence at the preliminary hearing. Such recollections fail to satisfy the County's burden of response.

Of even graver concern, however, is the County's effort to use Ms. Chilcoat's membership in a conservationist organization – and Franklin's marriage to her – in a far-fetched attempt to satisfy its burden of proof in justifying bindover on the specific intent crime of attempted wanton destruction of livestock. The United States Constitution's First Amendment and (among other provisions) article I, section 1 of the Utah Constitution plainly forbid the speculative inference that the County tries to draw to support pursuit of extremely serious criminal charges.

Piled on top of these constitutional violations, the County attempts to criminalize Ms. Chilcoat's alleged report to the BLM of possible illegal grazing operations on public lands. The right to petition and otherwise approach Government authorities are also constitutionally-protected rights and conduct protected by these rights cannot be criminally prosecuted.

The County also attempts to provide testimony about the direction of tire tracks in this case through a self-interested BLM grazing permittee – testimony indispensable to the bindover of the criminal charges. While those who run livestock over public lands may possess various skills connected with grazing their cattle, they are (without further training) simply incapable of providing in a criminal case admissible, scientifically-grounded direction-of-travel testimony based on an unscientific glance at tire tracks on a road. The County's pseudo-science must be excluded and all dependent criminal charges dismissed as a result.

Finally, the County has failed to provide *any* admissible evidence that Ms. Chilcoat somehow threatened a witness by providing information to the BLM, choosing to rest its case on a happenstance review of the file by a BLM grazing permittee. In a serious criminal prosecution, the rules of evidence cannot be short-circuited with such unreliable hearsay.

All charges against both defendants must be immediately dismissed.

ARGUMENT

I. MS. CHILCOAT'S MOTION TO QUASH MUST BE GRANTED BECAUSE THE COUNTY HAS FAILED TO PROVIDE ANY RECORD CITATIONS OF EVIDENCE IN SUPPORT OF ITS CLAIMS.

On April 9, 2018, Rose Chilcoat and her husband Mark Franklin both filed timely motions to quash the bindover in their respective criminal cases (hereinafter "Motion to Quash").[2] Each motion was supported by a detailed, twenty-page memorandum with very specific record citations to passages in the 95-page preliminary hearing transcript.

A week later, on April 16, 2018, the County filed its response (hereinafter "County Resp."). As it began its "Statement of Facts" section, the County dropped a footnote with an apology:

> The Facts stated here are based on the preliminary hearing *notes from the [county] prosecutors*. The [County] apologizes for not having citations to the record but had not anticipated this Motion 5 months after the hearing. In an effort to preserve the trial date, the [County] did not want to delay the Response in order to get a transcript.

County Resp. at 1 n.1 (emphasis added). The County's apology raises more questions than it dispels. The County did not need to "order" a transcript, as the defense had previously ordered it – as the numerous citations to the transcript included throughout the motion to quash made clear. Moreover, if the County had merely asked defense counsel for a copy of the transcript, a few minutes later an email response with the transcript would have been forthcoming. To avoid any future efforts to deflect attention from the actual record in this case, the defense has now filed the preliminary hearing transcript in this case.

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[2] The two motions to quash were identical. For simplicity, all references in this reply will be to the page numbers in the motion to quash filed by Ms. Chilcoat. As with the initial motions to quash, this reply discusses certain facts only for purposes of the motions and should not be construed as acceptance of these facts for any other purpose.

Notwithstanding the County's apology, any alleged second-hand accounts of "notes" of court proceedings taken by county prosecutors cannot serve as the basis for determining whether Ms. Chilcoat (and Mr. Franklin) must stand trial for second-degree felony charges. Of course, in this State, a criminal defendant has a constitutional right to a preliminary hearing. *See* Utah Const. art. I, § 13. The preliminary hearing plays "an important role in ferreting out groundless prosecutions before they go to trial." *State v. Virgin*, 2006 UT 29, ¶ 20, 137 P.3d 787, 792.

It is settled law that at the preliminary hearing the prosecution has the burden of producing "believable *evidence* of all the elements of the crime charged." *Virgin*, 2006 UT 29, ¶ 20, 137 P.3d 787, 792 (emphasis added). Of course, court decisions reviewing such issues necessarily must examine the details of specific testimony provided in order to reach a valid legal conclusion. *See, e.g., Virgin*, 2006 UT 29, ¶¶ 35-38, 137 P.3d at 795-96 (reviewing quotations from trial transcript as part of assessment of whether probable cause failed to exist for a bindover). Unproduced "notes" from prosecutors are not part of the record in this case. *See* Utah R. Civ. P. 44 (providing grounds for authenticating official records); *see also* Utah R. App. P. 11(e)(1)(2) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion"). Thus, while the defense has filed a motion to quash well-supported with specific page references to the official record, *see* Motion to Quash at 2-5 (citing transcript), the County has responded with nothing other than its own views of what happened. Any claim of the County unsupported by a transcript citation is simply that – a claim. *See, e.g., Child v. Globis*, 2010 UT App 344 ("Without transcripts of the hearings at which evidence was presented, this court cannot reach Globis's claims because we cannot review the evidence as presented. Absent a complete record, Globis's assertion of error

"stands as a unilateral allegation which the reviewing court has no power to determine" (*quoting State v. Penman,* 964 P.2d 1157, 1162 (Utah Ct. App. 1998)).

Moreover, the County's "apology" for its lack of a transcript, and then general assertions about what the transcript supposedly contains, obviously prejudice Ms. Chilcoat and Mr. Franklin. For example, one of the facts that County alleges in its responses is that "evidence was entered that . . . Franklin's actions were with the intent to halt, impede, obstruct, or interfere with [the permittee's] lawful animal operations." County Resp. at 5. What evidence?! Indeed, the responding police officer and his dispatch saw no such evidence when he responded to the situation. *See* Rogers' Declaration, Exhibit 1, at 2 (quoting exchange between responding officer and dispatch as acknowledging "I think all we'd have is probably just trespassing, I don't even think it is criminal trespassing if it wasn't done with malice.").

The absence of any admissible evidence underlying such alleged crimes was at the heart of Ms. Chilcoat's (and Mr. Franklin's) motions to quash, and the County cannot respond with unsupported generalities unadorned with any citation to the record. *See, e.g., Horgan v. Sandy City*, 2012 UT App. 210, ¶ 3, 283 P.3d 1079, 1080 (discussing need for "sufficient, accurate, and specific citations to the record and transcript"). The County has obviously failed to substantively respond to the motions to quash, and accordingly the Court must immediately grant the motions and quash the bindover order on all counts.

II. THE COUNTY'S USE OF MS. CHILCOAT'S MEMBERSHIP IN A CONSERVATION ORGANIZATION TO ATTEMPT TO PROVE CRIMINAL INTENT VIOLATES FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

To the extent that it is possible to understand what evidence the County is relying upon in its general response, it becomes obvious that permitting this prosecution to move forward would violate Ms. Chilcoat's (and Mr. Franklin's) federal and state constitutional rights to freedom of

speech, freedom of belief, and freedom of association. The County does not deny an indispensable component of its proof of alleged "criminal intent" is Ms. Chilcoat's membership in a conservationist organization known as Great Old Broads for Wilderness.[3] Indeed, it is becoming increasingly clear that her membership in this organization is the animating reason for this unfounded criminal prosecution. The First Amendment and the Utah Constitution forbid criminalizing political beliefs, particularly in communities were such beliefs may be unpopular.

A. Ms. Chilcoat and by Implication her Husband, Mr. Franklin, Hold Political Views that are Unpopular in Blanding, Utah.

Sadly, the basis for this criminal prosecution does not appear to have its origins in anything done by Ms. Chilcoat and her husband, Mr. Franklin. Rather, they appear to be victims of a larger political battle over the proper use of public lands in southeastern Utah.

It appears that the origins of this criminal prosecution can be traced to federal crimes committed by San Juan County Commissioner, Phillip Lyman, on the morning of May 10, 2014. As later charged by federal prosecutors,[4] Lyman led a conspiracy to challenge BLM restrictions on the use of off-road vehicles in Recapture Canyon. Criminal Information, *United States v. Lyman*, No. 2:14-cr-00470-DN, DE 1 (filed Sept. 17, 2014). Specifically, he led an illegal ATV ride through the canyon to protest BLM restrictions. On May 5, 2015, Lyman (and Monte Wells) were found guilty of federal conspiracy charges, DE 149, and on December 18, 2015, Lyman was sentenced to serve ten days in the custody of the federal Bureau of Prisons.

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[3] According to its website, Great Old Broads for Wilderness (hereinafter "Broads") is a national grassroots organization, led by women, that engages and inspires activism to preserve and protect wilderness and wild lands. Conceived by older women who love the wilderness, Broads gives voice to the millions of Americans who want to protect their public lands as wilderness for this and future generations. The organization thus strives to bring knowledge, commitment, and humor to the movement to protect our last wild places on earth. http://www.greatoldbroads.org/

[4] This Court can take judicial notice of records from the U.S. District Court for the District of Utah, as their accuracy cannot be reasonably questioned. *See* Utah R. Evid. 201(c).

Rose Chilcoat publicly applauded the conviction of Commissioner Lyman, explaining in a local newspaper:

> "I was pleased to see the guilty verdict for Commissioner Lyman and Monte Wells," said Rose Chilcoat, associate director with Great Old Broads for Wilderness, an environmental group that has been involved in issues in San Juan County. "Those were intentional and willful acts that just can't be tolerated in a civil society where you have to have some constraints and it can't be a free-for-all of everybody doing what they want. It is refreshing to see the federal government pursue cases where people have been flouting federal law, especially as it relates to public lands."

Four Corners Free Press, http://fourcornersfreepress.com/?p=2522 (May 12, 2015).[5]

As a result of her leadership in Great Old Broads for Wilderness, Ms. Chilcoat is a well-known conservationist,[6] whose advocacy of her positions appear to be anathema to those in San Juan County who support extensive grazing of livestock on public lands and oppose restrictions on ATV use. The responding law enforcement officer who investigated the complaints against Chilcoat and her husband immediately concluded that no crimes appeared to have been committed. *See* Rogers Decl., Ex. 1, at 2 (quoting exchange between responding officer and dispatch as "I think all we'd have is probably just trespassing, I don't even think it is criminal trespassing if it wasn't done with malice."). And yet, after the matter was reviewed by the

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[5] These statements are not hearsay, as they are being presented to show effect on the hearer – i.e., the San Juan County officials who took an unfavorable view of Chilcoat's praise of the criminal prosecution. *See, e.g., Provo City v. Warden,* 844 P.2d 360 (Utah Ct. App. 1992) (statement admissible to show reason for subsequent conduct).

[6] Throughout San Juan County, it is generally claimed that Chilcoat is an "environmentalist" and she is frequently described in such terms. *See, e.g.,* THE PETROGLYPh, Apr. 4, 2017 ("Rose Chilcoat and the Great Old Broads for Wilderness have been involved in environmentalist activism since 1989) (available at https://thepetroglyph.com/environmental-activist-chilcoat-caught-red-handed-endangering-livestock-25a6fd583d2f). While there is considerable overlap between the two terms, to be more precise, defense counsel will identify her as a "conservationist" – e.g., "a person who advocates conservation, especially of natural resources." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 265 (11th ed. 2006).

County Attorney's Office, the result was multiple felony charges against both Ms. Chilcoat and Mr. Franklin.

The politically-charged atmosphere in which that charging decision was made strongly suggests political motivations. And public statements from San Juan County officials – including the County Attorney – confirm the likelihood of animus. On June 25, 2017, San Juan County Commissioner Lyman shared a post and stated, "Interesting that even after being caught red-handed in criminal destruction of cattle Rose is still proselytizing for the annihilation of other people's livestock. Apparently, in this odd religion, if you eat meat, you are a climate denier. FYI-Cows are not the only animal that poops." Rogers' Decl., Ex. 1 at 1. On July 6, 2017, in a post that is best described as a rant against the BLM and the Salt Lake Tribune, Commissioner Lyman states, "[BLM Agent] Dan Love is a thug, *Rose Chilcoat, the self-proclaimed founder of Friends of Cedar Mesa, is a manipulator and a reprobate*. Somehow San Juan County has attracted the worst of the worst. We have been kind and we have been accepting, but it is time to recognize that the Brian Mafly's, the Rose Chilcoat's, the Lance Porters, the Steve Bloch's and Robert Shelby's of the world resent us not because we are evil but because *they are evil.*" *Id.* (emphases added).

The posts also show the Commissioner Lyman linked Ms. Chilcoat to his criminal prosecution for the illegal ATV ride in Recapture Canyon. For example, on August 24, 2017, Commissioner Lyman posted a lengthy diatribe on Facebook, concerning Congressman Bishop seeking a full investigative report on BLM Agent Dan Love, in which Lyman directly blames Ms. Chilcoat for his conviction: "10 years too late, but welcome to the party congressman. Where are your colleagues on this? This investigation should have started when *Dan Love teamed up with Rose Chilcoat to defame, accuse, prosecute, and kill people in Blanding* by

creating a big fat lie about our friends and neighbors, Ken Brown and Dustin Felstead and the beginnings of the Recapture witch hunt." *Id.* (emphasis added). The next month, Commissioner Lyman was more explicit about the linkage: "Let's not forget Dan Love's role in prosecuting innocent men for the trail in Recapture. He developed a strange accord with *the great old broads executive director, Rose Chilcoat, who is, herself, being prosecuted for felony acts of monkey-wrenching*. When Rose began falsely accusing Ken Brown of illegal trail construction, BLM employees who had authorized the maintenance work slowly shrank into the background allowing the false charges to gain traction." *Id.* at 2 (emphasis added).

The County Attorney who filed charges against Ms. Chilcoat also weighed in to support Commissioner Lyman and Monte Wells, publicly stating on Facebook in May 2015 he was "proud" of his friendship with Lyman: "Phil and Monte are friends of mine and I am proud of that." *Id.* The County Attorney asked critics of the Lyman prosecution not to post that "crap" on his Facebook page: "[I]f you would like to spew your blind hate about Phil and Monte (my friends) and ignore what this case could mean for you then take that crap somewhere else and leave it off my page." *Id.* Later, on March 20, 2018, the County Attorney posted on Commissioner Lyman's Facebook page, encouraging San Juan County residents who may have been surveyed by Dan Jones on pre-trial publicity to call him, concluding: "Email me at klaws@sanjuancounty.org." *Id.* at 3. It is relevant to note that on November 29, 2017, San Juan County, represented by the County Attorney, filed a lawsuit in the U.S. District Court for the District of Utah seeking to establish quiet title over a right of way in Recapture Canyon, arguing that a road through the canyon had been generally used for the required period of time to vest

title in the right of way in San Juan County, not the BLM. Complaint to Quiet Title, *San Juan County v. United States*, No. 2:16-cv-012228-DBP, DE 2 (D. Utah 2017).[7]

B. The Unpopular Political Views of Ms. Chilcoat

Against this backdrop of a hostile community environment – and hostile political leadership – it becomes even clearer that, despite the County's conclusory protestations (County Resp. at 6-7), the charges filed against Ms. Chilcoat (and her husband) rest on their perceived political views concerning public lands rather than any actions that may or may not have been taken with regard to a cattle gate. In her motion to quash, Ms. Chilcoat laid out with precision the constitutional provisions on which the defense arguments rest. Mot. to Quash at 12-15 (*citing* U.S. Const., amend. I; Utah Const., art. I, §§ 1,15). In particular, the First Amendment to the United States Constitution protects freedom of belief, freedom of expression, and freedom of association. In the context of this criminal prosecution, it is particularly important to recognize that "the First Amendment's protection of association prohibits a State from . . . punishing [a person] solely because [she] is a member of a particular political organization or because [she] holds certain beliefs." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6, 91 (1971).

Utah also provides expansive protections for freedom of belief and association. The Utah Supreme Court has, for example, explained that whenever construing state law that creates the risk of criminal prosecutions, courts must be mindful of any "'chilling effect' on protected

[7] In light of these facts, defense counsel held a telephone conference call with the County Attorney on April 17, 2018. During the telephone call, defense counsel asked the County Attorney's Office to recuse from further participation in this case. The County Attorney agreed to do so, stating it was the right thing to do. Thereafter during the call, the parties reached agreement as to how to move forward with the recusal. Later, the County Attorney's refused to honor his agreement to recuse. That refusal will be the subject of an additional motion from the defense, to be filed shortly, asking the Court to direct recusal of the San Juan County Attorney's Office from further handling this case.

activity," that is, the concern that "[i]ndividuals who are contemplating participating in protected speech may choose to avoid possible prosecution or litigation by refraining from the constitutionally protected activity." *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 11, 86 P.3d 735, 739.

Here, of course, State power is being deployed not merely to create a risk of criminal prosecution, but the actuality of such prosecution. San Juan County has launched a criminal prosecution against Ms. Chilcoat and Mr. Franklin that, unless stopped by this Court, will obviously and directly "chill" speech and association – and, indeed, could actually punish it.

The chilling effect is obvious from an alarming argument made by the County in its response. To prove that Ms. Chilcoat is guilty of the second-degree felony of attempted wanton destruction of livestock, the County intends to rely upon what it describes as Ms. "Chilcoat's *public beliefs* against livestock grazing on public lands." County Resp. at 5 (emphasis added). The chain of argument, if we understand it correctly, is that Ms. Chilcoat has "*public* beliefs against livestock grazing on public lands"; that these beliefs can be inferred because she allegedly made statements part of her leadership of Great Old Broads for Wilderness urging restriction of grazing of livestock on public lands; that these views led her to travel from her home in Colorado to a particular location in San Juan County, Utah; that these views led her to thereafter specifically aid and abet her husband in closing a gate near a BLM permittee's livestock operation; that her husband then closed such a gate; that in closing the gate, her husband knew it would have an effect that would injure or cause the death of livestock; and that her husband did all this "intentionally and knowingly," as charged in the Amended Criminal Information. *See* Amended Criminal Information, Count 1.

To even describe the chain of reasoning is to immediately see how attenuated it is. And, in any event, the chain of reasoning cannot even remotely approach the level of proof required to establish criminal intent in this case. Ms. Chilcoat and Mr. Franklin are charged, in Count 1 of the respective Amended Criminal Informations, with *"Attempted* Wanton Destruction of Livestock." In the circumstances alleged here, to "attempt" this particular crime, a defendant must engage in an act "with the purpose of causing" the result in question. *See State v. Casey*, 2003 UT 55, ¶ 28, 82 P.3d 1106, 1113 (*citing* Model Penal Code § 5.01(1)(a), (b) (1985)). The proscribed result at issue in this case is such things as death or injury to livestock. The Utah's attempt statute thus requires "intentional conduct" – that is, the specific purpose of causing death or injury to livestock. Indeed, given that the County is seeking to enhance the criminal penalties it seeks to impose, the County must prove a second level of criminal intent – i.e., that Ms. Chilcoat and Mr. Franklin also acted "with the intent to halt, impede, obstruct, or interfere with the lawful operation of an animal enterprise or to damage, take, or cause the loss of any property owned by, used by, or in the possession of a lawful animal enterprise." Utah Code Ann. § 76-6-111(3)(d).

As now revealed in the County's response brief, the County is attempting to draw the disturbing inference that Ms. Chilcoat's alleged "public beliefs" against livestock grazing can form the necessary evidence to proceed with a criminal prosecution of second degree felonies for attempted wanton destruction of livestock. The First Amendment shields thoughts and beliefs from punishment. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977); *Abood v. Detroit Bd. of Educ*., 431 U.S. 209, 234-35 (1977). A clearer example of deploying punitive sanctions against protected freedom of thought and expression is hard to imagine.

Even more clearly, the County's chain of argument is forbidden by the Utah Constitution. The Utah Constitution specifically promises, in its very first provision, that all persons have the rights "to assemble peaceably . . . and to communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const., art. I, § 1. And later in the Declaration of Rights, the Utah Constitution promises that "[n]o law shall be passed to abridge or restrain the freedom of speech . . . ." Utah Const., art. I, § 15. This right is centrally important to liberty in this State. Indeed, "[f]reedom of speech is not only the hallmark of a free people, but is, indeed, an essential attribute of the sovereignty of citizenship." *I.M.L. v. State,* 2002 UT 110, ¶ 14, 61 P.3d 1038, 1043 (*citing Cox v. Hatch,* 761 P.2d 556, 558 (Utah 1988)).

Here, the County's attenuated argument that it can use Ms. Chilcoat's "public" belief that certain livestock grazing is unwise will necessarily and unconstitutionally interfere with Ms. Chilcoat's federal and state constitutional rights to communicate her views. *Dawson v. Delaware*, 503 U.S. 159 (1992), illustrates these principles. *Dawson* reversed a criminal sentence based in part on the prosecution's admission of evidence that a defendant was a member the Aryan Brotherhood, "a white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates." *Id.* at 165. The Supreme Court noted that "[b]ecause the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance." *Dawson v. Delaware*, 503 U.S. 159, 166 (1992). Here, obviously, the chain of reasoning that the County is attempting to employ is far more attenuated than the chain found constitutionally impermissible in *Dawson.* While the Aryan Brotherhood specifically advocated unlawful acts such as murder, the Supreme Court found that "that Dawson's First Amendment rights were

violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs." *Id.* at 167. Of course, in this case, Great Old Broads for Wilderness hardly advocates unlawful activity, but rather greater emphasis on conserving natural resources on public lands. But as in *Dawson*, after reviewing the record in this case, "one is left with the feeling that the [membership] evidence was employed simply because the [finder of fact] would find these beliefs morally reprehensible." *Id.* Such argument targeting freedom of belief and association can survive neither federal nor state constitutional scrutiny.[8]

Accordingly, for all these reasons, alleged evidence about Ms. Chilcoat's (and thus Mr. Franklin's) political views cannot be used in this case – and, as a consequence the County lacks even a modicum of evidence of criminal intent. The bindover order must accordingly be immediately quashed as to all counts against Ms. Chilcoat (and her husband).

III. CRIMINALLY PROSECUTING MS. CHILCOAT FOR ALLEGEDLY REPORTING POSSIBLY ILLEGAL LIVESTOCK OPERATIONS TO THE BUREAU OF LAND MANAGEMENT VIOLATES MS. CHILCOAT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS AND IS UNSUPPORTED BY ANY EVIDENCE.

The County also seeks to prosecute Ms. Chilcoat for having the audacity to ask questions of BLM about whether a BLM permittee was illegally conducting livestock operations in violation of his permit. *See* Amended Criminal Information Against Chilcoat (Count 2) (alleging retaliation against a witness in violation of Utah Code Ann. § 76-8-508.3). Despite the County's

[8] Strangely, the County cites *United States v. Quaintance*, 523 F.3d 1144, 1146 (10th Cir. 2008), in its brief. County Resp. at 6. But this case merely holds that in *federal* court a constitutional claim is not reviewable on interlocutory appeal under *federal* appellate procedure. *See id.* at 1147. This decision does not relate to the scope of constitutional rights and, in any event, under well-established Utah law, interlocutory review of constitutional and other claims is plainly permissible. *See, e.g.*, *State v. Black*, 2015 UT 54, ¶ 8, 355 P.3d 981, 982 (granting interlocutory review of trial court decisions).

protestations (County Resp. at 8-9), this charge not only violates Ms. Chilcoat's right to freedom of speech for all the reasons just explained, but also her right to petition the federal Government (and the State government) for redress of grievances. The County also failed to provide sufficient evidence to bind this charge over for trial.

A. The Constitution Forbids the County from Proceeding on Count 2 Because Ms. Chilcoat Is Constitutionally Entitled to Raise Concerns with BLM.

As explained in Ms. Chilcoat's motion, the State appears to be proceeding on the theory that she sent a letter to the BLM inquiring about a BLM's permittee (Zane Odell) illegally damaging lands in violation of his BLM livestock permit. Ms. Chilcoat argued at length in her motion to quash that criminalizing such an (alleged) action infringes on her federal constitutional right to petition the government for redress of grievances. *See* Mot. to Quash at 17-20. And such rights are also protected under the Utah Constitution, which protects a right to "petition for redress of grievances," as well as the free speech protections mentioned earlier. Utah Const., art. I, § 1.

The defense had anticipated that, in response, the County might make some sort of substantive argument that its prosecution did not threaten any right of Ms. Chilcoat to approach governmental authorities. But quite remarkably, the County – once again – positively embraces unconstitutional action. The County asserts that Ms. Chilcoat's "claim that no criminal liability can be imposed when a citizen approaches a government agency for redress is without any legal foundation." County Resp. at 9. If accepted, the County's argument would obviously eviscerate the state and federal rights to petition for redress of grievances, because if the state can impose "criminal liability" when a United States citizen (such as Ms. Chilcoat) reports illegal behavior to a federal agency, then this cherished right becomes essentially meaningless. The Supreme

Court has made clear that "the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011). Moreover, the right to petition is a "cognate right" that the Constitution's drafters "coupled in a single guarantee" with the right to freedom of speech. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Further caselaw supporting this conclusion comes from the well-known *Noerr-Pennington* doctrine forbidding application of (among other things) antitrust laws to penalize political speech, cited by Ms. Chilcoat and Mr. Franklin in their motions to quash. Mot. to Quash at 18. In response, the County concedes that the doctrine is not limited to its antitrust origins, but also applies in tort cases. County Resp. at 9 (*citing Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 26). The County, however, claims that the doctrine is inapplicable here because "[t]his case has nothing to do with torts or antitrust claims." County Resp. at 10. But this distinction is misleading. If *tort* liability creates an impermissible restriction on politically-protected speech, *a fortiori* more serious *criminal* liability does so as well. Indeed, the County fails to recognize that antitrust liability is both *criminal* and *civil*. *See, e.g.,* 15 U.S.C. §§ 1-3 (Sherman Act, providing both civil *and* criminal penalties).

Presumably the reason that criminal cases involving the *Noerr-Pennington* doctrine are rare is that prosecutors' efforts to criminalize the speech of citizens communicating with government officials are also rare. But the "doctrine has evolved from its antitrust origins to apply to a myriad of situations in which it shields individuals from liability for petitioning a governmental entity for redress. [A]lthough the *Noerr–Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which [seek] to assign

liability on the basis of the defendant's exercise of its first amendment rights." *Diamond 67, LLC v. Oatis*, 144 A.3d 1055 (Conn. App. 2016).

Ms. Chilcoat was constitutionally entitled to approach BLM, and the County's effort to criminalize any alleged approach is plainly unconstitutional.

B. The State Failed to Introduce Sufficient Evidence to Support Count 2.

In her Motion to Quash, Ms. Chilcoat raised not only constitutional objections to the bindover, but also specific evidentiary concerns. *See* Motion to Quash at 18-20. The County's brief, two-paragraph response fails to in any way address Ms. Chilcoat's arguments. Accordingly, due to a simple failure to respond, the Motion to Quash must be granted on Count 2.

Perhaps the reason that the State refused to respond is that any response would have only underscored the constitutional violation identified by Ms. Chilcoat. As Ms. Chilcoat explained in her motion (Mot. to Quash at 18), the criminal statute which she is charged with violating requires the County to prove, as an element of the offense, that a defendant is not "seeking any legal redress to which the person is otherwise entitled." Utah Code Ann. § 76-8-508.3(3). Interestingly, the County never explains how Ms. Chilcoat is not entitled to submit an inquiry to the BLM regarding whether a BLM permittee is possibly acting illegally. The email that the County submitted as Exhibit 1 at the preliminary hearing noted three areas where natural areas had been disturbed and asked whether the disturbances were consistent with BLM permits. Here is the relevant portion of the email:

> All three of these areas of disturbance appeared to include new acreage not previously disturbed. All were well vegetated, providing wildlife habitat, prior to disturbance. Some of the dirt berms are more than 20 feet high. Please provide me with the National Environmental Policy Act (NEPA) compliance that your office completed regarding these actions.

> It may be that there are other locations/livestock reservoirs on these allotments where there has been recent ground disturbance. These are simply the ones I observed during my weekend camping trip in the area. If there are other areas BLM knows there has been recent earth moving activity, I ask you to please provide a list of those locations.
>
> There is another situation I'd like to bring to your attention. On April 3, after I stopped to photograph the stock reservoir ground disturbance near the corral at the top of Lime Ridge along highway 163, *my husband and I were accosted by three cowboys (one of whom I believe was Zane O'Dell and one who I believe was Zeb Dalton and one unknown to me) who physically blocked our vehicle*, accused us of criminal activity, threatened us with jail, and prevented our return to the highway. This was a distressing and fearful experience for both of us. My husband was falsely accused of preventing livestock from reaching water. The San Juan County Sheriff was called, responded, spoke with us and cleared us to leave.
>
> As visitors to our public lands who have long been interested in public lands grazing and have documented and reported information to the BLM and attempted to affect BLM management via proper channels, *this assault and behavior by BLM permittees is unacceptable*. I would like to lodge a complaint and ask that this complaint be included in these permittee's files. Neither I nor my husband did anything to harass or endanger the livestock present on the allotment. We were in the area documenting the recent earth moving activity.
>
> *I look forward to learning more about the ground disturbance documented in the attached photos. Thank you for your attention to this matter.*

Exhibit 1 to Preliminary Hearing (emphases added).

In order for the County to have provided sufficient evidence of any crime, it must affirmatively prove that Ms. Chilcoat was not "entitled" to the redress which the letter sought.[9] The only redress which the letter requested was to have information in the letter placed in a BLM file and to "learn[] more" about the lawfulness of the ground disturbances at issue. Any member of the public is undoubtedly entitled to make such inquiries. Indeed, this Court can take judicial

[9] Chilcoat's arguments regarding the letter should not be construed as admissions that she sent the letter to BLM, but merely an assumption of this alleged fact.

notice that the BLM's publicly-accessible website specifically affirmatively *requests* that the public report possible crimes to it.[10]

Initially at the preliminary hearing, the County's entire argument on Count 2 revolved around the use of the word "assault," highlighted above, in the penultimate paragraph of the email. But this Court itself explained the problems with County's initial "assault" theory at the preliminary hearing and refused to allow the County to proceed under this far-fetched claim. Prelim. Tr. at 85. But the County also predicted that, if the case moved forward to trial, it would be able to produce evidence at trial that the email contained other pieces of false information: "[T]he other false allegation that is made in the [letter] is with regards to the scope of these repairs to the ponds and things like that. And there *would be* sufficient evidence to show that some of the exhibits that were presented to the BLM with that letter were embellished or changed, altered or changed, altered to make those repairs look worse than they are." *Id.* at 82 (emphasis added). Of course, the issue at the preliminary hearing was not whether the County, given sufficient time, "would be" able to collect evidence of a deliberately false statement to BLM. The only issue before the Court was whether the State *had already* presented such evidence. During the preliminary hearing, over objection, the County asked only a single question about this subject (of BLM permittee Odell):

> Q. So based on the complaint that you've read, were you in violation of the rules of your allotment?
>
> A. No, I was not.

Prelim. Tran. 18-27.

[10] https://www.blm.gov/programs/public-safety-and-fire/law-enforcement/report-a-crime

This single sentence is not sufficient to permit bindover not only because it would rest on a legal opinion about "violation" of BLM rules that a rancher is not permitted to provide,[11] but also because the letter never alleged that a violation of the BLM rules had occurred. To the contrary, the emailed concluded: "I look forward to learning more about the ground disturbance documented in the attached photos." Thus, the County's theory of criminal liability collapses.

The County also failed to respond to the argument that Ms. Chilcoat lacked any belief that an official proceeding or investigation was pending or about to be instituted. *Id.* at 19-20. Bindover on Count 2 against Ms. Chilcoat must be quashed for these unrefuted reasons as well.

IV. THE COUNTY'S USE OF PSEUDOSCIENCE TO ESTABLISH THE DIRECTION OF TRAVEL FROM A LAY PERSON'S REVIEW OF TIRE TRACKS REQUIRES DISMISSAL OF ALL CHARGES RESTING ON THIS SPECULATION.

While charging Ms. Chilcoat (and Mr. Franklin) with second degree felonies for *attempted* wanton destruction of livestock, the County was ultimately forced to concede that no threat to any livestock was possible because the livestock could have simply walked to their water source through a gaping hole in the fence. *See* Prelim. Trans. at 63. The County, however, claims that it can show the required intent to attempt to "injure, physically alter, release, or cause the death of livestock," Utah Code Ann. § 76-6-111(3)(d), because Mr. Franklin (and by association, Ms. Chilcoat) committed their crimes when Mr. Franklin closed the gate "prior to getting to a point down the fence line where they could actually visibly see the opening in the fence." Prelim. Trans. at 63. But reaching this conclusion requires interpretive testimony about the direction of travel as inferred from tire tracks that Mr. Franklin allegedly left with his vehicle.

[11] *Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1347 (Utah 1993) ("Opinion testimony is not helpful to the fact finder when it is couched as a legal conclusion.").

The County's response (at pp. 7-8) fails, once again, to cite any record testimony. It is unpersuasive for this reason alone. Moreover, it is difficult to determine how BLM permittee Odell reached his conclusion. *See* Prelim. Trans. at 10-11. The County's apparent recollection of Odell's testimony is that it was "based off one set of tracks covering up a portion of the other set of tracks." County Resp. at 7. Even if the Court assumes for a moment that the County's assertion is true, the fundamental flaw in its position is that County identifies no point in the transcript where such a detailed explanation is made. In any event, it is hornbook law, in Utah and elsewhere, that a clear foundation for such speculative testimony has to be provided. *See* MANGRUM & BENSON ON UTAH EVIDENCE (2012-13 ed.) (discussing Rule 701) ("If the witness has not been qualified as an expert, then the examiner should carefully lay firsthand knowledge founding before eliciting conclusory opinions."). The County has failed to establish any appropriate foundation of the speculative conclusion offered by Odell, much less the kind of foundation that could support such extravagant conclusions.

Presumably the reason for the County's failure is not due to any lack of diligence on its part, but simply because such a foundation is impossible to lay. The defense has submitted to this Court true expert testimony on this subject -- testimony from Greg Rogers, a retired FBI Agent who is a certified crime scene investigator. He has reached the expert conclusion that "Odell's proffered testimony was not supported by the appropriate skills and qualifications, lacked any scientific methods, and was at best, a guess." Rogers Declaration, Ex. A to Defense Motion to Quash. In response, the County does not challenge Mr. Rogers's qualifications in any way. Instead, the County claims: "With all due respect to Mr. Rogers, it doesn't take scientific expertise to observe that when one track crosses another in the dirt, the track that was left first will be interrupted over covered by the track that was left second." County Resp. at 8. But Odell

was not simply describing what he saw about where tracks crossed. The pivotal piece of his testimony for present purposes was his speculations and conclusions about the car's ultimate direction of travel – speculation and conclusion that is necessary to establishing any alleged "criminal intent."

Utah's appellate courts have rigorously enforced the limitation in Utah R. Evid. 701 that any conclusions be "rationally based on the perception of the witness." Going beyond factual descriptions with interpretive conclusions is prohibited under the rule. For example, in excluding a treating physician's testimony about causation of an injury, the Utah Court of Appeals explained that "[l]ay witnesses can testify only to matters of which they have personal knowledge, *see* Utah R. Evid. 602, and it is undisputed that [the plaintiff's] treating physicians do not have personal knowledge of causation. Therefore, testimony from [the plaintiff's] treating physicians as to causation would go beyond the physicians' 'factual description of his or her personal observations during treatment.'" *Ladd v. Bowers Trucking, Inc.*, 2011 UT App 355, ¶ 13, 264 P.3d 752, 756–57 (*quoting Pete v. Youngblood,* 2006 UT App 303, ¶¶ 13–15, 141 P.3d 629) (determining that the plaintiff's designation of her treating physician as a lay witness, and not an expert witness, foreclosed the physician's ability to offer opinion testimony in an affidavit as to standard of care and breach)).

So too here. Odell's opinion, as the Country purports to recall it in its brief, was that vehicle in question "approached the gate first and then proceeded forward and around in a counter clockwise fashion and exited the area." County Resp. at 7. Whatever else may be said about such speculation, it was obviously not "based on the perception of the witness" but rather the drawing of conclusions based on interpretations that are not fully articulated, and thus is inadmissible. *See, e.g., State v. Rothlisberger,* 2004 UT App 226, ¶¶ 11–12, 95 P.3d 1193

(equating "rationally based on the perception of the witness" with direct personal observation), *aff'd,* 2006 UT 49, 147 P.3d 1176); *State v. Sellers*, 2011 UT App 38, ¶ 27, 248 P.3d 70, 80 (detective's testimony about [defendant's] level of intoxication was not based on personal observation and thus exceeds the scope of permissible lay opinion testimony under rule 701).

No doubt the reason the County presses so hard on this point is that its entire case collapses without this speculative testimony. The County's theory of criminal intent necessarily hinges on the fact that a vehicle approached that gate from the direction *away* from the gaping hole. Because the State failed to provide admissible evidence on this point at the preliminary hearing, the Court's bindover order must be quashed for this reason as well.

V. THE COUNTY'S CLAIM THAT ODELL COULD REVIEW BLM FILES AND AUTHENTICATE MATERIALS IN THEM IS UNSUPPORTED AND SHOULD LEAD TO DISMISSAL OF COUNTS 1 AND 3 AGAINST CHILCOAT.

Finally, Counts 1 and 3 must be dismissed against Ms. Chilcoat for lack of any proof that she was criminally involved in closing the gate. The County frankly concedes that its case here is "certainly more circumstantial." County Resp. at 5. The County is forced to concede that no statement — by Mr. Franklin, Ms. Chilcoat, or any other witness — was made implicating Ms. Chilcoat in that act. And no evidence was ever presented at the preliminary hearing that Ms. Chilcoat was on the property when the gate was closed. And although Mr. Franklin purportedly admitted that he closed the gate, he did not state that Ms. Chilcoat was with him then.

Nonetheless, the County maintains that it can survive this apparently fatal flaw in its case by relying on an emailed letter allegedly sent by Ms. Chilcoat to the BLM which, the County asserts, establishes that she was present in the vehicle when the gate was closed. The County notes that the defense objected to the letter on grounds of lack of authentication, foundation, and hearsay. County Resp. at 3. Nonetheless, the County argues this letter proves guilt because it

"had come from Mr. Odell's permittee file at the BLM and the complaint was Ms. Chilcoat's own statements." *Id.* Neither of these claims succeed.

As to the assertion that letter came from "Odell's permittee file" at the BLM, that is obviously insufficient authentication. Odell does not work for the BLM and, while he may be a subject of BLM recordkeeping, that hardly makes him qualified to authenticate BLM records. *See State v. Higginbotham*, 917 P.2d 545, 550 (Utah 1996) (noting need for "*certified* copies of public records" to be admissible). Moreover, a record of this type is still subject to hearsay restrictions, requiring a records custodian to establish that it was made and kept in the ordinary course of business or similar foundation. *See* Utah R. Evid. 803(6) & (8). Of course, Odell was not a custodian of the BLM records with knowledge of how they were made or kept – to the contrary, he testified he was just browsing in his file when he happened to come across the letter. Prelim. Trans. at 18. The hearsay objection is fatal to use of the letter.

Even more fundamentally, there is no way that Odell could have properly testified that the letter was Ms. Chilcoat's "own statements." Odell did not attempt to establish, for example, that he knew Ms. Chilcoat's home address or email account. *Cf. Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997) ("An e-mail address provides no authoritative information about the addressee . . . "). Nor did Odell attempt to provide any other identifying information. Lacking such information, the letter (even if admissible) would not suffice to even show that Ms. Chilcoat was in the area at the time Mr. Franklin closed the gate.

Beyond these overwhelming problems, the letter simply indicates a visit to the general area where the gate was – not even being in the car at issue, much less being in the car at the time the gate was closed. To allow the County to proceed here would authorize a second degree felony prosecution on nothing more than speculation. As the Utah Court of Appeals concluded

in similar circumstances, "[w]hen the evidence supports more than one possible conclusion, none more likely than the other, the choice of one possibility over another can be no more than speculation." *State v. Cristobal*, 2010 UT App 228, ¶ 16, 238 P.3d 1096, 1100-01.

And further beyond these multiple problems, the County – once again – does not respond to Ms. Chilcoat's detailed argument, specifically here that the County cannot establish any aiding and abetting. Mot. to Quash at 10-12. It is, of course, well-settled law that "[m]ere presence, or even prior knowledge, does not make one an accomplice when he neither … encourages [n]or assists in perpetration of the crime." *State v. Labrum*, 959 P.2d 120, 123-24 (Utah Ct. App. 1998). Nor does the County respond to Ms. Chilcoat's point that the BLM cannot constitute retaliation against a witness because it neither "ma[de] a threat of harm" or "cause[d] harm." Utah Code Ann. § 76-8-508.3(2)(a)(i) & (ii). These arguments, too, require quashing the Court's bindover order.

CONCLUSION

This prosecution involves an attempt by the County to impermissibly and criminally punish a conservationist and her husband for years of advocating on behalf of responsible use of public lands. This gross misuse of the criminal process smacks of malicious prosecution for political views that may be unpopular in some quarters. This Court has the power to end this improper and apparently politically-motivated prosecution now – and it should. The Court should quash the bindover as to all counts against both defendants.

DATED this 20th day of April, 2018.

/s/ Jeremy M. Delicino
Jeremy M. Delicino

/s/ Paul G. Cassell
Paul G. Cassell

Counsel for Defendant Rose Chilcoat

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was electronically served on this 20th day of April, 2018, to:

San Juan County Attorney
Via Green File

/s/ Paul Cassell