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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. AMMON BUNDY *et al*, Defendants.	Case No.: 3:16-CR-00051 **DEFENDANT AMMON BUNDY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** Oral Argument Requested Judge: Hon. Anna J. Brown

COMES NOW Defendant AMMON BUNDY[1] ("Defendant"), expressly admitting the personal jurisdiction of this court[2], and pursuant to Rule 12(b)(2) and Rule 47(a) of the Federal Rules of Criminal Procedure, respectfully moves for an order dismissing all counts in the above-captioned matter, for the Court's lack of subject matter jurisdiction.

INTRODUCTION

Ammon Bundy's peaceful protest at the Malheur Wildlife Refuge was an act of civil disobedience and a calculated legal maneuver through adverse possession (43 U.S. Code § 1068

[1] Fellow protester Ryan Bundy expressly joins in bringing this motion before the court.
[2] Ammon Bundy has recognized the power of the judiciary over him since Day 1. On January 31, 2016, just days after his arrest, Mr. Bundy restated, through his attorney, that "'the protest is entering a second phase, one that will play out through the federal court system…[P]hase one of this protest needs to come to an end…Phase two is exercising our due process rights, our right to counsel. Our right to use the power of process to get answers to questions that have been unanswered for years.' [Mr.] Bundy, in his statement, referenced making his case using 'Article III [courts] and an Article III judge.'' Article 3 of the Constitution establishes the judicial branch of the federal government, including the Supreme Court and lower courts…. Bundy [stated through his attorney that he] respects the federal judicial process as set forth in the Constitution."

- "Lands held in adverse possession"). The protest was in part designed to force the federal government into court to address the constitutionality of its federal land management policy. The very legal issue that Mr. Bundy sought to clarify – which remains unresolved from a constitutional basis – provides the foundation for the criminal prosecution of Mr. Bundy. He contends that the constitutional challenge to the federal government's jurisdiction over the land in question must be resolved before proceeding with the prosecution of Ammon Bundy – if indeed any grounds remain upon which to mount a legitimate prosecution.

However, instead of arguing the issue in a civil courtroom through an ejectment proceeding – where such a debate belongs – Mr. Bundy finds himself before a federal criminal court as a prisoner. Ammon and the Citizens for Constitutional Freedom may not have prevailed in their adverse possession claim. But, that was for a civil court to decide. If the government would have acted with a remote degree of competence, it would have challenged the adverse possession, with an ejectment or eviction claim. Then Ammon would have responded – in court, and the court would have heard our defense based upon, inter alia, 43 U.S. Code § 1068 - "Lands held in adverse possession"; and other relevant federal law, which taken together, unquestionably provides legitimacy to the protester's attempt.

SUMMARY OF GROUNDS AND BASIS FOR RELIEF[3]

On June 17, 2010, after the local Harney County Oregon District Attorney declined to prosecute, federal bureaucrats prevailed upon the United States Attorneys Office in Oregon. Thereafter, a *federal* grand jury indicted local ranchers Dwight and Steven Hammond on nineteen counts related to 2001 and 2006 wildfires on public land in the Steens Mountain area of southeastern Oregon. *See* Indictment, *United States v. Hammond et al*, No. 6: 10–cr–60066–HO.

[3] "A motion must state the grounds on which it is based and the relief or order sought." Federal Rules of Criminal Procedure, Rule 47(a).

More than ten years after the first fire, the Hammonds were subsequently convicted and sentenced to federal prison. However, at sentencing in that case, United States District Court Judge Michael R. Hogan found the Hammonds were well-established and respected citizens, and the fire damage involved amounted to almost nothing. Thus, Judge Hogan ruled that that the federally required minimum sentences would be "grossly disproportionate to the severity of the offense" and a "violation of the Eighth Amendment." *See* Oct. 30, 2012 Sentencing Hr'g Tr. at 26:3–6, Hammond et al, No. 6: 10–cr–60066–HO. Despite that finding where Judge Hogan intended to impose a fair sentence on the Hammonds that did not violate the 8th Amendment's cruel and unusual punishment clause, federal prosecutors appealed, seeking to impose the mandatory minimum sentence under the anti-terrorist law. After the Hammonds had already finished serving their federal prison terms imposed by Judge Hogan, the Ninth Circuit reversed Judge Hogan's sentences and ordered the Hammonds back to prison for 5 years, less the time they had already served.

The harsh federal treatment of respected local ranchers, after local prosecutors declined to prosecute, triggered public outrage and raised citizens' concerns regarding federal overreach by the Bureau of Land Management (BLM) and the United States Fish and Wildlife Service, and the legitimacy of purported federal ownership of public lands across the western states – all in the context of federalism. As Chief Justice Roberts recently observed:

> State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. **The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy**. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: By denying any one government complete

> jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (Internal marks and citations omitted).

As Ammon and his colleagues know, and of which we should all remain vigilant, "[w]hen government acts in excess of its lawful powers […] liberty is at stake. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Bond v. United States*, 564 U.S. 211, 221-22, 131 S. Ct. 2355, 2364 (2011). This was precisely the tenor of the Hammond-related protests in Harney County, Oregon in late 2015. It was also in this context that Defendant Ammon Bundy first learned of the Hammonds, and what caused him to travel to Oregon and find out directly from the Hammonds what had happened in their case.

It is undeniable that the federal government's treatment of the Hammonds both focused public concern and caused protests, including from local residents, citizens from across the country, patriot groups, militia groups, various political groups, and some so-called "sovereign citizens." On top of this, by December 2015, then acting United States Attorney for the District of Oregon had responded to growing public criticism by publishing his own professional and political opinion defending the Oregon federal court and his office's treatment of the Hammonds.[4] A plethora of other elected and appointed officials also publicly weighed in on what had become a national controversy.

[4] By early December 2015, well before the occupation at Malheur, the protest of the Hammonds was recognized as a challenge to the justice and fairness of the Federal Courts, and a political challenge to the competence of the United States Attorneys Office in Oregon. In partial response, then Acting United States Attorney Billy. J. Williams, wrote a public letter defending his office, the Federal Court, and the treatment of the Hammonds. *See* Williams, Billy J., "To The Citizens of Harney County, Oregon." December 9, 2015. https://www.justice.gov/usao-or/pr/citizens-

At the heart of all the passion and protest was a fundamental question of federalism, as referenced above by Justice Roberts. In light of the federal government's treatment of the Hammonds, could the public still believe that the "life, liberty and property" of ordinary U.S. citizens was still being protected from unaccountable and distant federal bureaucracies such as the BLM, and the USFWS? Central to this concern is the growing question regarding the Constitutional legitimacy of the federal government's claim of ownership and title to the vast majority of western lands.

In the Hammond case, as with this present case, the federal government based its charges upon the widely held but untested presumption that the fires burned "federal" land, lawfully owned and controlled by the United States. As argued in the supporting memorandum filed herewith, the United States Supreme Court has never considered the precise issue presented here. *Therefore, the issue must be analyzed with precision*. The United States government disproportionately claims ownership of approximately 50% of all the land in the 11 coterminous western States, as well as more than 60 % of Alaska, while claiming only 4% of the land in all the rest of the country and 39 States combined. Most relevant to this case, the United States claims permanent ownership of 81.1% of the land inside the boundaries of Nevada, 66.5% inside Utah, 61.7% inside Idaho and 53% inside Oregon. These claims encompass 187,166.84 acres of

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harney-county-oregon (Last visited 5/7/16) ("I respect their [the protestor's] right to peacefully disagree with the prison terms imposed. However, any criminal behavior contemplated by those who may object to the court's mandate **that harms someone** will not be tolerated and will result in serious consequences… the federal prosecutor has never called the Hammonds terrorists, an allegation made by some of the Hammonds' supporters. As Acting U.S. Attorney, I do not consider them to be terrorists… As Americans, we have the privilege of being served by the finest judicial system in the world. Despite suggestions to the contrary, what took place during this case was a process that followed the time-honored fundamental principles of the rule of law— from the investigation, negotiations, a public trial with the presentation of lawfully admitted evidence, the jury's findings, judicial findings, appellate rulings, to the final imposition of sentence. We stand by the ultimate resolution of this case.") (emphasis added).

Oregon land related to the Malheur National Wildlife Refuge and pertaining to Defendant's January 2, 2016 attempted adverse possession claim over a portion of these same lands.

In this context, and given the enumerated strictures of Article I, Section 8, Clause 17 (the "Enclave Clause"), the precise jurisdictional question at issue is this: **Does the Constitution of the United States, via the "Property Clause" of Article IV, Section 3, permit the federal government's permanent ownership and exclusive jurisdiction over public lands?**[5] If not, it also prevents the government from exercising jurisdiction here, and this case must be dismissed.

Importantly, Defendant Ammon Bundy is aware of the many federal court decisions and modern public discussions on this issue – and the core purpose of the Malheur protest was to raise, within that discussion, the primary legal question at hand - ***based upon a significant distinction***. The issue presented here is not whether Congress has the plenary power to manage and regulate public lands, or decide to sell some or withhold others from sale. **There is no question, within the constraints of the Constitution, Congress has plenary power to manage and regulate the property it lawfully owns**. This power was established and the legal question settled long ago.[6] What the Supreme Court has *never addressed* however, is whether Congress can forever retain the majority of the land within a State, and in this case *specifically*, **whether**

[5] The attached supporting memorandum treats the body of federal cases dealing with the "Property Clause" and other distinctions between how the law and Constitution relates to specific claims and title of ownership based upon, e.g., public domain lands, reserved public domain, deeded and purchased lands, donated property, etc.

[6] It is worth noting that Mr. Bundy's co-defendant Mr. Mendenbach has previously made arguments in federal court similar to those presented by this motion. *See e.g. United States v. Medenbach*, No. 1:15-CR-00407-MC, 2016 WL 1394440, at *1 (D. Or. Apr. 7, 2016) ("Defendant's argument has no merit.") In this prior case, Judge McShane was apparently responding to Mr. Mendenbach's *pro se* argument that, "[T]he power to own public lands in the states is reserved to the states by the Tenth Amendment." *Id*. The argument was advanced by Mr. Mendenbach in a one paragraph written statement that did not cite or treat prior relevant United States Supreme Court and Ninth Circuit decisions, *i.e. Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Light v. United States*, 220 U.S. 523, 536 (1911); and *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir.1997). Neither did Mr. Mendenbach's motion explore the Constitutional, legislative, or public policy history related to the application and contours of the "Property Clause" of Article IV, Section 3. These are all treated directly in the enclosed supporting memorandum.

the Constitution permits the federal government's purported ownership of and jurisdiction over the land and property occupied by Mr. Bundy and the Citizens for Constitutional Freedom, beginning on January 2, 2016. This motion to dismiss, for lack of subject matter jurisdiction, directly brings that discrete legal question before the Court.

Contrasted with shallow and uninformed media portrayals and government hyperbole, Ammon is not an "extremist" and is **not** a member of *any* militia, patriot group, or political land protest organization. **With this motion, the hyperbole stops now.** Mr. Bundy is **not** a militia member or a so-called "sovereign citizen," and he does **not** hold anti-government views. Ammon is a well-established and well-respected family man, entrepreneur, and politically active United States citizen who identifies as a federalist, and as pertaining to the Constitution of the United States, he is an *originalist*.[7] It is from Ammon's understanding of federalism and his genuine belief in originalism, coupled with his own personal life experiences, that he, like a growing body of significant thinkers across the United States, has challenged the federal government's overreach, speaking out against its attendant injustices, and rallying attention to the core question of federal land ownership and related abuses. This topic is a red-hot issue, especially in the western United States. Like the central issues highlighted by this case, it is increasingly poignant, particularly to those citizens whose lives and livelihoods are directly and regularly effected by the unapologetic hubris and illicit disdain from now militarized and intolerant federal employees of, *inter alia*, the BLM, the USFWS, and the FBI.

[7] This is hardly a philosophy of extremism or violence, and has been championed on both sides of today's dominant political spectrum. Originalism is a constitutional approach and philosophy with its most well-known adherents being current United States Supreme Court Justice Clarence Thomas, the late Justice Antonin Scalia, and the late Robert Bork. Additionally, some liberals, such as Justice Hugo Black and Akhil Amar, have also subscribed to the theory. *See e.g.* Amar, Akhil. "Rethinking Originalism." Slate. http://www.slate.com/articles/news_and_politics/jurisprudence/2005/09/rethinking_originalism.html (Last visited on 5/5/16.)

As this prosecution has been pending, the Government has made much of how "dangerous" Mr. Bundy and his colleagues are. At the very beginning of this protest, before the Government had pieced together its media strategy against the protesters, the President of the United States, a former constitutional law professor at the University of Chicago, flatly stated that it was a "local law enforcement matter" and when pressed, the White House responded, "The President is clearly aware of the situation." When it was pointed out that the occupation was purportedly on federal land the White House clarified, "The concern that we have is for the safety of federal personnel that work in those facilities. **To our knowledge at this point there are no federal employees that are at risk or in danger right now**." Theen, Andrew, "Oregon militants: Obama administration, presidential hopefuls weigh in on Malheur saga." Oregonlive.com, January 4, 2016. http://www.oregonlive.com/portland/index.ssf/2016/01/oregon_militants_obama_adminis.html (Visited 5/8/16).

Raising this question – and reaching the point of this motion - has been no small challenge for Mr. Bundy and his colleagues. In 2015, the legislature for the State of Utah commissioned a legal analysis to investigate and report on the plausibility of contesting the federal government's continued assertion of ownership and title to western lands. Significantly, after concluding that there was a legitimate legal basis for challenging the constitutionality of federal land ownership, the study also concluded that bringing it to federal court would require an estimated budget of $13,819,000.00.[8] Clearly, with this price tag, individual citizens like the Hammonds and Mr. Bundy could never realistically bring the challenge, despite their undisputed

[8] Legal Analysis of the Legal Consulting Team Prepared for the Utah Commission for the Stewardship of Public Lands, December 9, 2015 at p. 145. (hereafter "Stewardship of Public Lands Report.") http://le.utah.gov/interim/2015/pdf/00005590.pdf) (Last visited 5/7/16).

right to petition their government for redress and to protest and assemble, for bringing about change. But, at the height of the Hammond controversy, Defendant Ammon Bundy identified an alternative way to raise the legal challenge.

Out of the spontaneous protest milieu in Harney County, Oregon, on January 2, 2016, Ammon arranged a meeting that would transform the circumstances from a random, worrisome and obviously volatile group of dissenters, into an organized, purposeful, and lawful protest aimed at visibly and more effectively petitioning the government for redress.[9] At this impromptu meeting, and in the presence of local law enforcement, Ammon openly advocated a specific plan to organize and "continue the protest." Ryan Bundy verbally offered a "second" to the proposed plan, and LaVoy Finicum spoke in support of it as well. Neither of these men had previously heard of, let alone participated in the formation of Ammon's plan. Prior to this, Ammon was not the leader of any group related to the Hammond protests.[10]

Following the meeting, Ammon and his just-organized group (later to be named "Citizens for Constitutional Freedom") embarked upon this newly organized protest, an earnest effort to set-up and maintain *a lawful adverse possession claim* – on purportedly federal lands. The lands and property had been generally known as the Malheur National Wildlife Refuge and were directly related to the Hammond controversy, and that evening, the Citizens for Constitutional

[9] "When government acts in excess of its lawful powers […] liberty is at stake. The limitations that federalism entails are not therefore a matter of rights belonging only to the States. […] An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Bond v. United States*, 564 U.S. 211, 221-22, 131 S. Ct. 2355, 2364 (2011).

[10] Its also worth noting that most of the named defendants in this case were not present at that meeting, and therefore did not participate in the planning, strategy or initiation of the protest and subsequent occupation.

Freedom began the process of carrying out the ubiquitous requirements for a lawful adverse possession claim.[11]

After notifying the local Sherriff's office, they secured their claim; including land, property and vacant buildings[12] and openly took control and management of the same. Consistent with the purpose of the protest, they notoriously renamed the area, "The Harney County Resource Center." After the first moments of taking possession of the refuge, Ammon

[11] As every first-year law student knows, property held by the government cannot be taken by adverse possession – unless such right is granted via statute. Congress has crafted a few notable exceptions, including specifically for allowing attempted adverse possession against federal lands controlled by the Department of the Interior through the Color of Title Act. 43 U.S. Code § 1068(a) (Lands held in adverse possession; issuance of patent; reservation of minerals; conflicting claims):

> The **Secretary of the Interior** (a) **shall**, whenever it shall be shown to his satisfaction that a tract of public land has been **held in good faith and in peaceful, adverse, possession by a claimant**, his ancestors or grantors, **under claim** or color of title **for more than twenty years**, and that **valuable improvements** have been placed on such land or some part thereof has been reduced to cultivation…**issue a patent** for not to exceed **one hundred and sixty acres** of such land…

Generally, when seeking to set up an adverse possession claim, the law requires that:

> The disseisor must **unfurl his flag on the land**, and **keep it flying**, so that the **owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest**. He must **intend to hold the land for himself**, and that intention **must be made manifest by his acts**. It is the intention that guides the entry and fixes its character. No particular act, or series of acts, is necessary to demonstrate an intention to claim ownership. Such a purpose is sufficiently shown where one goes upon the land and **uses it openly and notoriously**, as owners of similar lands use their property, **to the exclusion of the true owner**.

Robin v. Brown, 308 Pa. 123, 126 (1932) (emphasis added). *See also Thomas v. Spencer*, 66 Or. 359, 363, 133 P. 822, 824 (1913)("If its inception is permissive or under a license from the owner, it cannot avail to work an ouster. To effect [lawful adverse possession] the possession taken must be open, **hostile**, and continuous; 'he (the person claiming adverse possession) **must unfurl his flag on the land and keep it flying**, so that the owner may see, if he will, that an enemy has invaded his domains and planted the standard of conquest. Also, in *Springer v. Young*, Justice Strahan says: "An adverse possession cannot begin until there has been a disseisin, and to constitute a disseisin there must be an **actual expulsion of the true owner**[…]An adverse possession is aptly defined by Ingersoll, J., in *Bryan v. Atwater*, 5 Day [(Conn.) 181, 5 Am.Dec. 136], to be 'a possession not under the legal proprietor, but entered into without his consent, either directly or indirectly given. It is a possession by which he is disseised and ousted of the lands so possessed.'")(Internal citations omitted) (emphasis added).

[12] Even the government now admits, by January 2, 2016 the refuge facilities were vacant, and no government personnel were present when the attempted adverse possession was undertaken.

Bundy clearly alerted the government that he we was "planning on staying here for years" (*see* Color of Title Act's 20-year requirement set forth herein[13]).

They contacted the utility company to take over responsibility for utilities and services, and began working the property, and maintaining the perimeter, controlling ingress and egress. This control was not to say that the land was closed off— Ammon and his fellow protesters invited the public to visit their claim and even formed a welcoming committee. In fact, when, in an act of political desperation, the government closed down a local school, families and their children actually visited the protest site undeterred by the political propaganda.

While effectuating[14] their adverse possession claim, they carried out cleaning, upkeep and maintenance, and they welcomed over a thousand visitors including elected officials, and prominent political leaders. Further, USFWS staff was granted access, and no one from the federal government ever made direct contact demanding that the attempted adverse possession end. Instead, the "distant federal bureaucracy" played coy, and was "unaccountable" as forecasted by Madison two centuries ago, and by Justice Roberts in 2012. Nevertheless, federal bureaucrats were apparently overcome by the temerity of free citizens organizing, employing the aggressive legal principles of adverse possession, and exercising their First Amendment rights to speech, assembly, and most offensively – the right to petition for redress of grievances.[15]

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[13] The Government apparently overlooked or ignored this statute and failed to learn from experience regarding the place for the courts to redress their dispute through an ejectment proceeding as described below in *In re Timmons*, 607 F.2d 120, 122 (5th Cir. 1979). They instead lied in wait and ultimately turned to force and violence.

[14] Ammon and the Citizens for Constitutional Freedom may not have prevailed in their adverse possession claim. But, that was for a civil court to decide. If the government would have acted with a remote degree of competence, it would have challenged the adverse possession, with an ejectment or eviction claim. Then Ammon would have responded -- in court, and the court would have heard our defense based upon, inter alia, 43 U.S. Code § 1068 - "Lands held in adverse possession"; and other relevant federal law, which taken together, unquestionably provides legitimacy to the protester's attempt.

[15] "[T]he right to petition for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights. It shares the preferred place accorded in our system of government to the First Amendment

Irritated and irrational, rather than seek legal expulsion, ejectment or eviction, government employees instead went first to the media, and sought to silence and discredit the protest, disingenuously labeling Mr. Bundy and other protestors, extremists and dangerous.[16]

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freedoms, and has a sanctity and a sanction not permitting dubious intrusions. Indeed, as the Supreme Court recognized in *United States v. Cruikshank*, 92 U.S. 542, 552 (1875), the right to petition is logically implicit in and fundamental to the very idea of a republican form of governance." *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1342 (7th Cir. 1977) (A conspiracy to impede federal officers is not tenable when based upon a petition for redress.) (Internal marks and citations omitted).

[16] In an uncanny parallel, the history of federal jurisprudence only appears to include one other protest "occupation" of a federal wildlife refuge, "providing habitat for migratory ducks and geese, wading birds, and resident species." *In re Timmons*, 607 F.2d 120, 122 (5th Cir. 1979). In 1979 a passionate and civic minded leader, after failing to get a direct response from the government to his prior petitions for redress, organized a group of like-minded associates into the "People Organized for Equal Rights" who occupied and took possession of a federal wildlife refuge. *Id*., at 123. Like the present case, protestors in *Timmons*, "entered the wildlife refuge with the apparent intention of asserting […] claim to the land." *Id*. Approximately "twenty-five to forty individuals" began possession "without permits or authorization and informed the Project Leader of the Savannah National Wildlife Refuge Complex, Department of Interior, that they intended to remain indefinitely […] [and] said that they did not recognize the area as federal property." *Id*. The leader of the occupation having previously tried to "address the government" went "upon the land to pray that God deliver him, that He help him gain the attention of his government." *Id*. The occupiers also brought "several unauthorized off-road vehicles" and "something like forty automobiles" and "commenced bringing building materials, including concrete blocks, bags of mortar and ladders." *Id*. at 123. Rather than militarizing the situation, and rather than demonizing protestors as religious or political extremists, in *Timmons*, the federal government followed well-established and predictable legal precedent, by acting first through the courts. "**The United States government then filed a complaint for ejectment, a civil action, against Edgar Timmons, Jr., a group known as People Organized for Equal Rights and other unknown individuals**." The court responded by **entering an order "in connection with this complaint for ejectment**" that required, *inter alia*, that the "defendants […] remove themselves and all of their personal belongings by 5:00 p. m. on May 1, 1979." *Id*. (emphasis added). In telling contrast to the present case, after the defendants failed to vacate the refuge,

> [O]n the next day the U.S. Attorney, an Assistant U.S. Attorney and the U.S. Marshal came to the area to meet with appellants and discuss the order that had been entered. They encouraged the appellants to leave the area voluntarily and pursue their claims through normal judicial proceedings. The U.S. Attorney spoke personally with appellants and explained that he had no desire to arrest anyone. He also attempted to convince them either to seek legal advice and file a civil action to quiet title to the wildlife refuge or to take their complaint to the Congress of the United States, rather than to violate the district court order.

Id. Following this visit, the **defendants still failed to vacate**. **So, the federal court issued an order to show cause**, "why they should not be held in criminal contempt for their failure to obey the April 30 order." *Id*. Trial on the order to show cause took place on May 4, 1979 and "[f]ollowing a two hour trial" the defendants were convicted of criminal contempt and sentenced to "30 days" in jail. *Id*. Significantly, for this case, "the merits of the underlying action were not explored." *Id*., at 124. Unlike here, the 1979 protestors did not respond by raising a constitutional challenge to the government's federal land ownership claims. ("The jurisdiction of the court is unquestioned; no effort was made to seek judicial review before disobeying its order." *Id*. at 125.) And, the Fifth Circuit Court of Appeals expressly noted that the original TRO issued after the ejectment complaint, "might be challenged as a prior restraint on First Amendment liberties, although we may not go so far as to assume, even *arguendo*, that the alleged invalidity of the government's acquisition of title to the land would support a refusal to obey the order." *Id*. Finally, the Fifth Circuit also observed:

In fact, leaving all pretext aside, one United States Senator from Oregon has now publically admitted that he attended a meeting on January 26, 2016 (the day of Mr. Bundy's arrest) with FBI Director James Comey, where Mr. Bundy's political opponents tactically orchestrated a plan to stop the Malheur protest because it had become "a situation where the virus was spreading" and the government had decided there would "have to be consequences" to stop it, and its growing public support.[17] At the heart of the matter is the poignant admonition of Justice Potter Stewart, regarding the First Amendment and its attendant rights.

> It may indeed best serve its high purpose when it **induces a condition of unrest**, creates dissatisfaction with conditions as they are, **or even stirs people to anger**. Speech is often **provocative** and challenging. It may strike at prejudices and **preconceptions** and have profound **unsettling effects** as it presses for acceptance of an idea. That is why freedom of speech * * * is * * * protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil **that rises far above public inconvenience, annoyance, or unrest.** * * * There is no room under our Constitution for a more restrictive view.

Edwards v. S. Carolina, 372 U.S. 229, 237-38, 83 S. Ct. 680, 684 (1963) (Emphasis added).

Up to this point, the proceedings before this Court, including characterizations of Mr. Bundy, several of his colleagues, and their actions – have all been tainted by federal governmental bias in response to the protest and tactics involved at the Malheur occupation. This bias inveighs unjustly against the plain requirement that this Court remain neutral and fact

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> It may be that there is some valid basis to attack by legal process the government's acquisition of the Timmons tract two generations ago. Counsel who prepared so able a brief are able adequately to mount a proper direct attack. But, until the government's title is divested, the appellants must obey the process issued by the court system that not only protects the government's property but also preserves the appellants' life and liberty while mounting their protest and safeguards their access to a legal forum for their dispute. The marshal's guns were not drawn against appellants, the militia was not called and those who chose to defy the court order were not injured. Even their confinement has been suspended pending this appeal. *Id*., at 125-26.

[17] KOIN 6 News Staff, "Militia at Malheur: 'Virus was spreading.'" January 29, 2016. http://koin.com/2016/01/29/militia-at-malheur-virus-was-spreading (Last visited 4/18/16)

based, which it generally has with one exception by a magistrate judge.[18] Despite no overt acts of force or violence by Mr. Bundy or the Malheur protest itself[19], the federal government ambushed and used overwhelming force to arrest Mr. Bundy, and in the process killed his friend and fellow activist and protestor, Robert "LaVoy" Finicum. Thus, while the executive branch of the federal government has used its unmatched muscle and might to forcefully end the Malheur occupation, it did not end the protest. The use of force cannot answer the present question, nor stop the national debate about federal government overreach and the treatment of rural America under the thumb of the BLM and USFWS.

In fact, by virtue of their attempted adverse possession of purported federal property, Mr. Bundy and the Citizens of Constitutional Freedom now have secured the legal standing they sought: to raise this issue in federal court. They did not have $13 million to buy their place in Court today, like the state of Utah is contemplating, but they did pay a significant price with their "liberty, their livelihoods, and their reputations," to paraphrase the last sentence of the Declaration of Independence. As the Court is well aware, it has cost Mr. Bundy and approximately two-dozen members of the Citizens for Constitutional Freedom more than 100 days of their liberty, under extremely harsh conditions, and most poignantly, it has cost the blood of a well-loved rancher, family man, and deeply principled supporter of the United States. These are American citizens who have each placed their lives, their families, and their honor – all on

[18] Despite not being present in the courtroom, Ammon Bundy's pretrial release decision was evidently decided *in abstentia* by a magistrate judge at a co-defendant's release hearing. The magistrate stated, "So long as that situation is ongoing, **I'm not going to release anybody** from custody,'" presumably relying on media accounts rather than evidence in the courtroom. Bernstein, Maxine, *The Oregonian*, "Judge won't release Oregon standoff defendants as long as refuge occupation continues." January 28, 2016. http://www.oregonlive.com/portland/index.ssf/2016/01/federal_magistrate_judge_as_lo.html (Last visited 5/09/16). This quote attributed to the magistrate judge by the newspaper was addressed on the record the following day by counsel for Ryan Bundy.

[19] The visible display of armed and organized militia at the Harney County Resource Center was both for lawful protection and political speech, which will be addressed specifically in an upcoming motion.

the line – to bring this question here before the Court. A question that has not been directly addressed before through the constitutional framework set forth herein.[20] Prior cases have either sidestepped this issue or have ruled on different grounds.[21]

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[20] To the extent that Defendant's argument challenges prior Executive Orders and prior congressional actions, a unanimous United States Supreme Court has recently ruled that individual citizens – based upon principles of federalism – have standing to petition for redress due to constitutional violations. *Bond v. United States*, 564 U.S. 211, 221-22, 131 S. Ct. 2355, 2364 (2011) ("Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States […] Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.")

[21] To the extent the Court finds that this is not a distinct issue as set forth herein and that the previous cases that have analyzed ownership of land govern this Court, despite them being distinguished on constitutional grounds set forth herein, then Mr. Bundy makes his record for appeal that those cases were wrongly decided and should be overruled.

The ownership history of the Malheur National Wildlife Refuge is long and winding. It is not so simple to say that this land is simply "federal land," and therefore the Property Clause confers authority upon the Federal Government to regulate it. The United States Supreme Court has previously analyzed ownership of parts of the Malheur National Wildlife Refuge twice but they are distinct issues than what is framed here.

Defendant asserts that, to the extent that *United States v. Oregon* deals with lands now known as the Malheur National Wildlife Refuge and finds that the property is federally owned, that case is wrongly decided, inconsistent with the plain language of Article 1, section 8 of the United States Constitution, and therefore should be overturned. Defendant maintains this position because he believes the courts have inadequately analyzed the founders' purpose in putting these clauses into the Constitution. An interpretation that is consistent with their plain reading and intent leads to the conclusion that the Property Clause does not grant the Federal Government the broad powers that it has been interpreted to have in previous cases.

Because this land should have been conveyed to the State upon Oregon's admission to statehood pursuant to the plain language of the Constitution, the jurisdiction of the federal court does not exist to hear this case as further described herein. Legal Analysis of the Legal Consulting Team Prepared for the Utah Commission for the Stewardship of Public Lands, December 9, 2015 (available electronically at http://le.utah.gov/interim/2015/pdf/00005590.pdf), p.1. A copy of that report is attached to this motion as Exhibit 1.

In addition to other arguments set forth in the memorandum of law herein, the Utah Team advocated for the use of the Compact Theory in litigation, arguing that both the United States and Utah, believed that upon statehood, disposal of public lands would occur, consistent with past practice of other states admitted into statehood. Id. at 3. As the Team noted,

> [f]or over 150 years, the federal government maintained a policy of disposing of public lands so that State governments had complete jurisdiction over nearly all the territory within their borders, giving those States that same opportunity for settlement, development, preservation and conservation of parks and recreation areas, and the promotion of culture and commerce that the original States received. But it never happened west of the 104°W Meridian. The federal government has treated States west of that line unequally. It has allowed those States dominion

While it appears easy for some to mock or criticize, the core of the entire January 2016 protest was unmistakably an expensive citizen-led effort to show to the public, and ultimately to the federal courts, that a significant cross-section of the American people genuinely believe the answer – framed as a jurisdictional question in this motion – is "No."[22] The current claims by the federal government, to the ownership and exclusive jurisdiction over public lands within the States – including the specific land at issue here – is plainly prohibited by the Constitution of the United States. If not, federalism is dead and "one government [has] complete jurisdiction" over the lives of all Americans and there is no fundamental "protection" for "liberty of the individual from [the] arbitrary power" of federal bureaucrats. *Bond*, 564 U.S. at 211.

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over only a small percentage of the land within their borders.

Id. at 8.

The team went on to note the importance of exploring the transfer of federal land to state control by explaining that

> Utah-like all other western public land States -cannot settle its land. It cannot fully advance commerce. It cannot develop the tax base necessary to fund schools, build roads, finance higher education…Utah cannot build transit and communications systems common in eastern States because its privately owned lands are broken up by intervening federal lands that Utah cannot condemn for such public improvements. **Utah cannot control its own destiny.** Utah, is, in short, treated decidedly unequally by the federal government.

Id. at 8-9.

As the team noted, and defendant asserts here, "[t]here are solutions. While some argue that there is nothing constitutionally infirm in allowing some States to be treated unequally, history, the law, current trends in Supreme Court jurisprudence and 200 years of constitutional decision making suggest otherwise." Id. at 9.

[22] "Fidelity to principles of federalism is not for the States alone to vindicate. The recognition of an injured person's standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond, supra,* at 221-22.

CONCLUSION

Thus, by this motion Defendant Ammon Bundy and those defendants joining herewith, moves this Court for an order dismissing all of the counts pending in this action because, among the many other arguments that have been and will yet be advanced, the Constitution of the United States prevents the government from exercising jurisdiction on the issues presented.

This motion is further based on the incorporated and enclosed Memorandum of Points and Authorities, exhibit cited therein, all matters of which the court may take judicial notice, and such other evidence and argument as will be presented at oral argument on this motion. To the extent that this Court does not find that this argument falls under a pre-trial jurisdictional issue, Defendant intends to assert that this is a factual issue that he will also raise at trial, and jury instructions will need to be crafted on this issue and he reserves his right to do so. This will be briefed for the Court's review at the time set aside for those motions.

DATED: May 9, 2016

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. AMMON BUNDY *et al*, Defendants.	Case No.: 3:16-CR-00051 **AMMON BUNDY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**[23] Oral Argument Requested Judge: Hon. Anna J. Brown

The argument presented here is straightforward: The Constitution of the United States prohibits the federal government's ownership of the land comprising the Malheur National Wildlife Refuge. Since the land is not lawfully the federal government's, the pending counts must be dismissed for lack of subject matter jurisdiction.[24] The basis for this argument and the

[23] Defendant has followed the Court's requirement and limited this memorandum to 15 pages. This has required including key factual descriptions of the property ownership history as an exhibit, and that Defendant forgo significant and in-depth treatment of the case law related to the Property Clause and related applications. When the Court sees the serious treatment of the issue here, and the quality and merit of the arguments raised, Defendant requests that the Court acknowledge his reservation of right here, to further supplement the record.

[24] "The presence or absence of jurisdiction to hear a case is the 'first and fundamental question presented by every case brought to the federal courts.'" *Farmer v. Fisher*, 386 Fed. Appx. 554, 556 (6th Cir. 2010), *citing Caudill v. N.Am.Media Corp.*, 200 F.3d 914, 916 (6th Cir. 2000). "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and by statute." *Kokkonen v. Guardian Life Ins. Of America*, 511 U.S. 375, 377 (1994). In the criminal law context, Title 18 U.S.C. § 3231 grants "original jurisdiction…of all offenses against the laws of the United States" to district courts. However, the "employees" that the Defendants in this case are charged with threatening (of which we expect they will be acquitted at trial) had no authority to work on that land. If the employees cannot constitutionally even have duties at that land, then the Federal Government

position advocated here has not been determined by either the Ninth Circuit or by the United States Supreme Court. Further, Defendant's argument is based upon a plain application of Article I, Section 8, and Article IV, Section 3, and that this argument is not new or "radical" any more than the right of individual gun ownership was "new" or "radical" prior to *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008). The argument here, and Defendant's treatment of these core Constitutional provisions, is not novel or inventive – it is fundamental. Professor Robert G. Natelson recently wrote about this very line of reasoning in his law review article, "Federal Land Retention and the Constitution's Property Clause: The Original Understanding." 76 Colo. L.Rev. 327 (2005). Additionally, several legislatures in the Western States have weighed in on the issue due to the impact that expansive federal land use policy has had by "throw[ing] people out of work and bar[ring] them from their own backyards." *Id.* at 330. Also, as referenced in the motion above, the Utah legislature recently commissioned a legal analysis related to possible litigation to bring purportedly federal lands "back" under State control, as required by the United States Constitution. The report concluded, "that legitimate legal theories exist" and Defendant advances those here." *Stewardship of Public Lands Report*, at p.1.[25] The Utah report warned, "[T]he federal government will most likely vigorously oppose this effort, raising substantive and procedural hurdles to achieving such an outcome." *Id.*

Thus, this motion is socially, politically, and legally appropriate – at this time. The public is debating this issue, States are debating this issue, the Malheur protest was aimed at

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cannot charge these protesters in this Court with a crime for interfering with these duties. Additionally, Count 2 requires the Government to prove that these protesters were at a federal facility. Therefore, the question of whether this is a federal facility, and the constitutionality of which appears to be a question of law and must be determined so that the question of whether these protesters even committed a federal crime in the first place can be resolved. Counts 4-6 require proof that certain property and lands belong to the Federal Government. Count 6 specifically alleges that the Malheur National Wildlife Refuge is property of the United States.

[25] Because of the page limitation in this filing, Defendant relies heavily on this report to protect his record, the legal citations and argument therein, and incorporates that report in full, as central and material to his argument here. A copy of that report is attached to this motion as Exhibit 1.

raising this issue, and new legal developments, including *e.g. Shelby Shelby County v. Holder*, 133 U.S. 2612 (2013) (holding a requirement in the Voting Rights Act unconstitutional under the Equal Sovereignty Principle, and thereby overruling by implication the Ninth Circuit cases of *U.S. v. Vogler*, 859 F.2d 638 (1988), *U.S. v. Medenbach*, 116 F.3d 487 (9th Cir. 1997), and others where arguments about the Enclave Clause and Property Clause were treated as well-settled law) have created circumstances where the question presented here is ripe for resolution.[26]

I. Contrary to Popular Presumption and the Growing Federal Bureaucracy Related to Land Issues in the United States, the Federal Government's Right to Acquire and Own Property is Exceptionally Limited by the Constitution.

Article 1, Section 8, of the Constitution of the United States carefully lists the powers granted to Congress at the inception of our nation. In this Section, Clause 17 (the "Enclave Clause") enumerates the only grant of powers related to federal land ownership.

> The Congress shall have the power…to exercise exclusive legislative jurisdiction in all cases whatsoever, over **such district** (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the of the United States and to exercise **like authority over all places purchased** by the consent of the legislature of the state in which the same shall be, **for the erection of forts, magazines, arsenals, dockyards and other needful buildings**.

(Emphasis added.) The Framers placed the power to acquire, own and administer federal property, within the enumerated powers where it is expected. Here, Congress is granted the power to acquire, own and exercise plenary power over its own land, and land within a State that has been purchased for "other needful buildings" with the State's consent. This is consistent with all of the other structural aspects of the Constitution, as well as with the practice by the Framers of placing a check on granted powers. Importantly, the oft-cited "Property Clause" is not listed

[26] Additionally, documents from the Constitutional Convention that contain a "prototype of the Necessary and Proper Clause," were not available until 1987. "Federal Land Retention and the Constitution's Property Clause: The Original Understanding." 76 Colo. L.Rev. 327, 333 n.23, (2005). This is well after some of the United States Supreme Court cases that interpret the Property Clause and attempt to infer what the Founding Fathers meant by it.

in Article 1, Section 8. Instead, it is included as part of the separately-outlined Article IV, which deals with relationships between the States and the federal government, the so-called States' Relations Article. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 379 (1978). Specifically, it is placed in Article IV, Section 3, which addresses the formation and admission of new States, and reads,

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting **the Territory** *or* **other Property** belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Significantly, the Property Clause does not address or grant the right to acquire nor the right to permanently own property, nor does it purport (directly or by implication) to expand the Enclave Clause; it only describes the "Power to dispose" and to "make all needful Rules and Regulations." This is consistent with the long-held idea in this country that outside the strictures of Enclave Clause, all lands within a State are only temporarily, if ever, Constitutionally owned or control by the federal government.

> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a state. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession.

Pollard v. Hagan, 44 U.S. 212, 224, 11 L. Ed. 565 (1845). In fact, as Defendant shows below, a careful reading of the Constitution and its historical underpinnings makes clear that the unchecked presumption of expansive federal land ownership is prohibited, and the unjustified pattern of federal bureaucracies crossing this line, must be stopped. Under the Constitution, the

federal government simply holds no power not specifically delegated by the States and makes no provision for the federal government's owning any more land than what is necessary to provide for the Capitol city and for certain needed instruments of government, such as arsenals, forts and dockyards. And, contrary to common presumption, the United States Supreme Court has never ruled if or how the Property Clause could permit the federal government to permanently own and/or maintain property outside the limited terms of the Enclave Clause.

Thus, the burden is on the Government – not defendants – to justify jurisdiction here, when the ownership claims of the government – for the Oregon land at issue here – clearly falls outside Article 1, Section 8. This includes a detailed disclosure of the claim and title the government purports to have over the land and property that was occupied when Defendant and the Citizens for Constitutional Freedom attempted to set-up its lawful adverse possession claim, beginning January 2, 2016.[27]

[27] The ownership history of the various 187,166.84 acres of land known as the Malheur National Wildlife Refuge is long and winding. For a more complete review, see Exhibit 2, Malheur National Wildlife Refuge Compressive Conservation Plan, at p. 8 to 13. It is not so simple to say that this land is simply "federal land," and therefore the Property Clause confers authority upon the Federal Government to regulate it. The United States Supreme Court has previously analyzed ownership of parts of the Malheur National Wildlife Refuge twice. In neither case was the present challenge raised. In 1908, President Theodore Roosevelt issued Executive Order 929, "[e]stablishing Lake Malheur Reservation in Oregon as Preserve and Breeding Ground for Native Birds." That order decreed that all subdivisions that touched the shores of Lakes Malheur and Harney, and their connecting waters, segregated by a line through those subdivisions, would be the "Lake Malheur Reservation." Executive Order 983. The refuge headquarters is likely located in a part of the original land contemplated by the Executive Order. Unlike other cases that involve interpretation of the Enclave and Property clauses, the land that is now known as the Malheur National Wildlife Refuge was private property, only made Federal Property by Executive Order. Prior to that Executive Order, the United States Supreme Court analyzed ownership of land that is now part of the Refuge, because it was private property at the time. In 1902, the United States Supreme Court decided *French-Glenn Live Stock Company v. Alva Springer*, 185 U.S. 47 (1902). In that case, French-Glenn Live Stock Company sued Ms. Springer to recover a tract of land on the south side of Malheur Lake. *Id*. At 48. The case was submitted to a jury, who found that Ms. Springer was the rightful owner. *Id*. In that case, the plaintiff, French-Glenn provided evidence in support of its ownership of that tract of land. *Id* at 48. That evidence included land records from a U.S. government survey, field notes from surveys that spoke to the "meander" line of the lake, records of selections of land made by Oregon with the approval of the Secretary of the Interior, patents for certain lands, including 158.53 acres, and oral evidence that the lake was a "continuous body of water up to the meander line of that year." *Id*. French-Glenn claimed ownership based on titles from the United States Government. *Id*. At 49. Ms. Springer claimed ownership pursuant to homestead laws. *Id*. The court found that the boundary of the lake was not the proper analysis to determine who owned the property. *Id*. The court instead affirmed the analysis and judgment of the Oregon Supreme Court, which found that a simple analysis of the plats and surveys of the land would show the true owner of the land. *Id*. The

Given the enumerated strictures the Enclave Clause, the precise jurisdictional question being presented to this court is: Does the Constitution of the United States, via the "Property Clause" of Article IV, Section 3, permit the federal government's permanent ownership and exclusive jurisdiction over public lands. If not, then the Constitution of the United States also prevents the government from exercising jurisdiction here, and this case must be dismissed.

Defendant is aware of the many federal court decisions previously raised by the government in other cases, as discussed below, but one core purpose of the Malheur protest was to raise the legal question at hand - *based upon a significant and often overlooked distinction*. The issue presented here is not whether Congress has the plenary power to manage, regulate, sell or dispose of public lands. There is no question on that point, within the constraints of the Constitution, Congress has plenary power to manage and regulate the property it lawfully owns. However, what no federal court in this district has ever directly addressed, and what the Supreme Court has never previously determined, is whether Congress can forever retain the majority of the land within a State, and in this case specifically, the land and property occupied by Mr. Bundy and the Citizens for Constitutional Freedom, beginning on January 2, 2016. The present motion brings that discrete legal question.

Supreme Court also analyzed land ownership in relation to the land at issue in this case in 1935, in *United States v. Oregon*, 295 U.S. 1, 1935. In that case, the United States brought a quiet title suit against the State of Oregon regarding land in Harney County. *Id*. Again, **the present jurisdictional question was not raised**. The lands at issue in that case were the lands underlying five bodies of water: Lake Malheur, Mud Lake, Harney Lake, the Narrows, and the Sand Reef. The court analyzed that ownership of the land beneath these bodies of water turned on whether the bodies of water were navigable. *Id*. If the bodies of water were navigable, the court reasoned, then the land belonged to the State upon statehood. *Id*. If the waters were non-navigable, then the court reasoned that it must instead examine whether title passed at any time to the State. *Id*. The court believed, and the constitutionality of which was apparently left unchallenged, that it had to engage in this analysis because of the Oregon Admission Acts provided that the United States "parted with title" to the lands that bordered the meander line of these bodies of water via grant to the State in that act. *Id*. The Court assigned a "special master, with the powers of a master in chancery, to take the evidence and report his findings of fact and conclusions of law, and to make recommendations to this Court for a decree." *Id*. at 7. However, the Court did not analyze the lands that were claimed to be privately owned, since private owners were not party to the quiet title suit at issue in the case. *Id*. at 13. The court analyzed the master's findings and found that some land belonged to Oregon, some to the United States, and that the Executive Order was "an assertion of title and possession." *Id*. at 25.

II. The "Property Clause" Cannot Justify Federal Ownership of the Malheur Lands and the Executive Orders, Congressional Actions, Purchases and Land Donations Purporting to Establish Such Ownership are Prohibited.

The Property Clause itself speaks to the disposal and needful regulation of property, but does not speak to the acquisition of land outside the Enclave Clause and does not address permanent retention of property, let alone the majority of land within an admitted State. The Supreme Court has never addressed the Property Clause in this context, and has never analyzed the scope of the Property Clause as balanced against the structural Constitutional principles presented in this case. The closest case on record appears to be *Light v. United States*, 220 U.S. 523 (1911), discussed below, where the Court specifically sidestepped the structural Constitutional issues raised. Even the most prominently cited Property Clause cases admit that the core Constitutional limitations of the Property Clause have not been determined. For example, while writing of the expansive powers granted to Congress "over the public lands," even Justice Thurgood Marshall admitted: "[T]he furthest reaches of the power granted by the Property Clause have not yet been definitively resolved." *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S. Ct. 2285, 2291 (1976).

"Because there is no constitutional text speaking to this precise question, the answer […] must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Printz v. United States*, 521 U.S. 898, 905, 117 S. Ct. 2365, 2370 (1997).

A. Historical Documents Show That the Founding Era Understanding And Subsequent Practice Supports the Restrictive Application of the Property Clause, As Pertaining to Acquisition and Ownership.

The original intent of the United States Constitution was to create sovereign states out of the original thirteen colonies. The Founding Fathers intended for the role of the federal government to be limited.[28] Before the Constitution, the original 13 colonies were independent

[28] As James Madison wrote in the Federalist Papers, "The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign

sovereigns. All subsequent States went into statehood intending to be equal sovereigns as well. The Compact Theory, as outlined below, and in Exhibit 1, and incorporated by reference herein, shows that the states did not intend to enter into statehood deprived of traditional sovereignty. Yet today, in circumstances like the Oregon refuge land at issue, the Federal Government has claimed ownership and other strategies to acquire and retain property for reasons never contemplated by the Enclave Clause. A fair reading of the Founding era documents, and related jurisprudence, shows that the Enclave Clause limits the Government's power over property to enumerated purposes **once a piece of land stops being a territory and enters Statehood**.[29] Defendant asserts that the plain language of the Enclave clause enumerates where Congress has the power to exercise jurisdiction inside of states: a condition precedent to exercising that authority is to get the consent of the state legislature. If Congress can "exercise exclusive legislation" over an enclave within a state, then a person could be charged with violating federal law in such an enclave.

However, if the land is not an enclave within a state, then state law must apply. Defendant asserts that the Property Clause does not negate the Enclave Clause and allow Congress to own and regulate vast tracts of land without the consent of the state legislature and this narrow issue has not been expressly decided by a higher court and therefore this Court has

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commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement and prosperity of the state." The Federalist No. 45.

[29] Both the United States Supreme Court and the Ninth Circuit Court of Appeals Court have never fully explored the scope of power granted to Congress under the Property Clause. The key Property Clause cases were handed down when the policy of the United States called for the disposal of public lands. **The Court has never ruled on whether the Property Clause permits the federal government to forever retain the majority of land within the borders of a State**. When examined in a full historical, constitutional, and jurisprudential context, it is clear that the **Framers intended to grant the power to regulate federal lands only in the context of disposal, not to permanently retain the majority of the land within a State**. As argued below, the historical evidence supporting the Equal Sovereignty Principle, the Equal Footing Doctrine, and the Compact Theory supports this interpretation of the Property Clause.

the ability to make a determination. To the extent that the Court finds that the issues have been decided, then he asserts that any case law to the contrary is wrongly decided and should be overruled on appeal, as described in his motion. Regardless, one needs to look no further than the plain language of that clause to reach such an interpretation.

However, it will be important, in order to persuade the Court to find that certain cases are wrongly decided, for the Court to hear evidence of how exactly to interpret these constitutional provisions based on founding documents and the events surrounding the drafting of these provisions of the Constitution. The Federalists and Anti-Federalists extensively debated the necessity and purpose of the Enclave and Property Clauses. The Court should examine those debates, much as courts look to legislative history of statutes to interpret them. From that analysis, the Court can determine what the founders meant when they drafted these two clauses of the Constitution. By understanding what they were trying to accomplish, the Court can apply those clauses according to their true intent. As Justice Stephen Breyer once noted, "[The Constitution's] handful of general purposes will inform judicial interpretation of many individual provisions that do not refer directly to the general objective in in question." *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 247-48 (2002).

B. The Federalist Papers support Defendant's Argument for the Intent of the Property and Enclave Clauses.

Defendants in this case began this protest at the land currently known as the Malheur National Wildlife Refuge, in part, to bring attention to the words of the Constitution that suggest otherwise—the Enclave and Property Clause. Defendant asserts here that the Constitutional language of these clauses should lead the court to a different conclusion than previous courts have reached. This conclusion is supported by an examination of what the Founding Fathers themselves said about these clauses. Defendant adopts these arguments and incorporates them

herein. In this context, James Madison took notes at the Constitutional Convention as the Founding Fathers debated the final words of the Enclave Clause and voted upon them. On September 5, 1787 he noted: "on the residue, to wit, 'to exercise like authority over all places purchased for forts & Mr. Gerry contended that this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be means of awing the State into an undue obedience to the Gnl. Government—Mr. King thought himself the provision unnecessary, **the power being already involved; but would move to insert after the word 'purchased' the words 'by the consent of the Legislature of the State.' This would certainly make the power safe**. Mr. Govr Morris 2nded. The motion, which was agreed to nem. Con. As was then the residue of the clause as amended." (emphasis added.) In Federalist Paper No. 43, James Madison wrote,

> To dispose of and make all needful rules and regulations respecting the territory or other property, belonging to the United States, with a proviso, that nothing in the constitution shall be so construed, as to prejudice any claims of the United States or of any particular State. This is a power of very great importance, and required by considerations, similar to those which show the propriety of the former. The proviso annexed is proper in itself, and was probably rendered **absolutely necessary by jealousies and questions concerning the western territory sufficiently known to the public.**

(emphasis added).

The Federalist Papers show that the Founding Fathers were able to even add these clauses into the Constitution because they assured their opponents that these powers would be limited in scope, and even addressed concerns about what would happen with the land that now comprises the Western States, a fear that has expressly been realized under current erroneous interpretations of the constitution.

Another example of the Founders intent in drafting these clauses is found in a letter from Gouvernor Morris to Henry W. Livingston, written on December 4, 1803, in which the

Gouvernor stated, "I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that, had it been more pointedly expressed, a strong opposition would have been made."

This short recitation of Founding era perspective shows that there were those who wished to draft the Property Clause to allow for what *Kleppe* and other cases have interpreted that clause to allow: federal ownership of land within states on a large scale, with broad power to regulate those lands. However, that is simply not what the founders intended and the plain language must govern, which supports Defendant's contention here. And if it is unclear, the legislative history most be looked at, which was ignored in prior case interpretations.[30]

C. Prior Federal Cases Never Answered The Present Question, Nor Determined that the Federal Government Can Retain The Public Lands Within a State. Alternatively, Such Cases Should Be Overturned.

Defendant is aware of many cases that have been relied upon for an expansive application of the Property Clause.[31] But, not only were these cases decided without reference to

[30] For a more full treatment of the historical argument, Defendant directs the Court to Exhibit 1, *Stewardship of Public Lands Report*, at pp. 10-48 and 114–118.

[31] Defendant is aware of, and discloses to the Court, *Kleppe v. New Mexico*, 426 U.S. 529 (1976). In that case, the United States Supreme Court held that the Wild Free-roaming Horses and Burros Act was constitutional under the Property Clause of the United States Constitution, and stands for the proposition that the federal government has plenary power to manage its own lands as it wishes, without interference. *Kleppe*, 426 U.S. at 529 (1976)(But, the case presumes – like many similar cases - without deciding, that the land at issue was acquired and owned within Constitutional limits). The Court held that, "in arguing that the Act encroaches upon State sovereignty and that Congress can obtain exclusive legislative jurisdiction over the public lands in a State only by State consent…, appellees have confused Congress' derivative legislative power from a State pursuant to Art. I, § 8, cl. 17, with the Congress' power under the Property Clause." *Id.* at 530. The court further held that an act pursuant to the Property Clause overrides State law pursuant to the Supremacy Clause of the United States Constitution. *Id*. However, the Court analyzed the Property Clause in light of Appellee's argument that the clause only granted the federal government limited authority to "dispose of, to make incidental rules regarding the use of, and to protect federal property under previous case law that allows "the power over the public land [to be] entrusted to Congress…without limitation…". *Id.* at 539. Defendant is also aware of, and discloses to the Court, *U.S. v. Vogler*, 859 F.2d 638 (1988), which cites *Kleppe.* In that case, the court found that pursuant to *Kleppe*, the government has "broad power"

the historical records cited and referred to above, they generally avoided the discrete question at issue here. The closest Supreme Court case on record appears to be the case of *Light v. United States*, 220 U.S. 523, 524, 31 S. Ct. 485, 486 (1911). *Light* involved grazing on the recently established Holy Cross Forest Reserve in California in violation of regulations issued by the Secretary of Agriculture for the use of the forest reserve land. There, Light, a rancher with the right to graze his cattle on certain open public lands, "with the expectation and intention that they would do so, turned his cattle out at a time and place which made it certain that they would leave the open public lands and go at once to the Reserve, where there was good water and fine pasturage." The Court noted that although an implied license had developed to allow ranchers to graze cattle on open land, this did not prohibit the United States from withdrawing that implied license at any time. Light asserted that in order to withdraw the implied license under Colorado law, the government would be required to fence the land. Light additionally asserted Constitutional arguments, based on the equal footing doctrine, as well as the equal sovereignty principle, that Congress could not reserve lands equal to one fifth of the State of Colorado. The Court specifically avoided addressing those arguments, instead resolving the matter on non-constitutional grounds and admitting that it was leaving unresolved, "the other constitutional questions involved." *Id.* at 536-8. *Light* therefore does not address the instant issue. The case assumes that, as part of its disposal and needful regulation of public lands, Congress can create forest reserves. However, the case does not discuss whether these reserves are, or can be,

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in regulating federal land. *Vogler,* 859 F.2d 641. In *Vogler*, the court stated, "Congress' power under the property clause is extensive; the property clause gives Congress the power over public lands 'to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them…'" *Id.* (citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917). Defendant is also aware of, and discloses to the Court, *State of Russia v. National City Bank of New York,* 69 F.2d 44, 47 (2nd Circuit 1934), in which the court stated, "The United States is in the nature of a corporate entity, and has a common-law right to acquire property." These cases do not directly address the question here, and to the extent that they touch on the issue, they are wrongly decided because they are premised on incorrect assumptions about the intent behind the Property and Enclave Clauses, as outlined herein.

permanent, or discuss the impact on the structure of government envisioned by the Framers if expansive tracts of land are to be permanently withheld. Instead, the case discusses only the recognized power of Congress to manage the property entrusted to it, and to protect it from intentional trespass. Thus, in the end, it falls into the category of cases like *Kleppe*.

In sum, in analyzing the Enclave and Property Clauses, prior courts have erroneously begun with the premise that, because the lands were assumed to be public land, then the Property Clause provided broad authority to the Federal Government to regulate it. Defendants urge this Court to begin with a different premise—that these lands were unconstitutionally acquired and/or unconstitutionally maintained by the Federal Government, and are not therefore simply "public lands" without question. The Property Clause rules that the Government is empowered to make are only those that are "needful" and the only land upon which those rules can be made, are lands Constitutionally acquired, owned and maintained under Article I. Although courts have presumed that the Property Clause allows the Federal Government to retain land, that position is simply untenable in light of the history and structure of the relevant Constitutional provisions.

III. Additional Legal Doctrines Verify That the Federal Government's Permanent Ownership of Lands Within the States is Constitutionally Impermissible.

In addition to the main Enclave Clause vs. Property Clause arguments, Defendant also raises the "Equal Sovereignty" principle,[32] the "Equal Footing Doctrine"[33] and the "Compact Theory"[34] as additional grounds supporting the position that the federal lands in question are being claimed and held by the federal government against the plain meaning and clear limitations of the Constitution of the United States. After analyzing these principles and these documents, the Court should conclude that the intent of these Constitutional provisions were consistent with

[32] Due to space concerns, Defendant refers the Court to Exhibit 1, at pp.55-72.
[33] Due to space concerns, Defendant refers the Court to Exhibit 1, at pp.72-98.
[34] Due to space concerns, Defendant refers the Court to Exhibit 1, at pp. 99-113.

the plain language of these clauses, and decide accordingly that the United States has no subject matter jurisdiction in this case.

For 150 years, the federal government maintained a policy of disposing of public lands. The result was that State governments had complete jurisdiction over nearly all the territory within their borders, giving those States that same opportunity for settlement, development, preservation and conservation of parks and recreation areas, and the promotion of culture and commerce that the original States received. See Exhibit 1, at p 8. But, west of the 104°W Meridian, circumstances changed. The federal government has treated States west of that line unequally. It has allowed those States dominion over only a small percentage of the land within their borders and under an even more expansive modern view of federal land ownership. Western States cannot fully advance commerce. Id. They cannot develop the tax base necessary to fund schools, build roads, finance higher education…They cannot build transit and communications systems common in eastern States because privately owned lands are broken up by intervening federal lands that States cannot condemn for such public improvements. Western States like Oregon cannot control their own destiny.

CONCLUSION

An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Bond v. United States*, 564 U.S. 211, 221-22, 131 S. Ct. 2355, 2364 (2011). Defendant Ammon Bundy organized his fellow citizens in protest of the expansive and unsupported interpretation of the Constitution that purports to allow the federal government to own and control more territory, and exercise jurisdiction over

more land in the Western States, than the States themselves. The discrete question raised has not been ruled upon by the Ninth Circuit or the United States Supreme Court.

As discussed above, the presumptions based upon the expansive application of the Property Clause are unjustified by the text of the Constitution, unsupported by the history and related Founding era understanding, and directly destructive to the principles of federalism. The Hammonds are a classic case where federal bureaucracies won the day, and the Hammonds have been to prison – twice. During the Malheur protest and occupation, U.S. Representative Greg Walden addressed this exact consequence on the floor of Congress, when on January 5, 2016, he explained that even he had sponsored and passed key legislation to limit the BLM, and despite the legislation passing, the bureaucrats simply refuse to be governed.[35] Commenting on his floor speech Congressman Walden said, "I got up there and 17 years of working with farmers and ranchers and folks in eastern Oregon just poured out […] it was an artesian well of emotion."[36] What else could be the response, when federalism is allowed to fail under unproven claims of federal land ownership that increasingly amounts to tyranny. This is what Justice Roberts warned about when he cited James Madison in Federalist No. 45. "The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." The Federalist No. 45, at 293.

Defendant finally brings this motion as the culminating act of civic activism. , not just his – but all of those thousands of individual citizens who protested, visited and supported the

[35] Walden, Greg. U.S. Representative, Speech. January 5, 2016. https://www.youtube.com/watch?v=bx4ocLdWE90 (Last visited 5/8/2016).

[36] Zaitz, Leslie, "Walden uncorks years of frustrations in speech going viral." Oregonlive.com. 1/9/2016. http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/walden_uncorked_years_of_frust.html (Last Visited 5/7/16).

attempted adverse possession and related work at the "Harney County Resource Center." Sometimes civic activity in a free society can be uncomfortable for the government – it is usually then that institutions like this Court should pay special attention. There is no other way that federalism can ultimately preserve liberty, allowing "those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond, supra*, at 221-22.

The current claims by the federal government, to the ownership and exclusive jurisdiction over public lands within the States – including the specific land at issue here – are plainly prohibited by the Constitution of the United States. The court should therefore dismiss this action for lack of subject matter jurisdiction and thereby ensure that federalism still "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.*

While the protesters in this case are charged with crimes in Oregon, and there is undoubtedly a federal district of Oregon, the ownership of this land is critical to determining whether the protesters can even be charged with committing federal crimes. Defendants assert this case should be dismissed and reserves the right to supplement this record as well as argue at an appropriate time for evidence and jury instructions consistent with the lack of lawful duties alleged in the Indictment.

DATED: May 9, 2016

ARNOLD LAW

/s/ Lissa Casey — Lissa Casey
/s/ Michael Arnold — Michael Arnold
Attorneys for Defendant Ammon Bundy