J. Morgan Philpot (Oregon Bar No. 144811)
Marcus R. Mumford (admitted *pro hac vice*)
405 South Main, Suite 975
Salt Lake City, UT 84111
(801) 428-2000
morgan@jmphilpot.com
mrm@mumfordpc.com
Attorneys for Defendant Ammon Bundy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, *Plaintiff*, v. AMMON BUNDY, *et al*, *Defendants*.	Case No. 3:16-cr-00051-BR DEFENDANT AMMON BUNDY'S MOTION TO CONSOLIDATE HEARINGS REGARDING PRETRIAL RELEASE District Judge Robert E. Jones

RELIEF REQUESTED

In conjunction with his concurrently-filed motion to revoke the magistrate's order of pretrial detention in this case, Defendant Ammon Bundy respectfully moves and requests that this Court consolidate the hearing set for July 18, 2016 [Doc. 856] to receive evidence on that issue, with its review of the order of pretrial detention entered in *United States v. Ammon E. Bundy*, Case No. 2:16-cr-46-GMN-PAL-3, pending in the United States District Court for the District of Nevada (hereinafter, the "Nevada Case").

STATEMENT OF FACTS

1. Defendant was arrested on January 26, 2016, based on the allegations subsequently set forth in a Criminal Complaint signed by FBI Agent Katherine Armstrong accusing Defendant of having violated 18 U.S.C. § 372. [Docs. 14 & 110]

2. On January 27, 2016, Defendant appeared before Magistrate Judge Stacie F. Beckerman, where he was advised of his rights and ordered detained pending further hearing. [Doc. 22]

3. On January 29, 2016, the government filed a memorandum seeking to have Defendant detained in custody pending trial in this matter. [Doc. 23] The government based the motion on its argument that 18 U.S.C. § 372 was a crime of violence for purposes of the Bail Reform Act:

> The charged offense involves the ongoing armed occupation of the Malheur National Wildlife Refuge (MNWR). Title 18, United States Code, Section 372 is a crime of violence for purposes of the Bail Reform Act because it "has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another" and it is a felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

[Doc. 23 at 4] The government also argued for Defendant's pretrial detention based on allegations that he "participated in the April 2014 armed standoff with BLM employees regarding his father's land in Bunkerville, Nevada." [Id. at 6]

4. At the hearing on that motion, Pretrial Services recommended conditional release, including GPS monitoring. But the magistrate judge ordered him detained pending trial, based on the government's arguments, vague references to the "nature of the offense" and a lack of "ties," and the erroneous finding that Defendant had "prior criminal history." [Docs. 24, 26]

5. On February 3, 2016, the government filed an indictment, charging Defendant with one count of violating 18 U.S.C. § 372, same as in its original Criminal Complaint. [Doc. 58]

6. On March 9, 2016, the government filed a superseding indictment, adding two additional counts against Defendant alleging (i) possession of a firearm in federal facilities, in violation of 18 U.S.C. § 930(b); and (ii) use and carry of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). [Doc. 282] Defendant remains in custody based on the magistrate's January 29, 2016 Order. [Doc. 26]

7. On February 17, 2016, the government filed another indictment against Defendant, only this time the government filed in the United States District Court for the District of Nevada. [Nevada Case, Doc. 7]

8. On March 2, 2016, the government filed a Superseding Indictment in the Nevada Case and obtained a writ of *habeas corpus ad prosequendum* to compel Defendant's attendance for arraignment in Nevada. [Nevada Case, Docs. 27 & 54] Among other things, the superseding indictment in Nevada charged Defendant with violations of 18 U.S.C. §§ 372 and 924(c), based on events that began in March 2014 and "continu[ed] to on or about the date of this Superseding Indictment," *i.e.*, March 2, 2016, which took place "in the State and Federal District of Nevada *and elsewhere*." [Nevada Case, Doc. 27, ¶¶ 158, 160 (emphasis added)] In other words, the charges filed in Nevada appear to include the facts and circumstances alleged in this case.

9. On March 22, 2016, the Court held a "semi-joint proceeding" with the Nevada court and prosecutors from both districts on Defendants' unopposed motion to prohibit their transport to Nevada. [Docs. 312 & 340 at 5] The Court characterized the request as "in effect, … loaning [the Defendants] … to Nevada for that initial appearance," a situation that the government created, having "clearly chose the timing of the filing of the Indictments." [Doc. 340 at 11, 52]

10. Prosecutors represented that "in Nevada and Oregon, we're speaking with one voice." [Doc. 340 at 20] They disputed the "notion" that "somehow the district court is limited territorially from executing writs ad pros":

> Again, it's the same sovereign. The United States has brought cases in both districts. And just to underscore the point that has already been made is that the fact that the defendants reoffended in Oregon should not work to the detriment of the Government…. *There's nothing unusual about a defendant being charged in either related or unrelated cases in two different districts at the same time*.

[Doc. 340 at 24, 27 (emphasis added)]

11. Citing a lack of precedent either way, the Court denied Defendants' motion:

> The parties have raised important questions that are fundamental to court power and to the unusual situation here where two very complicated cases have been initiated by the United States in two different districts involving so many of the same defendants who have been detained while these proceedings go forward.

> …
>
> Although the defendants who are affected by this motion assert the Court in Nevada did not have the power to issue the writs for defendants in the custody of the U.S. Marshal here in Oregon, pursuant to orders of this court requiring their detention, I do not find any precedent – nor do the parties offer any – that declare co-equal courts, such as the District of Nevada and the District of Oregon, do not have the power to cooperate in the administration of their respective proceedings.

[Doc. 340 at 54] Significantly, the Court only overruled as "premature" Defendants' objection based on how the Nevada Case would interfere with their rights in this case. [Id. at 55; Doc. 334]

12. The Court made special mention of co-defendants Peter Santilli and Joseph O'Shaughnessy, who were released in this case, subject to conditions, before the government filed and sought to compel their attendance in the Nevada Case. [*See* Docs. 54, 231 & 340 at 19]

13. O'Shaughnessy's counsel made a record of the "nightmare" that the government created regarding trial preparation in this case after he was arrested and denied release in Nevada:

> [T]his has been a nightmare for me. I have not been able to speak to my client since his arrest on the Nevada Indictment …
>
> And I have made repeated requests to speak with him through the prison when he was at DCA Florence, and I've been – also made requests for assistance through our U.S. Attorney's Office. And I just wanted to put on the record it has been impossible for me to speak with him, despite repeated efforts on my part.
>
> … [I]t is almost impossible for a lawyer to have an effective relationship for his or her client when they are a thousand miles away.

[Doc. 340 at 44] In response, the Court forced O'Shaughnessy to choose whether he wanted to remain in custody in Nevada or be transported back to Oregon to facilitate his pretrial preparation. [Id. at 41-42] When O'Shaughnessy chose the "less evil" of being transported back to Oregon to facilitate his trial preparation, [id. at 44], the government forced him to consent to the revocation of the release order that he had previously obtained in this case. [Docs. 403, 408] With respect to Santilli, the Court observed that he "remain[ed] in custody in Oregon pursuant to an Order of Detention as to the Nevada proceedings." [Doc. 334 at 5-6] And he, too, was forced

to revoke his prior release order to facilitate his return to Oregon to participate in the preparation of his defense. [Docs. 544, 558] In other words, after this Court concluded that O'Shaughnessy and Santilli should be released under the Bail Reform Act, the government used detention orders from Nevada to force them back into custody in Oregon, where they are now each subject to two different detention orders, one in Nevada and one here.

14. On April 15, 2016, Defendant was arraigned in Nevada. [Nevada Case, Doc. 248]

15. On April 20, 2016, on the motion of Nevada prosecutors, the Nevada magistrate ordered that Defendant be detained pending trial based on "the rebuttable presumption" accompanying the charges filed in Nevada, and those alleged in this case:

> *Defendant is alleged to have subsequently participated in the occupation of a federal wildlife refuge in Oregon by individuals opposed to the actions of the federal government. Defendant was arrested and taken into custody with respect to that incident and is facing criminal charges in the District of Oregon*. … Other than the charges discussed above, he does not have a significant prior criminal record. Based on the nature and character of the charges in the Superceding [sic] Indictment, and the weight of the evidence against Defendant, *as well has his alleged involvement in the subsequent events in Oregon,* the Court finds that there are no conditions or combination of conditions that can be fashioned to protect the community against the risk of danger posed by the defendant, or to reasonably assure the defendant's future appearance in Court. The Court therefore orders that defendant be detained pending trial.

[Nevada Case, Docs. 289, 299 at 2 (emphasis added)][1] Because Defendant did not have adequate opportunity to challenge the government's motion, the Nevada magistrate emphasized that his order was "without prejudice to Defendant's right to … reopen the detention hearing." [Id.]

16. Thereafter, and pursuant to the two courts' arrangement and this Court's order entered March 22, 2016, Defendant was transported back to Oregon. [Doc. 334] The Nevada court did not stay or suspend its detention order while this matter proceeds.

17. On March 9, 2016, the Court ordered that any future motion to review a defendant's

[1] The Nevada detention order, Nevada Case, Doc. 299, is attached hereto as Exhibit 1.

detention status be directed to Judge Robert Jones. [Doc. 285 at 3]

18. Accordingly, this Court is currently overseeing Defendant's custody that has been imposed based on two detention orders: the detention order entered by the magistrate in this case on January 29, 2016, [Doc. 26], and the Nevada detention order. [Nevada Case, Doc. 299]

19. That being the case, and to avoid a situation where Defendant is released only to have the government use its prosecution in Nevada to take him back into custody where he will be kept several thousand miles away until he agrees to revoke his release, as it did in the cases of O'Shaughnessy and Santilli, Defendant brings this motion to consolidate in front of this Court a review of both of those detention orders under 18 U.S.C. §§ 3142 & 3145.

ARGUMENT

As set forth above, this motion is necessitated by the government's dual prosecution of Defendant in this Court and Nevada. As prosecutors have admitted, and as the Court found, the government is speaking with "one voice" regarding both cases and "clearly" controlling those cases to pursue Defendant. [See above SOF ¶¶ 20, 52] But the use of dual prosecutions to keep a defendant in custody pending trial is unfair and contrary to the purposes of the Bail Reform Act.

"A presumptively innocent defendant has a great liberty interest in avoiding pretrial detention." *United States v. Fernandez-Alfonso*, 816 F.2d 477, 478 (9th Cir. 1987). Other judges addressing pre-trial detention issues have observed that "distance alone may deprive one of … constitutionally protected liberties." *Cobb v. Aytch*, 643 F.2d 946, 958 n.7 (3d Cir. 1981). And the legislative history of the Act includes consideration of many other interests that weigh against the government's efforts to keep Defendant in custody:

> Studies have shown that failure to release has other adverse effects upon the accused's preparation for trial, retention of employment, relations with his family, his attitude toward social justice, the outcome of the trial, and the severity of the sentence. For example, in preparation for his trial, the defendant who remains in

> jail does not have the same access to his counsel as the man free on bail. He is limited in his ability to collect witnesses for his defense. Often, he loses his employment, his family may become the subjects of welfare payments, and in many instances in the Federal system he becomes a financial burden to the Federal Government in that the Federal Government reimburses local authorities when a defendant is incarcerated in a local jail.

H.R.Rep.No.1541, 89th Cong., 2d Sess., U.S.C.C.A.N. 2293, 2298-99 (1966).

In other contexts, federal courts have strongly rebuked efforts by the government to use multiple prosecutions to prejudice a defendant's rights:

> The Supreme Court long ago recognized that "the cruelty of harassment by multiple prosecutions" can violate the Due Process clause of the Fifth Amendment. *Bartkus v. Illinois*, 359 U.S. 121, 127 (1959). The question is whether the government is attempting "to wear the accused out by a multitude of cases with accumulated trials." *Hoag v. New Jersey*, 356 U.S. 464, 467 (1958) (quoting *Palko v. Connecticut*, 302 U.S. 319, 328 (1937)).

PHE, Inc. v. U.S. Dep't of Justice, 743 F. Supp. 15, 24-25 (D.D.C. 1990). In *PHE*, the federal court exercised its inherent power to enjoin multiple prosecutions against the distributors of sexually-oriented media: what it described as a "coordinated effort," beginning with federal prosecutors in Utah and the Eastern District of North Carolina, to force the distributors "to face criminal prosecutions in multiple federal district courts for the purpose of coercing [them] to refrain from distributing materials which [the government] acknowledge are constitutionally protected," a strategy intended to "drive [the distributors] out of their chosen profession" by "economic attrition." *PHE*, 743 F. Supp. at 20. The *PHE* court relied on *Dombrowski v. Pfister,* 380 U.S. 479 (1965), where the Supreme Court held "that federal courts may enjoin not only threats of prosecution, but indictments and prosecutions that are calculated to infringe upon First Amendment rights." *PHE*, 743 F. Supp. at 22 (noting that the *Dombrowski* court was justified to enjoin the prosecutions of civil rights workers in Louisiana and other southern states). The *PHE* court was satisfied that the distributors made a sufficient showing of bad faith on the part of federal prosecutors, ***notwithstanding that the underlying prosecutions may have had merit***:

> … "[b]ad faith and harassing prosecutions also encompass those prosecutions that are initiated to retaliate for or discourage the exercise of constitutional rights." "A showing that a prosecution was brought in retaliation for or to discourage the exercise of constitutional rights 'will justify an injunction ***regardless of whether valid convictions conceivably could be obtained***.'"

Id. at 25 (quoting *Lewellen v. Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988), and *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981)) (emphasis added). The government may try and distinguish *PHE* as a civil case, or by arguing that the dual prosecutions Defendant faces were not brought in bad faith or based on the same charges. But the Court does not have to resolve or address any of those issues. Defendant is simply asking this Court to consolidate its review of the detention orders that he is under to while he is subject to this Court's jurisdiction. Plainly, there are two detention orders currently in effect, and the Court has already, in the context of the government's actions, addressed motions brought by other defendants who were "in custody in Oregon pursuant to an Order of Detention as to the Nevada proceedings." [SOF ¶ 10]

Further, this Court has the same inherent authority that *PHE* used to enjoin the government's actions. *PHE*, 743 F. Supp. at 21-23. As the government argued in response to Defendants efforts to appeal this Court's March 22, 2016 Order to the Ninth Circuit: "District judges enjoy 'inherent power' to control their dockets in a manner that will 'promote economy of time and effort for itself, counsel, and for the litigants.'"[2] It cannot be that the Court only exercises that inherent power when the government is making the request. And the Court has already deemed this matter "complex." [Doc. 289] While specifically limiting itself to civil cases, the Manual for Complex Litigation, observes that "some of the case management techniques may be useful in complex criminal cases." Ann. Manual Complex Lit., Introduction (4th ed.) (citing *United States v. Bulger*, 283 F.R.D. 46 (D. Mass. 2012), as an example of a court

[2] See attached Government's Response To Emergency Motion, filed in *United States v. Bundy, et al*., 9th Cir. Case No. 16-30080, at 3 (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962), and *United States v. Guerrero*, 693 F.3d 990, 995 (9th Cir. 2012)).

applying the Manual to criminal matters).[3] In complex, multi-district litigation, courts increasingly consolidate at least certain aspects of pretrial proceedings.[4]

It has already been established that the government is coordinating its efforts against Defendant in both cases. The government used allegations regarding the alleged 2014 "armed standoff" in Bunkerville to detain Defendant in this case, just as it used allegations from this case to obtain the Nevada detention order. [SOF ¶¶ 3, 15] As the Supreme Court held in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), "[a]s between federal district courts, … though no precise rule has evolved, the general principle is to avoid duplicative litigation."[5] And the government made a critical misrepresentation in previously arguing that there was "nothing unusual about a defendant being charged in *either related or unrelated cases* in two different districts at the same time." [SOF ¶ 10] In fact, the government has a policy – the so-called "Petite Policy" – to protect persons by limiting dual prosecutions to the rarest of cases. *See* United States Attorneys Manual § 9-2.031, available at https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031. In meet-and-confer on this motion, the government confirmed that it did not comply with the Petite Policy. Accordingly, this case, and likely the Nevada Case, should be dismissed. *See id*. Perhaps the

[3] *See* LR (Civil) 42-1 ("Unless otherwise directed …, consolidation and case management of complex or related cases are governed by … The Manual for Complex Litigation (4th ed. 2004)."); *Harry & David v. ICG America, Inc*., 2010 WL 3522982 (D. Or. 2010).
[4] *See, e.g., In re Wells Fargo Loan Processor Overtime Pay Litigation*, 2008 WL 2397424 (N.D. Cal. 2008) (consolidating pretrial matters in multi-district litigation); *In re Aurora Dairy Corp. Organic Milk Marketing & Sales Prac's Litig.*, 2008 WL 1805731 (E.D. Mo. 2008) (consolidating complex cases to minimize expense to litigants and promote judicial efficiency); *In re Zyprexa Products Liability Litigation*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006) (exercising binding authority in pretrial matters in cases that would be adjudicated where they originated).
[5] *See also UtahAmerican Energy, Inc. v. Dep't of Labor*, 685 F.3d 1118, 1124 (D.C. Cir. 2012) (affirming dismissal under first-to-file rule); *In re M.C. Products, Inc.*, 205 F.3d 1351, 1999 WL 1253223, at *1 n.2 (9th Cir. Dec. 22, 1999) (unpublished) (citing *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 750 (9th Cir.1979), to note that a second-filed suit may sometimes be dismissed in favor of first-filed under the rule).

government will argue that the cases are not related, but that is not what the government has argued to date, using the allegations asserted in each case to obtain detention orders in the other. [SOF ¶¶ 3, 15] Perhaps the government will also argue that Defendant cannot enforce its Petite Policy to obtain dismissal, but that is not what Defendant is seeking here and there is substantial authority to the contrary, especially where the purpose of the policies at issue are to protect constitutional rights.[6] For purposes of this motion, the fact that the government would misstate matters regarding the regularity of charging a defendant in "*either related or unrelated cases* in two different districts at the same time" as part of its efforts to secure Defendant's presence in Nevada, while intending to use, as it did several days later, the allegations asserted in this case as a basis for the Nevada court's detention order, further demonstrates why the Court should consolidate its review of pretrial custody in both matters here. [SOF ¶¶ 10, 15] It also evidences the government's bad faith in using dual prosecutions against Defendant, "'regardless of whether valid convictions conceivably could be obtained'" in either case. *See PHE*, 743 F. Supp. at 25.

MEET AND CONFER CERTIFICATION

Defendant's counsel certifies that he conferred with counsel for the government in advance of this motion and the corresponding motion to obtain Defendant's release from pretrial

[6] *See Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (holding that a failure to follow established DOJ and Immigration Board procedures was a denial of due process), *superseded on other grounds, as stated in LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998) (changes to the procedures); *Bridges v. Wixon*, 326 U.S. 135, 153 (1945) (holding that "one under investigation … is legally entitled to insist upon the observance of rules" promulgated by an executive body for his protection); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) ("An agency of the federal government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."); *United States v. Leahey*, 434 F.2d 7, 11 (1st Cir. 1970) (holding "that the agency had a duty to conform to its procedure, that citizens have a right to rely on conformance, and that the courts must enforce both the right and the duty"); *United States v. Koerber*, 966 F. Supp. 2d 1207, 1234-45 (D. Utah 2013) (applying the line of *Accardi-Bridges* authority to "prevent the erosion of 'citizens' faith in the evenhanded administration of the laws").

custody, and the government indicated its intent to oppose it.

Respectfully submitted this 14th day of July, 2016.

/s/ Marcus R. Mumford
Marcus R. Mumford
J. Morgan Philpot
Attorneys for Ammon Bundy