IN THE UTAH SUPREME COURT

Southern Utah Wilderness Alliance, Appellant/Cross-Appellee, v. Kane County Commission, Appellee/Cross-Appellant, and Garfield County Commission, Appellee.	 Appellate Case No. 20180454-SC [Related Appeal: No. 20180410-SC] District Court No. 170600020

BRIEF OF *AMICI CURIAE* Utah Headliners Chapter of Society of Professional Journalists, Fox 13 KSTU-TV and *Deseret News*

Appeal from a Final Judgment of
the Honorable Marvin D. Bagley,
Utah Sixth District Court

Peter Stirba
Matthew Strout
STIRBA, P.C.
215 South State Street, Suite 750
Salt Lake City, UT 84110
Attorneys for Appellee
Garfield County
Commission

David C. Reymann
Austin J. Riter
PARR BROWN GEE & LOVELESS, P.C.
101 S. 200 East, Suite 700
Salt Lake City, UT 84111
Attorneys for Appellant/Cross-Appellee
Southern Utah Wilderness Alliance

Shawn T. Welch
Richard D. Flint

Edward L. Carter (9871)
KEEN LAW OFFICES LLC
39 S. 400 W.
Orem, UT 84058
Tel. 801-374-5336
Attorney for *Amici Curiae* Utah
Headliners Chapter of
Society of Professional
Journalists, Fox 13 KSTU-
TV and *Deseret News*

Timothy M. Bagshaw
Chelsea J. Davis
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Attorneys for Appellee/Cross-Appellant
Kane County Commission

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other

INTRODUCTION

The Utah Headliners Chapter ("Chapter") of the Society of Professional Journalists ("SPJ"), Fox 13 KSTU-TV and the *Deseret News* (collectively, "Amici") respectfully submit this Brief in support of the position of the Appellant/Cross-Appellee Southern Utah Wilderness Alliance ("SUWA").

The Society of Professional Journalists is the nation's most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. SPJ is dedicated to the preservation and promotion of a free press as the cornerstone of our nation and our liberty. To ensure that the concept of self-government outlined by the United States Constitution remains a reality into future centuries, SPJ believes that the American people must be well-informed in order to make decisions regarding their lives and their local and national communities. It is the role of journalists to provide this information in an accurate, comprehensive, timely, and understandable manner.

The mission of SPJ is to encourage a climate in which journalism can be practiced freely and fully; to promote the flow of information; to stimulate high standards and ethical behavior in the practice of journalism; to foster excellence and to encourage diversity among journalists; to inspire successive generations of talented individuals to become dedicated journalists; and to maintain constant vigilance in protection of First Amendment guarantees of freedom of speech and of the press.

The Utah Headliners Chapter of the Society of Professional Journalists shares the

goals of national SPJ on a local level. The Chapter has been a leader for decades in advocating for open government in Utah. The Chapter is actively involved in wide-ranging efforts to ensure the public's right to know about government actions throughout the state of Utah.

The *Deseret News* is the first news organization and longest continuously operating business in the state of Utah. The *Deseret News* offers news, information, commentary, and analysis from an award-winning team of reporters, editors, columnists, and bloggers. Fox 13 KSTU-TV operates a statewide multimedia news operation based in Salt Lake City. The Fox 13 KSTU-TV newsroom produces dozens of hours of local broadcast news each week.

The Amici have great interest in the subject matter of this litigation. The Amici regularly attend meetings of various county commissions across Utah. The Amici will be affected by the Court's decision in this matter, given issues of standing and other aspects of the Utah Open and Public Meetings Act ("Act"), Utah Code Ann. §§ 52-4-101 *et seq*. The guarantee of open public meetings is vital to the Amici's future functioning.

JURISDICTION

Jurisdiction is proper in this Court pursuant to UTAH CONST. art. VIII, § 3 and Utah Code Ann. § 78A-3-102(3)(j).

ISSUES AND STANDARDS

1. Whether the trial court erred in concluding that SUWA, which is similarly positioned for purposes of this issue as the Amici, lacked standing to seek enforcement of

the Utah Open and Public Meetings Act.

The trial court's order granting the Rule 12(b)(1) motion presents a question of law that is reviewed for correctness. *See Gregory v. Shurtleff*, 2013 UT 18, ¶ 8, 299 P.3d 1098, 1102; *Peterson v. Delta Air Lines, Inc.*, 2002 UT App 56, ¶¶ 1-2, 42 P.3d 1253, 1255.

2. Whether the trial court erred in concluding that SUWA failed to state a claim under the Open and Public Meetings Act, thus effectively precluding news organizations such as Amici from monitoring and reporting on public bodies that skirt the Act by disclaiming jurisdiction or advisory power.

The trial court's order presents a question of law that is reviewed for correctness. *See Gregory*, 2013 UT 18, ¶ 8, 299 P.3d at 1102; *Peterson*, 2002 UT App 56, ¶¶ 1-2, 42 P.3d at 1255.

3. Whether the trial court erred in imposing a punitive and excessive fee award on SUWA, which would effectively deter news organizations such as Amici from seeking to report on public business.

The trial court's determination that SUWA's claim was without merit presents a question of law that is reviewed for correctness. *See Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 7, 122 P.3d 556, 559. The trial court's determination that SUWA's claim was brought in bad faith is a question of fact reviewed under a clearly erroneous standard. *Id*. ¶ 8. The trial court's determination of a reasonable fee is reviewed for abuse of discretion. *Crane-Jenkins v. Mikarose, LLC*, 2016 UT App 71, ¶ 4, 371 P.3d 49, 53.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

This is an appeal from an Order of the Sixth District Court dismissing Plaintiff SUWA's Complaint seeking declaratory and injunctive relief under the Act. (R. at 1-6). On June 6, 2018 the trial court dismissed the Complaint for lack of standing or, in the alternative, for failure to state a claim upon which relief can be granted. (R. at 357-363). On December 5, 2018 the district court concluded SUWA acted in bad faith and imposed attorney fees. (R. at 698-711). After rejecting SUWA's objections, the district court entered the judgment for fees on April 12, 2019. (R. at 927-934).

On June 26, 2019, the Amici filed in this Court a motion for leave to file this Brief. The motion was granted on August 15, 2019.

B. Statement of Facts

To avoid repetition, the Amici hereby incorporate by this reference the Statement of Facts contained in the Brief of the Appellant/Cross-Appellee SUWA.

SUMMARY OF ARGUMENT

The Amici submit that they and SUWA do have standing under the Act to seek enforcement or compliance. Otherwise, the constitutional role and societal purposes of Amici, including to report on the doings of public bodies, would be frustrated. Amici further contend that the district court order, if affirmed, would allow public bodies to skirt the Act by claiming and disclaiming jurisdiction for convenience sake. The Amici further contend that the district court decision would create a chilling effect that could hinder news organizations in their desire and ability to monitor and ensure compliance with the Act.

ARGUMENT

I. The District Court Decision, if Affirmed, Would Hinder News Organizations Such as Amici From Acting in the Public Interest to Report on the Public's Business.

The district court erred in concluding that SUWA lacked standing or, in the alternative, failed to state a claim for which relief could be granted. As stated in SUWA's brief to this Court, organizations such as SUWA and Amici are granted standing by the Act. Utah Code Ann. § 52-4-303(3) ("A person denied any right under this chapter may commence suit in a court of competent jurisdiction. . . ."). Further, Amici endorse SUWA's argument that SUWA has associational standing and alternative standing. Amici are similarly positioned in that they have made, and likely will again make, legal challenges to public bodies' failures to comply with the Act and yet, if the district court opinion is affirmed, Amici could be deemed "not a person denied a right under the act."

(R. at 359).

Such an outcome runs fundamentally counter to the constitutional purpose and societal role of journalists. Both the United States and the Utah constitutions explicitly protect freedom of press from government intrusion. U.S. CONST., amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."); UTAH CONST., art. I, § 15 ("No law shall be passed to abridge or restrain the freedom of speech or of the press."). Amici and other journalism organizations in Utah work daily to disseminate truthful and accurate news and information in the public interest, including by reporting on the meetings and actions of public bodies as defined in the Act. Yet the district court order in this case, if affirmed, could preclude a news organization or association of journalists from obtaining judicial review of a public body's improper decision to conduct public business in private. That would be out of step with the Act as well as other statutory and constitutional provisions.

This Court has recognized that freedom of the press is "among our most cherished values." *In re Modification of Canon 3A(7) of the Utah Code of Judicial Conduct*, 628 P.2d 1292, 1293 (Mem.) (1981) (petition brought by the Utah chapter of the Society of Professional Journalists). In a case brought by the Chapter, one of the Amici in this case, to challenge denial of access to a government proceeding, this Court stated a fundamental principle rooted in the Utah Constitution:

> The freedoms of speech and press are fundamental to the effective exercise of the ultimate political power of the people. If they are to exercise their sovereign power in an intelligent and responsible manner, the people must

have free speech and a free press and *access to operations of government*. *Soc'y of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1173 (Utah 1987) (quoting *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515, 521 (Utah 1984) (emphasis added by this Court in *Soc'y v. Bullock*)).

The district court would have this Act mean little if anything for journalists and the public they serve. If journalism organizations, as was the case with SUWA, are not deemed proper plaintiffs to ensure compliance with the Act, or are deemed not to have had their rights violated by a public body that improperly fails to comply with the Act, then the society at large—not just journalists—will suffer. Preventing such an outcome is precisely why the Legislature stated the public policy behind the Act. Like other public bodies, the Garfield County Commission and the Kane County Commission "exist to aid in the conduct of the people's business." Utah Code Ann. § 52-4-102(1). In order for that to happen, the Garfield County Commission and Kane County Commission must "take their actions openly" and "conduct their deliberations openly." Utah Code Ann. § 52-4-102(2).

Scholars have documented that, over many decades, journalists in the United States have achieved their most idealistic and valuable public service when they disseminate truth by providing a forum for diverse voices to discuss public issues; gather information about official government activities and publicly comment on and critique those activities; maintain independence from government and other influences; act ethically; and provide a check on government use of official power. *See* Edward L.

Carter, *Mass Communication Law and Policy Research and the Values of Free Expression*, 94 Journalism & Mass Comm. Q. 641-662 (2017) (citations omitted) (attached as Addendum A). These and other societal values—such as contributing to societal stability, facilitating the fulfillment of a variety of human rights, enabling both liberty and equality, and others—are discussed at length in the peer-reviewed published scholarship included in Addendum A.

Those journalistic values are relevant to this case because they have been adopted or encapsulated both by the Legislature, in stating the public policy of the Act, and by this Court, in interpreting and applying the Act and other statutes. Public bodies such as the Kane County Commission and the Garfield County Commission only exist in order to do the public's business openly to allow for public examination that, as a matter of practicality and efficiency, often happens via journalists. *See* Utah Code Ann. § 52-4-102. It is also true that the Act has several specific exceptions for which a public body may hold a meeting outside public view. In reviewing these exceptions, this Court concluded the following:

> . . . . [The exceptions] suggest a clear legislative intent to ensure that the public's business is done in full view of the public except in those specific instances where either the public, or a specific individual who is the subject of the meeting, may be significantly disadvantaged by premature public disclosure of sensitive information.

Kearns-Tribune Corp. v. Salt Lake Cty. Comm'n, 2001 UT 55, ¶ 10, 28 P.3d 686.

In the case at hand, though, the Garfield County Commission and the Kane County Commission never even got to the point of providing public notice and an agenda and

fulfilling the other requirements for a quorum of a public body to meet to discuss public business. *See* Utah Code Ann. § 52-4-202. There was never a determination that anyone would be "disadvantaged by premature public disclosure of sensitive information." *Kearns-Tribune*, 2001 UT 55, ¶ 10. There was no finding by the commissioners and their attorneys that an exception to the Act justified closure of an otherwise open and public meeting. *See* Utah Code Ann. § 52-4-205.

Instead, the commissioners in both counties merely attempted to exempt themselves altogether from the Act and thus precluded journalists and other members of the public even from knowing that a meeting was happening. As a result, journalists were prevented from informing their readers and viewers about matters of public interest, the highest-order information they are called upon to provide in our society. *KUTV, Inc. v. Conder*, 668 P.2d 513, 528 (Utah 1983) ("The interest protected by the freedom of the press is the public interest in receiving information and opinion unhampered by government control."). In the end, all of that results in less deliberative, and lower-quality, government decision-making and less public acceptance of, and lower confidence in, the result of a public body's processes. *See Carter*, Mass Communication Law and Policy Research and the Values of Free Expression, *infra*.

II. The District Court Decision, if Affirmed, Would Allow Public Bodies to Contravene the Act's Purpose by Improperly Disclaiming Jurisdiction or Advisory Power for Convenience.

The district court erred in concluding that the Garfield County Commission and the Kane County Commission did not hold meetings, as defined in the Act, with Interior

Secretary Ryan Zinke in 2017. In fact, a meeting is defined as follows:

> . . . . [T]he convening of a public body or a specified body, with a quorum present, including a workshop or an executive session, whether in person or by means of electronic communications, for the purpose of discussing, receiving comments from the public about, or acting upon a matter over which the public body or specific body has jurisdiction or advisory power.

Utah Code Ann. § 52-4-103(6)(a).

The Act further defines what is not a meeting. These non-meetings are all very specific and inapplicable here—a chance or social gathering; convening of the State Tax Commission to consider a confidential matter; convening of a three-member board of trustees of a public transit district; and convening of a public body with both legislative and executive responsibilities under certain circumstances inapplicable in this case. Utah Code Ann. § 52-4-103(6)(b) and (c). The non-meeting relating to "administrative or operational matters" requires that no public funds be appropriated; no formal action be required; and that the matter be one that "would not come before the public body for discussion or action." Utah Code Ann. § 52-4-103(6)(c).

The meeting or meetings with Secretary Zinke fall within the scope of a public body meeting as defined by the Act. Although the district court made much of the fact that the Garfield County Commission and the Kane County Commission did not have jurisdiction or advisory power to change the boundaries of the Grand Staircase-Escalante National Monument (R. at 362), this is a red herring. Amici do not doubt that the district court is technically correct in stating this simple and obvious truth, and responsible journalists would not attempt to say that the Garfield County and Kane County

commissioners could somehow override Congress and the President with respect to national monument boundary designations. But the real question is whether the Garfield County and Kane County commissioners had jurisdiction or advisory power to communicate their feelings and recommendations about the monument boundaries to Secretary Zinke. The clear answer is yes.

It is of course true that the "reduction of the Monument boundaries" (R. at 362) would not come before the county commissioners after their meetings with Secretary Zinke in terms of an opportunity for the Kane County Commission and the Garfield County Commission to actually make decisions on changing the national monument boundaries. But that is again the wrong question for the district court to have addressed. Instead, the district court should have considered whether the county commissioners would, after their meetings with Secretary Zinke, have to contemplate their own positions in the resolutions they adopted. Amici and other journalists would be compelled by their role in society to ensure that the commissioners did in fact face public scrutiny and answer the need for public accountability for their positions in the resolutions once the meetings with Secretary Zinke were over. Thus the "administrative or operational matters" exception of Utah Code Ann. § 52-4-103(6)(c) is not applicable.

The Kane County Commission adopted a resolution on February 6, 2017. (R. at 155-156). The resolution called for a reduction in the boundaries of the Grand Staircase-Escalante National Monument and indicated that county officials would consult about the matter with the Interior Department, among others. (R. at 155-156). Meanwhile, the

Garfield County resolution is nearly identical. (R. at 228-229). The counties' input, including the meetings with Secretary Zinke, was in response to an invitation subsequent to an executive order by the President. (R. at 361). It is self-evident that the county commissioners would discuss with Secretary Zinke their recommendations for the monument boundary changes that were contemplated in the President's executive order. If so, then the commissioners' recommendations to, and conversations with, Secretary Zinke were clearly matters over which the county commissions had jurisdiction or advisory power.

If public bodies can claim and disclaim jurisdiction or advisory power according to convenience, then the public suffers. The suffering effect extends to academic research and to democracy itself. *See* Sarah F. Trainor, *Finding Common Ground: Moral Values and Cultural Identity in Early Conflict over the Grand Staircase-Escalante National Monument*, 28 J. Land, Resources, and Envtl. L. 331 (2008) (utilizing public meetings in Utah counties, among other sources, to conduct a scholarly study of the role of tribal governments and societal values in conflict resolution over land-use surrounding the Grand Staircase-Escalante National Monument); Daxton R. "Chip" Stewart, *Let the Sunshine In, or Else: An Examination of the 'Teeth' of State and Federal Open Meetings and Open Records Laws*, 15 Comm. L. & Pol. 265 (2010) (discussing the harm to democracy in Utah and other states when public bodies fail to comply with public meeting laws).

III. The District Court Decision, if Affirmed, Would Create a Chilling Effect and Deter Efforts to Monitor and Ensure Compliance with the Act.

The district court erred in concluding that SUWA acted in bad faith and that the Garfield County Commission and the Kane County Commission were entitled to punitive and excessive attorney fees. In a civil action, the trial court is instructed to award attorney fees to a prevailing party "if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith. . . ." Utah Code Ann. § 78B-5-825(1). This Court has stated that a determination that an action lacks legal merit is not automatically conclusive of bad faith. *Still Standing Stable*, 2005 UT 46, ¶¶ 10-11. Instead, a finding of bad faith requires that the Court conclude the party lacked an honest belief in the propriety of its action, intended to take unconscionable advantage of another, or intended or had knowledge that its action would hinder, delay or defraud another. *Id*. ¶ 12.

The evidence in this case falls short of that standard. In fact, SUWA's claims under the Act involve legitimate and unresolved legal questions. To find bad faith is to engage in the kind of twisted mental gymnastics conducted by the district court here, particularly with respect to the court's red herring that SUWA was ostensibly arguing the county commissioners had jurisdiction or advisory power to actually establish the monument boundaries. Of course that has never been the case. Further, the district court relied on the fact that SUWA had sued San Juan County in 1995. (R. at 706). But as the court acknowledged, that case "did not result in an [sic] final adjudication on the

merits…." (R. at 706). It is difficult to understand how a 20-year-old case that never went to a final judgment should put SUWA on notice that it was at risk of a bad-faith determination in this case.

Critically for Amici, the district court decision creates a chilling effect that could deter journalists and news organizations from their societal role to monitor and ensure compliance with the Act. The chilling effect is familiar within the First Amendment facial overbreadth doctrine:

> Individuals who are contemplating participating in protected speech may choose to avoid possible prosecution or litigation by refraining from the constitutionally protected activity. . . . Because these individuals are never prosecuted, the overbroad statute goes unchallenged.

Provo City Corp. v. Thompson, 2004 UT 14, ¶ 11, 86 P.3d 735, 739.

In this context, the effect is similar. Given the harsh and unjustified punishment imposed on SUWA, the district court order—if allowed to stand—could discourage journalists and news organizations from challenging public bodies that fail to comply with the Act. Knowing the excessive attorney fees that were imposed by the district court in this case, journalism organizations may be less likely to take actions in the public interest to ensure public business is conducted openly. This Court has acknowledged the risks of similar chilling effects. *See Cox v. Hatch*, 761 P.2d 556 (Utah 1988) (affirming a district court conclusion that a chilling effect would result from imposition of liability for a mass media activity that involved dissemination of information on public matters); *Porco v. Porco*, 752 P.2d 365, 369 (Utah 1988) ("We recognize that sanctions for

frivolous appeals should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions.").

If news media organizations such as Amici, as well as other individuals and entities, decline to monitor and ensure compliance with the Act, the harms to the free-press values discussed above will be magnified. The search for truth in the marketplace of ideas could be inhibited, and the press' role to serve as a check on the potential abuse of government power could go unfilled. Given potential fear over large and unjustified punitive fee awards such as the one in this case, the harms to those and other free-press values could grow without a way to be remedied. *See Provo City Corp.*, 2004 UT 14.

CONCLUSION

For all of the foregoing reasons, this Court should hold that the trial court erred in concluding SUWA lacked standing, failed to state a claim and deserved a punitive and excessive fee award. The Order of the trial court should be reversed.

RESPECTFULLY SUBMITTED this 29th day of August 2019.

By: /s/ Edward L. Carter
Edward L. Carter
Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the page limits set forth in the Utah Rules of Appellate Procedure, Rule 24(g)(1) because the brief is less than 30 pages long.

I also HEREBY CERTIFY that this brief complies with the Utah Rules of Appellate Procedure, Rule 21(1) regarding public and non-public filings.

/s/ Edward L. Carter
Edward L. Carter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of August 2019, two (2) true and correct copies of **BRIEF OF *AMICI CURIAE*** were sent via United States mail, postage prepaid, with a copy by email, to:

Peter Stirba
Matthew Strout
STIRBA, P.C.
215 South State Street, Suite 750
Salt Lake City, Utah 84110
Attorneys for Appellee Garfield County Commission

Shawn T. Welch
Richard D. Flint
Timothy M. Bagshaw
Chelsea J. Davis
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, Utah 84101
Attorneys for Appellee/Cross-Appellant Kane County Commission

David C. Reymann
Austin J. Riter
PARR BROWN GEE & LOVELESS
101 S. 200 East, Suite 700
Salt Lake City, Utah 84111
Attorneys for Appellant/Cross-Appellee SUWA

/s/ Edward L. Carter
Edward L. Carter

ADDENDUM A

(RESEARCH ARTICLE)