

1 DANIEL J. HILL, ESQ.
NV Bar # 12773
2 WOLF, RIFKIN, SHAPIRO,
3 SCHULMAN & RABKIN LLP
3556 East Russell Road, 2nd Floor
4 Las Vegas, Nevada 89120
Tel: (702) 341-5200
5 Fax: (702) 341-5300
DHill@wrslawyers.com
6 *Attorney for Defendant Ammon Bundy*

7
8 **UNITED STATES DISTRICT COURT**
9
10 **DISTRICT OF NEVADA**

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 vs.
14 AMMON E. BUNDY, *et al.*,
15 Defendants.

CASE NO.: 2:16-CR-00046-GMN-PAL
DEFENDANT AMMON E. BUNDY'S
MEMORANDUM IN OPPOSITION TO
ENTRY OF PROTECTIVE ORDER

16
17
18 This is defendant Ammon E. Bundy's ("Ammon") MEMORANDUM IN OPPOSITION TO
19 ENTRY OF PROTECTIVE ORDER, filed in response to the Court's April 26, 2016 Order (Doc.
20 321). The government's proposed protective order is attached as **Exhibit 1**. The government has not
21 shown any cause, much less good cause, for an umbrella protective order. It is Ammon's position that
22 no protective order is warranted in this case.

23 //
24 //
25 //
26 //
27 //
28 //

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Given the highly charged political and social commentary that surrounds this case, the
4 defendants are wholly dependent on this Court to ensure that law—above hyperbole, rhetoric, or
5 politics—rules the day. So far, the explanations and presumptions about what happened at the
6 Bundy Ranch have been guided solely by the government—even including direct quotations at
7 detention hearings from the very material that it now purports to be confidential. The government,
8 from senators to law enforcement and beyond, have openly mocked, decried, and derided
9 Ammon’s and the others’ protest against an alarming and heavily militarized operation to remove
10 Cliven Bundy’s cattle from grazing land. What is at stake in this case is losing the opportunity to
11 protest outside designated “free speech zones.” This is why Ammon depends on this Court as a
12 fair and neutral tribunal to guarantee that his trial proceeds as publicly as possible.

13 **I. ARGUMENT**

14 The government proposes a blanket protective order shielding all of the evidence in this
15 case from the public, without showing any cause, much less good cause. *See* Exh. 1. As the
16 government has conceded on multiple occasions, much of its case against Ammon and the others
17 is comprised of social media posts, pictures, and videos. Furthermore, the government itself read
18 extensively from transcribed witness statements at Ammon’s detention hearing, in full view of the
19 press and a dozen or so observers. Nevertheless, the government seeks to make its case secret
20 now, after it has detained every defendant and moved for a year delay in trial. Ammon objects to
21 all things secret, and insists that this case proceed publicly.

22 **A. The government has shown no good cause for the entry of a protective**
23 **order**

24 “It is well established that the fruits of pretrial discovery are . . . presumptively public.” *San Jose*
25 *Mercury News v. U.S. Dist. Court*, 187 F.3d 106, 1103 (9th Cir. 1999). Federal Rule of Criminal
26 Procedure 16(d)(1) provides that, “[a]t any time the court may, for good cause, deny, restrict, or defer
27 discovery or inspection, or grant other appropriate relief.” As the party seeking a protective order, the
28 government bears the burden of showing good cause why the documents should not be disclosed. *See*,

1 e.g., *United States v. Benzer*, 2015 WL 9200365, at *5 (D. Nev. Dec. 15, 2015) (citing *United States v.*
2 *Smith*, 985 F.Supp.2d 506, 522 (S.D.N.Y. 2013)). “Good cause exists when a party shows that
3 disclosure will result in a clearly defined, specific and serious injury.” *Id.* (citing *Smith*, 985 F.Supp.2d
4 at 522) (internal quotations omitted). In other words, “in the Ninth Circuit...[a] party asserting good
5 cause bears the burden, for each particular document it seeks to protect, of showing that specific
6 prejudice or harm will result if no protective order is granted.” *United States v. Arredondo*, 2012 WL
7 1946955, at *1 (D. Ariz. May 30, 2012) (citing *Foltz v. v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d
8 1122, 1130 (9th Cir. 2003)) (emphasis in original). “Broad allegation of harm, unsubstantiated by
9 specific examples or articulated reasoning, do not support a good cause showing.” *Pansy v. Borough*
10 *of Stroudsburg*, 23 F.3d 772, 786 (3rd Cir. 1994). As such, as courts have observed, “umbrella
11 protective orders are disfavored.” *See, e.g., United States v. Carriles*, 654 F.Supp.2d 557, 565 (W.D.
12 Tex. Oct. 8, 2009); *see also Bater AG v. Barr Lab.*, 162 F.R.D. 456, 465 (S.D.N.Y. 1995).

13 Here, the government seeks entry of an umbrella protective order without attempting to
14 articulate good cause—or any cause—why *each* document should be hidden from the public. Even on
15 a hypothetical level, no overarching good cause exists to make the government’s evidence secret. The
16 discovery in this case, based on all the extant representations from the government, is garden variety:
17 social media posts, surveillance footage, witness statements, law enforcement reports. Moreover, this
18 case is already as public as it gets. Everyone knows who was at the Bundy Ranch, whether they were
19 protestors, mercenary cowboys, BLM agents, or law enforcement. Still, nothing remarkable has
20 happened to any of the players in the two years it took the government to bring the indictment. Despite
21 the government’s insistence, there is nothing out of the ordinary about this case except the number of
22 defendants, which resulted from the government’s own charging discretion.

23 Furthermore, the government has already made public use of the discovery to detain the
24 defendants and delay trial. At Ammon’s detention hearing, the government went so far as to quote, *at*
25 *length*, from the very witness statements it now seeks to shroud behind an umbrella protective order.
26 The government hasn’t even offered generalities supporting sealing its discovery—now that it has
27 made selective public use of it—and certainly hasn’t articulated “clearly defined, specific and serious
28 injuries” that will occur without a protective order. Therefore, no protective order may issue.

1 **B. Defendants would suffer prejudice from a protective order**

2 The government has not offered any good cause for a protective order. Assuming, for the sake
3 of argument, that it had, any good cause would be outweighed by the prejudice that would befall
4 Ammon and the other defendants if the discovery were secret. Any good cause must be balanced
5 against the public's interest in the information, as well as any prejudice that may be suffered by the
6 defendants. *See, e.g., United States v. Wecht*, 484 F.3d 194, 211 (3rd Cir. 2007).

7 There are thousands of eyewitnesses in this case who saw what happened on the Bundy Ranch
8 and who can potentially discredit the government's carefully-hewn and time-honed conception of the
9 events. Over the past several months, Ammon's Oregon counsel, and, more recently, undersigned
10 counsel, have labored diligently to earn the trust of those witnesses. They are understandably hesitant
11 to offer their knowledge after the preemptive militarized treatment of the Bundy Ranch protestors.
12 Ammon's counsel both here and in Oregon have actively sought out the information that these
13 witnesses have. Consider that, with the assistance of the public and social media, in a non-secret
14 pretrial setting, defenses can be unearthed in mere minutes where traditional investigative efforts
15 might take weeks or lead nowhere.¹

16 This case is not about something finite to which only a few were a party. This case is about
17 assembly and speech in the face of a paramilitary compound set up preemptively by government
18 actors on a sparsely populated rural ranch. This is a case of public interest because so many people
19 safely visited the Bundy Ranch during the protest, where they held signs, sang songs, and cooked. The
20 public's impressions, and the information that they have, are critical to defending Ammon and the
21 other indicted protestors. Gagging their attorneys with an umbrella protective order that freezes the
22 only hope they have to investigate a case with so many witnesses does not seek justice. It only allows
23 the government to continue its narrative, with the benefits of massive investigatory resources and the
24 edited discovery they have already disclosed to the public. For this reason, too, a protective order

25 _____
26 ¹ Forthcoming, and within the deadline set by the Court for the protective order briefing, is
27 Ammon Bundy's ex parte motion to file with the Court an affidavit along with the indispensable
28 favorable evidence this process has produced.

1 should not issue.

2 **II. CONCLUSION**

3 The government has not offered any cause for its proposed protective order, much less good
4 cause that articulates specific harm that will occur without a protective order. Furthermore, any
5 conceivable good cause is outweighed by the prejudice that Ammon and the other defendants will
6 suffer should the proposed protective order issue. Accordingly, Ammon Bundy respectfully requests
7 that the government's proposed protective order be rejected.

8 Respectfully submitted this 28th day of April 2016.

9 **WOLF, RIFKIN, SHAPIRO,**
10 **SCHULMAN & RABKIN, LLP**

11 *By: /s/ Daniel Hill*
12 _____
13 DANIEL J. HILL, ESQ.
14 Nevada Bar No. 12773
15 3556 E. Russell Road, Second Floor
16 Las Vegas, Nevada 89120
17 *Attorney for Defendant Ammon Bundy*

18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2016, a true and correct copy of **DEFENDANT AMMON E. BUNDY'S MEMORANDUM IN OPPOSITION TO ENTRY OF PROTECTIVE ORDER** was served via the United States District Court CM/ECF system on all parties or persons requiring notice

By /s/ Jennifer Finley
Jennifer Finley, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

EXHIBIT 1

EXHIBIT 1

1 DANIEL G. BOGDEN
 United States Attorney
 2 STEVEN W. MYHRE
 NICHOLAS D. DICKINSON
 Assistant United States Attorneys
 3 NADIA J. AHMED
 ERIN M. CREEGAN
 4 Special Assistant United States Attorneys
 501 Las Vegas Blvd. South, Suite 1100
 5 Las Vegas, Nevada 89101
 PHONE: (702) 388-6336
 6 FAX: (702) 388-6698

7 **UNITED STATES DISTRICT COURT**
 8 **DISTRICT OF NEVADA**

9 UNITED STATES OF AMERICA,)

10 Plaintiff,)

11 v.)

12 CLIVEN D. BUNDY,)
 13 RYAN C. BUNDY,)
 AMMON E. BUNDY,)
 14 RYAN W. PAYNE,)
 PETER T. SANTILLI,)
 15 MEL D. BUNDY,)
 DAVID H. BUNDY,)
 16 BRIAN D. CAVALIER,)
 BLAINE COOPER,)
 17 GERALD A. DELEMUS,)
 ERIC J. PARKER,)
 18 O. SCOTT DREXLER,)
 RICKY R. LOVELIEN,)
 19 STEVEN A. STEWART,)
 TODD C. ENGEL,)
 20 GREGORY P. BURLESON,)
 JOSEPH D. O'SHAUGHNESSY,)
 21 MICAH L. McGUIRE, and)
 JASON D. WOODS,)

22 Defendants.)
 23
 24

2:16-CR-00046-GMN-PAL

PROPOSED PROTECTIVE ORDER

1 Upon motion of the United States, the Court being advised as to the nature
2 of this case, and good cause being shown, it is hereby ORDERED that, pursuant to
3 Rule 16(d)(1) of the Federal Rules of Criminal Procedure, defense counsel may
4 provide copies of discovery only to the following individuals:

5 (1) The defendants in this case;

6 (2) Persons employed by the attorney of record who are necessary to assist
7 counsel of record in preparation for trial or other proceedings in this case;
8 and

9 (3) Persons who defense counsel deems necessary to further legitimate
10 investigation and preparation of this case.

11 IT IS FURTHER ORDERED that defense counsel shall provide a copy of
12 this Protective Order to any person above who receives copies of discovery.

13 IT IS FURTHER ORDERED that any person above who receives copies of
14 discovery from defense counsel shall use the discovery only to assist the defense in
15 the investigation and preparation of this case, and shall not reproduce or
16 disseminate the discovery material to any other person or entity.

17 IT IS FURTHER ORDERED that this Protective Order applies only to
18 materials and documents created or written by the government, or obtained by the
19 government through warrants or court orders. This Protective Order does not
20 restrict reproduction or dissemination of discovery materials the defense may
21 otherwise obtain through open sources (e.g., social media posts by the defendants
22 or others, news accounts related to the events in this case, etc.).

23 IT IS FURTHER ORDERED that if there is specific discovery material that
24

1 defense counsel believes should be an exception to this Protective Order, the
2 parties shall confer before seeking guidance from this Court. The parties shall
3 advise the Court by letter of any exceptions made to the Protective Order.

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24