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 JOINT MOTION FOR PRETRIAL RELEASE OF DEFENDANTS AMMON BUNDY AND RYAN BUNDY District Judge Robert E. Jones

PLEASE TAKE NOTICE THAT, *pursuant* to the Bail Reform Act of 1966, 18 U.S.C. §§ 3142(f) & 3145(b), Fed. R. Crim. P 59(a), the "due process" clause of the Fifth Amendment, the "assistance of counsel" clause of the Sixth Amendment, the "excessive bail" and "cruel and unusual punishments" clauses of the Eight Amendment, and other applicable authority, Defendants Ammon Bundy and Ryan Bundy each move this court to revoke the detention orders entered against them by the magistrate on January 29, 2016, [respectively, Docs. 26, 27], to revoke the detention orders entered against them in *United States v. Cliven D. Bundy*, *et al.*, Case No. 2:16-cr-46-GMN-PAL, pending in the United States District Court for the District of Nevada (hereinafter, the "Nevada Case"), [respectively, Nevada Case, Docs. 298, 299], and to order their immediate release from pre-trial custody.

This motion is based on the Memorandum of Points and Authorities filed herewith, and the attached exhibits, including the Declaration of Ammon Bundy, attached as Exhibit 1, all matters of which the court may take judicial notice, and such other evidence and oral argument

that will be presented at the *evidentiary hearing lawfully required by this motion* and currently scheduled for July 18, 2016, where Defendants intend to call witnesses, including three government agents and officers.

MEET AND CONFER CERTIFICATION

Defendant's counsel certifies that he conferred with counsel for the government in advance of this motion, 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

/s/ Ryan Bundy
Ryan Bundy, Pro Se Defendant
Signed Electronically by Permission.

MEMORANDUM OF POINTS AND AUTHORITIES

On March 22, 2016, President Barack Obama proclaimed, in an historic speech given in Havana, Cuba: "[C]itizens should be free to speak their minds without fear – to organize, and to criticize their government, and to protest peacefully, and that the rule of law should not include arbitrary detentions of people who exercise those rights."[1] Ammon Bundy and his brother, Ryan Bundy, agree. They are American political activists, well-known for their views on land use issues and a strict interpretation of the Constitution of the United States. But the Bundys had to read about the President's lofty Havana rhetoric from their respective jail cells in this district.

With this motion, the Defendants seek to rectify the errors committed by the government and magistrate in ordering them detained pending trial, and to bring the Court's treatment of them in line with the President's recent words, and the unique American legal tradition those words were based on, including the Bail Reform Act of 1966, the statutory rights granted by the Color of Title Act, 43 U.S.C. § 1068, and those rights recognized in the First, Second, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution. It may surprise the Court to hear the breadth of Defendants' arguments. Defendants' actions at the Malheur National Wildlife Refuge are commonly understood to have been part of a "protest," implicating First Amendment rights, where some participants carried arms, in the exercise of Second Amendment rights. But the *nature and circumstances of the alleged offenses* – the critical issue in reviewing pretrial custody – cannot be considered without a full appreciation of the statutory and other constitutional rights at issue, including the adverse possession claim that Defendants asserted and attempted to pursue by occupying the refuge and its surrounding premises beginning January 2, 2016.

Federal courts have long recognized that prosecutions seeking to "retaliate for or

[1] The White House, Office of the Press Secretary, http://www.whitehouse.gov/the-press-office/2016/03/22remarks-president-obama-people-cuba (Last visited Apr 4, 2016).

discourage the exercise of constitutional rights" are brought in "[b]ad faith." *Lewellen v. Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988). Scrutiny is especially warranted in cases charging conspiracy, where, since at least *Poulterers' Case* decided by the Star Chamber in 1611, courts have allowed prosecutors to expand the law "away from targeting clearly dangerous and operative conspiracies and toward enabling the prosecution" of "unpopular ideas, and the speech that expresses them."[2] Here, the government has admitted that it was not the occupation of the Refuge itself that spurred law enforcement to arrest and charge the Bundys on January 26, 2016, as they drove to a rally in neighboring Grant County. Contemporary newspaper accounts report how, a mere "hours before" the arrest, Oregon's two Senators met with prosecutors and FBI Director James Comey and determined that action needed to be taken against the Bundys' protest in order to stop the "virus [that] was spreading" by imposing "consequences."[3]

Such tragic and inflammatory phrasing attributed to Senator Ron Wyden, given how events unfolded, requires the Court to ask the question, what was the "virus" that required such an immediate and fatal reaction from the government that day? To answer that question, the Court will come to see why the Bundys' asserted innocence is so controversial, but, more importantly, why neither of them is a danger or a flight risk. Ammon Bundy, Ryan Bundy, and the Citizens for Constitutional Freedom occupied the Refuge in January 2016 as a base of political operations and as part of a valid exercise of their rights, inter alia, to *attempt* an adverse possession claim, pursuant to federal statute, over the Refuge and related property. And here the Bundys are wholly dependent on this Court *to ensure* that the law – as opposed to hyperbole,

---

[2] Steven R. Morrison, System of Modern Criminal Conspiracy, 63 Catholic Univ. L. Rev. 371, 372, 377 (2014) (citing Kenneth A. David, The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and United States, 25 Vand. J. Transnat'l L. 951, 954-55 (1993)).
[3] 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 July 13, 2016).

exaggeration, or politics – rules the day, so that they are released to their families and can meaningfully assist in the preparation of their defense in this matter.

STATEMENT OF RELEVANT FACTS

1. DWIGHT AND STEVEN HAMMOND. On June 21, 2012, Oregon ranchers Dwight and Steven Hammond were convicted of felony charges for arson on public land after a long and public dispute with the federal government. At sentencing, the judge declined to apply the five-year mandatory minimum sentence, finding it "grossly disproportionate to the severity of the offense" and also a "violation of the Eight Amendment." *See* 10/30/2012 Sentencing Hrg. at 26:3–6, *United States v. Hammond, et al*, Case No. 6:10–cr–60066–HO. On February 7, 2014, after both Hammonds had completed their sentences, the Ninth Circuit Court of Appeals concluded that the district court erred in not applying the mandatory minimum. In October 2015, the district court resentenced the Hammonds and, on January 4, 2016, they reported back to federal prison.

2. UNORGANIZED PROTEST – 2015. Beginning in approximately October 2015 and continuing through December 2015, local residents and citizens arriving in Harney County from across the United States began protesting the Ninth Circuit's decision, the conduct of the United States Attorney's Office in the Hammond case, and the federal government's treatment of ranchers in general. [*See* Doc. 14 at 5-7, 15-24]

3. In November 2015, several thousand people and several concerned organizations signed and submitted a "NOTICE: Redress of Grievance," raising issues that the Hammond case brought to the surface: to Harney County Sheriff David Ward, the Harney County Commissioners, local Justice of the Peace Donna Thomas, local District Attorney Tim Colahan,

Oregon Attorney General Ellen Rosenblum, and Oregon Governor Kate Brown.[4] Signers included the Bundy family, and eleven organizations.

4. On November 20, 2015, Sherriff Ward published a letter replying to the "huge response from American citizens" that his office was receiving regarding the Hammond case. *Id*.

5. By December 30, 2015, media sources were reporting how local citizens had begun forming organizations and joining the protests, and growing concerns about civil unrest. In response to what appears to be the Bundys' statements, Acting United States Attorney Billy J. Williams published a letter "To The Citizens of Harney County, Oregon," stating his "respect" for the rights of these "outside individuals and organizations" to "peacefully disagree with the prison terms imposed," but warning that "any criminal behavior … that harms someone will not be tolerated and will result in serious consequences."[5]

6. Ammon Bundy was not, and never became, a member of any of the above-referenced political organizations, was not, and never became, a member of any militia group, and was not, and never became or considered himself part of, the so-called sovereign citizen movement.

7. Ammon started visiting the Hammonds in late 2015 independently, on his own initiative after reading about them on online publications, and not part of any organized effort. These early efforts to raise awareness about the Hammonds' situation were not tied to any group or organization, as Ammon was not a leader or spokesperson for any group at the time.

8. Prior to his first trip to Oregon, Ammon was known as a respected businessman and a prominent individual political activist who would volunteer his time giving seminars in different public forums – elementary schools, cottage meetings, and other public gatherings – on the

[4] *See* https://www.oathkeepers.org/a-new-resolution-put-out-by-ammond-bundy-concerning-the-hammond-family/ (last visited Apr 18, 2016).
[5] *See* Billy J. Williams, "To the Citizens of Harney County, Oregon," available at https://www.documentcloud.org/documents/2660399-Statement-USattorney.html (last visited Apr 18, 2016).

importance of adhering to the structure of the Constitution to resolve political disagreements and on specific land rights issues. Among other things, Ammon had lobbied the Nevada legislature on legislation that he helped write related to land rights and adverse possession in particular.

9. In the time period covered by the Superseding Indictment, Ammon Bundy did not brandish or carry a firearm and instead used his rights of free speech, association, and assembly to petition for redress from local, county, state and federal government officials and agencies on behalf of himself and his friends. Similarly, Ammon never threatened or participated in any violent or threatening activity, and in fact worked to discourage anyone from that kind of behavior, encouraging people to seek redress from their government in word and in personal example. This effort included specifically requesting and meeting for a combined period of at least eight hours with the local sherriff in Harney County during the time period the government has accused him of being engaged in its alleged "conspiracy."

10. To the contrary, at times, Ammon shared with local law enforcement his concerns that, based upon his observations as the time grew nearer for the Hammonds to self-surrender, the area was at risk of extreme civil unrest generated from random, unorganized protesters. He shared his observations and judgment to local, county, state and national government leaders that they should do more to acknowledge citizen concerns and that they were not productive in how they were engaging those citizens who were expressing their disagreements with those leaders. Mr. Bundy expressed his concern that the government's refusal to engage the citizenry would likely provoke, rather than avert, the growing tensions.

11. PROTEST PARADE ON JANUARY 2, 2016. On January 2, 2016 most of the previously unorganized protesters in Harney County participated in a parade and show of support for the Hammonds. Ammon Bundy participated in the public parade on January 2, 2016, but not as an

organizer or leader. Ammon was increasingly determined to find a way to help and shed light on the injustices suffered by the Hammonds and others by the creeping overreach and unjust treatment exerted by the federal government through its bureaucratic agencies.

12. As those convictions materialized, Ammon resolved to share a specific idea with a small group of people who were participating in the parade and public protest on January 2, 2016. That idea included his personal conclusion that it would benefit everyone if the protest activities that had so far been unorganized and centered in the area of Burns were deliberately organized and removed from the town to the more remote location of the Refuge (approximately 30 miles out of town), which had played a central role in the Hammonds controversy and related issues of federal overreach in Harney County.

13. AMMON BUNDY'S LEADERSHIP MEETING – JANUARY 2, 2016. In sharing his idea initially, Mr. Bundy asked a small group of individuals to meet with him, and this included one of the local deputy sheriffs who openly attended the meeting. As it turned out, approximately two dozen individuals attended, including LaVoy Finicum and Ryan Bundy. Ammon does not believe that anyone knew in advance what he was going to share, but those who had previously seen some of his political seminars might recognize common principles. As to the specifics, Ammon had not developed, shared or decided upon the details of any plan prior to the meeting.

14. At the January 2, 2016 meeting, Ammon proposed there should be an organized and focused expansion of the protest, and that the effort should be **principled, non-violent, and lawful**. During the course of the meeting he ultimately proposed a specific plan based upon his opinion, understanding and good faith belief in the principles of adverse possession.

15. Mr. Bundy and several others present at the meeting had learned that the Malheur refuge was currently unoccupied and that no government employees or officers were present.

Accordingly, he encouraged the organization of a responsible group of individuals who would travel in advance to the Refuge, verify that it was unoccupied and commence setting up the necessary requirements for a lawful attempt to establish a statutory claim for adverse possession.

16. The idea that Mr. Bundy expressed was that there was a legitimate property law basis for attempting an adverse possession, and that because this was permitted by law, it could also be used as a viable method of political protest, and if successful, the occupiers would assist Harney County and its residents in furthering legitimate and lawful aims related to the land they would occupy, and, if unsuccessful, the *attempt* to establish a statutory adverse possession claim would still focus the protest message, generate necessary media attention, and stimulate a broader national discussion of land use issues and the problem of federal overreach, including questions raised regarding Article I, Section 8, Clause 17 of the U.S. Constitution.

17. One of the goals of the protest and adverse possession occupation was to acquire legal standing – to bring the question of federal land overreach to the federal courts' attention or to require the federal government to make solid and legitimate argument in support of its claim of ownership – and with that newly acquired standing open up for Ammon and his colleagues the federal courts as a forum to raise their legal and political demands for redress on those issues.

18. As part of the execution of his idea, Mr. Bundy tried to ensure that the effort to establish a statutory adverse possession claim was legitimate, taking reasonable precautions to ensure that the disseizors could protect themselves and the property against any unlawful force and that any activities related to that protection were orderly and supervised by responsible people who possessed either the necessary real life experience and/or relevant training for such matters.

19. Ammon was not among the first group to travel to the Refuge to establish the statutory adverse possession claim, but his brother, Ryan, was. After traveling to the Refuge, with the full

knowledge and awareness of law-enforcement as they had communicated plans at the meeting, and after confirming that no other people were present, specifically no federal officers, that vanguard group began the process of formally staking a claim, under the principles of law applicable to statutory adverse possession, to the land and surrounding property at the Refuge.

20. In this same effort, the protestors would later change the name of the Refuge, which they published with signs, and would attempt to change responsibility for the payment of utilities and services, which are all part of what Mr. Bundy understood to be required in order to establish the legitimate control and use of the property that a valid adverse possession claim requires.

21. As part of the organized protest, Ammon, Ryan, and others, continued to organize, spread their message, invite people to the new Harney County Resource Center, and otherwise work to expand the legitimate use of statutory adverse possession and other lawful methods to investigate and establish other claims throughout the area.

22. As the law of statutory adverse possession requires, the protest occupation of the Refuge was open, hostile and notorious. At the outset of the occupation, under Mr. Bundy's recommendation and leadership, the occupiers established appropriate caretaker responsibilities including securing the previously vacated property, setting up a perimeter watch, and controlling ingress and egress.

23. Under the leadership and direction of Ammon Bundy, the occupiers named themselves **Citizens for Constitutional Freedom**, publicly announced the formation of their association and began publishing material and press statements online in that name, diligently striving to maintain their claim over the Refuge land and property from January 2, 2016, through at least January 26, 2016, under that name.

24. From January 2 to January 26, 2016, it is estimated that more than 1,000 individuals,

including businessmen, ranchers, political protestors, elected officials from different branches of state executives and legislatures, attorneys, and federal government employees – all came and went from the claimed property at the Refuge, without interference from the federal government, notice or arrest. As part of their role in controlling ingress and egress to establish the attempted statutory claim of adverse possession, Mr. Bundy and others were happy to welcome these visitors. At the same time, Ammon, Ryan, and others regularly attended meetings in and around Burns, Oregon – making no secret of their travels, and on multiple occasions seeking meetings with local, state and federal law enforcement officials.

25. It is significant that, contrary to the overwhelming presumptions being advanced by the government and the media - *at no time prior to January 26, 2016, did Ammon Bundy receive or learn of any eviction or ejectment notice, trespass complaint, or any other formal demand by any person or entity claiming ownership of the land and property being claimed by occupiers*.

26. It is also significant that, at no time prior to January 26, 2016, did Ammon Bundy receive or learn of any notice, summons, arrest warrant, or formal criminal allegation by any local, state or federal government agency or officer.

27. In fact, prior to Ammon's arrest and the shooting death of LaVoy Finicum at the hands of government agents, Mr. Bundy is not aware of any formal legal demand (either criminal or civil) that the United States Government made to him or any other person at the Refuge.

ARGUMENT

The statement President Obama made in Havana is no triviality. It reflects the uniquely ubiquitous American notion that governmental allegations of wrongdoing – no matter how egregious – are presumptively untrue. *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) ("That an individual is charged with a crime cannot, as a constitutional matter, give rise to any

inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt."). Thus, despite the broad, sinister, and pervasive efforts made by the government to label Ammon Bundy and his protesting colleagues as domestic extremists and dangerous, the Court must begin in a neutral position on the issue of pretrial detention and insist that the government prove the danger that Defendants present "by clear and convincing evidence." *Id*.

In this case, Ammon Bundy led, with the principles he advocated, and with the help of Ryan and several others who were similarly devoted to the principles of a civil and orderly protest, the spontaneous milieu of various highly charged citizens expressing their frustrations and dissent in Harney County into an organized, purposeful, and lawful non-violent occupation at the Refuge where citizens were meaningfully petitioning their government for redress. Ammon and Ryan have been imprisoned six months while the government has characterized them as dangerous and extreme individuals, and with prosecutors demonstrating a willful degree of ignorance regarding the basic doctrine of statutory adverse possession that was clearly invoked by the Refuge protest.[6]

---

[6] The doctrines of adverse possession have been routinely invoked in the United States over the last two hundred years. *See e.g. Ewing's Lessee v. Burnet*, 36 U.S. 41, 42-43, 9 L. Ed. 624 (1837) (explaining the historic legality of "ouster by actual adverse possession" as "well settled" and that to "constitute an adverse possession" there must be nothing "short of an exclusive appropriation of the property, by an actual occupancy of it, so as to give notice to the public and all concerned"); *NAC Tex Hotel Co. v. Greak*, No. 12-14-00260-CV, 2015 WL 7019738, at *3 (Tex. App. Nov. 12, 2015) ("But the doctrine of adverse possession itself is a harsh one, taking real estate from a record owner without express consent or compensation. Before taking such a severe step, the law reasonably requires that the parties' intentions be very clear."); *see also* 3 Am. Jur. 2d, *Adverse Possession* §11 (1986) ("One claiming title by adverse possession always claims in derogation of the right of the true owner, admitting that the legal title is in another. Thus, as a general rule, one who seeks to set up an adverse possession need not have a good title, or in fact any title, except a possession adverse and hostile to that of the

It is ***because prosecutors and government officials find the protest itself so upsetting and provocative*** that the law and the Constitution insist that the actions alleged to have taken place at Refuge be given careful and deliberate treatment under the law. The heart of the issue is best characterized by former Supreme Court Justice Potter Stewart:

> A function of [the First Amendment] under our system of government is to invite dispute. 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 (1963). These principles are even more vulnerable in the present context:

> Basically, what is at stake here is loss of an opportunity to express to Congress one's dissatisfaction with the laws and policies of the United States. Staged demonstrations—capable of attracting national or regional attention in the press and broadcast media—are for better or worse a major vehicle by which those who wish to express dissent can create a forum in which their views may be brought to the attention of a mass audience and, in turn, to the attention of a national legislature.... The demonstration, the picket line, and ***the myriad other forms of protest which abound in our society*** each offer peculiarly important opportunities in which speakers may at once persuade, accuse, and seek sympathy or political

---

true owner under a pretense or claim."); *Id.* at §12 ("While a discussion of adverse possession ordinarily centers on real property, the same principle has been applied to the acquisition of title to personal property."); *Id.* at §43 ("The requirement for adverse possession that the possession be hostile does not require ill will or malice, but an assertion of ownership adverse to that of the true owner and all others..whether by mistake or willfully. Hostility of possession means that one in possession of land claims the exclusive right to that land, and occupies it as its owner…[and]/or oust[s] the owner from the land."); *Id*. at §45 ("[T]he intention with which possession is taken and maintained is the controlling factor…If the possessor intends to hold the land only until or unless the true owners claims the premises ... there is no claim of right under adverse possession … It is not necessary that the use be made either in the belief or under a claim that it is legally justified…Adverse possession does not depend on…whether the motivation is guilty or innocent."; *Id*. at § 69 ("A possession that does not amount to an ouster of the owner of land is not sufficiently exclusive to support adverse possession.").

> support, all in a manner likely to be noticed. Loss of such an opportunity is surely not insignificant.

Hartley v. Wilfert, 918 F. Supp. 2d 45, 50 (D.D.C. 2013) (emphasis added).

In the government's brief seeking pretrial detention of all defendants, prosecutors argued obtusely: "[T]his offense demonstrates a remarkable inability on the part of all charged defendants to follow the law, and thus comply with the terms of court-ordered supervision." [Doc. 23 at 2] But the law contemplates protest. It contemplates legitimate dissent. And it contemplates the exercise of a person's right to establish a claim of statutory adverse possession. So that the efforts of Defendants to comply with the law are not so easily dismissed. In fact, it is government lawyers who are advocating matters contrary to what the law in this area requires. *See Scott*, 450 F.3d at 874 ("That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody."). The court is duty bound to ignore such conclusory rhetoric and, "[i]n a full-blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id*.

I. BOTH AMMON BUNDY & HIS BROTHER RYAN BUNDY SHOULD BE RELEASED

As the Court understands, when Congress passed the Bail Reform Act it reaffirmed the "traditional presumption favoring pretrial release for the majority of Federal defendants." *United States v. Berrios–Berrios*, 791 F.2d 246, 250 (2d Cir. 1986) (citation omitted). The general expectation of the Bail Reform Act is that a defendant shall be released on his own recognizance or unsecured bond, "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. §§ 3142(a)(1) & 3142(b). When a court determines that release on

recognizance will not assure a defendant's appearance or ameliorate any danger, it may release the accused, nonetheless, on the "least restrictive" condition or combination of conditions. *Id*. at §§ 3142(a)(2) & 3142(c)

The Supreme Court has made clear, it is only after "**a full-blown adversary hearing**" where the government proves to a "neutral decisionmaker by clear and convincing evidence that ***no conditions*** of release can reasonably assure the safety of the community or any person" or the appearance of the defendant(s) at later court proceedings, that pre-trial detention is allowed. *United States v. Salerno*, 481 U.S. 739, 750 (1987) (emphasis added). In the present case, the overwhelming evidence indicates that the Defendants are not flight risks. To the contrary, they are desirous to advance their arguments and their defense in Court. In fact, the protest at issue was exactly the result of their political advocacy and their desire to legitimately address these important issues and their views of the constitutional limits placed on the federal government. Both men have strong ties to their local communities, established families in church, school and extra-curricular activities and excellent reputations as upstanding moral citizens. Regarding danger – there is simply no evidence that suggests that upon release either defendant would be a danger to anyone – let alone the clear and convincing evidence required by the Act.

a. THE INITIAL DETENTION HEARING WAS IMPERMISSIBLE, AND THE DETENTION ORDER SHOULD BE VACATED AS A MATTER OF LAW

On January 29, 2016, Magistrate Judge Stacie F. Beckerman conducted what the court termed a "detention hearing" under the auspices of 18 U.S.C. § 3142(f). However, "§ 3142(f) does not authorize a detention hearing whenever the government thinks detention would be desirable, but rather limits such hearings [to a fixed set of prerequisites]." *United States v. Byrd,* 969 F.2d 106, 109 (5th Cir. 1992). And, even then, detention is still not lawfully permissible unless "the judicial officer finds, after a hearing, that no condition or combination of conditions

will reasonably assure the appearance of the person as required and the safety of any other person and the community." *Id*. ("There can be no doubt that this Act clearly favors nondetention. It is not surprising that detention can be ordered only after a hearing; due process requires as much. What may be surprising is the conclusion that even after a hearing, detention can be ordered only in certain designated and limited circumstances, irrespective of whether the defendant's release may jeopardize public safety."). In this case, the detention hearing was not legally justified.

First, the alleged crimes at issue are not "violent" or "crimes of violence." In all of the allegations in the initial complaint, the first indictment, and now the superseding indictment there is not one allegation that Mr. Bundy's conduct "involve[d]" any violence. The same is true for Ryan Bundy. This is key, and the government has glossed over this factor. Quoting the language of the statute, the government has argued that the charged offense(s) against Defendants are "crime[s] 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] ***But the government is making a mistake in applying the law***. Significantly, recent Supreme Court treatment of this subject, and Ninth Circuit decisions, leave no room for further mistake. In making a determination under the Bail Reform Act, the Court must look to, not the generic language of the "charged offense" or its elements, nor general and conclusory statements about all defendants, ***but to the specific allegations*** of specific personal conduct of the Defendants. *See United States v. Tortora*, 922 F.2d 880, 888 (1st Cir. 1990) ("Detention determinations must be made individually and, in the final analysis, must be based on the

evidence which is before the court regarding the particular defendant.").

Second, the government's allegation that there is a "crime of violence" at issue in this case is false, and this question has been conclusively determined when the Court "conclude[d] on this record that § 372 is not a crime of violence within the meaning of § 924(c)(3)." [Doc. 671 at 16] This determination is conclusive for Bail Reform Act considerations. *See United States v. Twine*, 344 F.3d 987, 987-88 (9th Cir. 2003) (holding that once a charge is found NOT to be "a crime of violence" under the same or similar language of a substantive statute, the same charge "is not a crime of violence for purposes of the Bail Reform Act"). Because there is no "crime of violence," the government is NOT entitled to any presumption that either Defendant "presents a danger to the community" under 18 U.S.C. § 3142(e)(2). Further, the government's basis for the initial hearing and the Court's detention order was the invalid "crime of violence" requisite at § 3142(f)(1). [Doc. 23 at 4; Doc. 26 at 1; Doc. 27 at 1]

Third, there was no significant proffer or evidence of "serious" flight risk. The magistrate checked the box indicating "serious risk defendant will flee" on the form ordering Defendants' pretrial detention, but the government's proffered grounds on this point are legally inadequate. The government only argued three potential grounds: 1) "[A]s a threshold matter," that Ammon Bundy "lacks ties to the District of Oregon." [Doc. 23 at 5] This is clearly an invalid conclusion. The Ninth Circuit has long ago clarified that ties "to the community" include where the defendant resides, and is not limited to where he has been charged with a crime.[7] 2)

[7] *United States v. Townsend*, 897 F.2d 989, 995 (9th Cir. 1990) ("What "community" is meant? If it were only the community in which the indictment was brought, a defendant who had deep roots in Boston, for example, might be denied bail if indicted in New Haven. If the defendant is a United States resident, the community to be considered must be at least as broad as in the United States. Accordingly, we hold that "community" in this section of the statute embraces both the community in which the charges are brought and also a community in the United States to which

That Mr. Bundy's "own statements demonstrate his unwillingness to comply with the terms of pretrial supervision." [Doc. 23 at 5] But this is likewise insufficient given that pretrial services evaluated and recommended his release. 3) That Mr. Bundy allegedly stated: "There is no justice in a federal court. The feds have used the courts to take rights not protect them." [Doc. 23 at 5] But the government cannot seriously construe a defendant's political opinion to support a finding of flight without any actual evidence of that defendant's propensity to flee. *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988) (holding that a hearing "is permitted only when the charge is for certain enumerated crimes […] or when there is ***a serious risk*** that defendant will flee"). Because there was no crime of violence, and because there was no allegation of a "serious risk" of flight, for either Ammon or Ryan Bundy, the initial detention order should be vacated, even in advance of an evidentiary hearing challenging detention.

b. THE RELEASE FACTORS ALL POINT IN FAVOR OF RELEASE

Even if the Court rules that the initial hearing was justified, the law is clear that pretrial detention should be used "[o]nly in rare cases" and "[d]oubts regarding the propriety of release are to be resolved in favor of defendants." *Townsend*, 897 F.2d at 994. The Bail Reform Act directs the judicial officer to order pre-trial release on personal recognizance or upon the execution of an unsecured appearance bond "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."18 U.S.C. § 3142(b). In other words, release – without conditions – is the beginning presumption. If such release and the unsecured appearance bond will not reasonably assure appearance or will endanger safety, then the judicial officer is directed to consider a number of conditions to be attached to a release order. 18 U.S.C. §

---

the defendant has ties."); *United States v. Himler*, 797 F.2d 156, 162 (3d Cir. 1986) (reversing order of pretrial detention because of defendant's "family ties to the area").

3142(c). It is only "[i]f, after a hearing pursuant to [§ 3142(f)], the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," that the judicial officer may order detention. § 3142(e).

In order to find that no condition or release will assure the appearance of the person or the safety of another person or the community, the government must prove a "serious" flight risk by a preponderance of the evidence and any danger to another or the community by "clear and convincing" evidence. *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). The Ninth Circuit has made clear that if "danger" is argued, it cannot be argued alone because a theoretical danger to the community, by itself is not enough to justify pretrial detention. *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003) ("We are not persuaded that the Bail Reform Act authorizes pretrial detention without bail based solely on a finding of dangerousness.").

In weighing the evidence to determine whether the standards of "preponderance" and "clear and convincing" have been met, the factors are: (1) the nature and seriousness of the offense charged; (2) the weight of the evidence against the defendant; (3) the defendant's character, physical and mental condition, family and community ties, past conduct, history relating to drug and alcohol abuse, and criminal history; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. *Id*. "Of these factors, the weight of the evidence is the least important, and the statute neither requires nor permits a pretrial determination of guilt." *United States v. Winsor*, 785 F.2d 755, 757 (9th Cir. 1986).

(1) The nature and seriousness of the offense charged.

To this point, perhaps the Court believed that the nature and seriousness of the offenses

charged were limited to a First and/or Second Amendment "protest." As set forth above, that is an incomplete explanation for the actions underlying the charged offenses. And the law also requires an analysis of the "circumstances of the offense charged." *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir. 1985). In the present case, the "circumstances" include Ammon and Ryan Bundy's history as political activists on constitutional and land issues. More importantly, the "circumstances" require that the Court – in this case –inquire into "why" the protest related to the pending charges took the form that it did. In simple terms, the Court must consider as central to the "circumstances" here that Ammon Bundy organized (and Ryan Bundy supported) the occupation of the Refuge based upon a good faith belief in the lawful exercise of their statutory rights (adverse possession) and constitutional rights (right to assemble, protest, speak, petition and to bear arms).

The nature of the alleged criminal conduct was based upon the Bundys' good faith attempt to setup **a lawful adverse possession claim** at the Refuge. Acts that amount to the lawful exercise of constitutional and statutory rights cannot be an unlawful conspiracy. *See, e.g., Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1346 (7th Cir. 1977) (holding the petition for redress cannot also be an impermissible act of impeding federal officers: "No citation of authorities is needed for the proposition that the rights our founding fathers set down in the First Amendment are the subject of special protection by the courts. Those rights despite their theoretical strength as a constituent of democratic government have demonstrated remarkable fragility when exposed to the air of autocracy."); *see also United States v. Hylton*, 710 F.2d 1106, 1112 (5th Cir. 1983) (holding that actions amounting to a petition for redress of grievances could not be the basis of an indictment charging a defendant with "corruptly endeavoring to intimidate or impede" IRS agents: "[W]e likewise cannot condone the imposition of criminal sanction for Hylton's exercise

of her constitutional right.").

In the present case, to engage in the analysis of the "circumstances" surrounding the alleged offenses, as required by *Motamedi*, the Court must consider the nature of the attempted statutory adverse possession, which though lawful, may appear unseemly. In the words of courts describing the principles of adverse possession, to undertake the attempt at an adverse claim,

> 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, 162 A. 161, 161 (1932). Further, in *Springer v. Young*, Justice Strahan explains: "An adverse possession cannot begin until there has been a disseizin; and, to constitute a disseizin, there must be an actual expulsion of the true owner for the full period prescribed by the statute. An adverse possession is aptly defined by INGERSOLL, J., in *Bryan v. Atwater, 5 Day*, 181, 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 disseized and ousted of the lands so possessed." To make a possession adverse it must be "an actual, continued, visible, notorious, distinct, and hostile possession." *Springer v. Young*, 12 P. 400, 403-04 (1886). It should, therefore, come as no surprise to anyone, let alone the government or this court that – the Refuge occupation involved "an ouster" and "a disseisin" and such actions are hardly new or un-established legal theories, and do not suggest that the character or trustworthiness of those who seek to setup a lawful adverse possession claim is lacking. To the contrary, the specific steps and lengths to which these defendants endeavored, including the establishment of a perimeter, the changing of the sign and renaming of the facility, the taking over of routine maintenance and

cleaning,[8] and the managing and control of the of the property all show that this was no random or spontaneous act of dangerousness or recklessness, but that it was a careful attempt by citizens acting in good faith to exercising a lawful right – including under federal statute – and in lawful protest of their government's actions.[9] Any consideration of the circumstances, without addressing the nature and legitimacy of citizens attempting to establish an adverse passion claim

[8] *See* attached Exhibit 2, which includes twenty-two first-hand witness statements, disputing the alleged "circumstances" of the offenses charged, including that Ammon Bundy and Ryan Bundy, along with the other defendants engaged in carrying out the attempted statutory adverse possession claim were not dangerous (*see* declaration of Travis Williams, at 16; declaration of Linsey Tyler, at 38; declaration of Chris Briels, at 52), were not violent (*see* declaration of Thomas Davis, at 13; declaration of Walter Lee "Butch" Eaton, at 18) and were not threatening (*see* declaration of Melodi Molt, at 9; declaration of Linda Gainer, at 23; declaration of Dillon Banton, at 40; affidavit of James Male, at 42; and declaration of Chris Briels at 52). These fact witness accounts described how the Refuge was "clean" (*see* affidavit of Larry Jay, p. 6; declaration of Melodi Molt, p. 9; declaration of Kristy Ann Cooper, p. 20; declaration of Linsey Tyler, p. 38) and "better taken care of" (*see* declaration of Travis Williams, p. 16; declaration of Chris Briels, p. 52) than it had been before the occupation, and that there was "no violence" at the refuge during the occupation (*see* declaration of Walter Lee "Butch" Eaton, p. 18; declaration of Dillon Banton, p. 40) and that visitors to the refuge including local residents "felt safe" (*see* declaration of Kristy A. Cooper, pp. 20-21; declaration of Rodney Glen Cooper, p. 33) and the occupation seemed "safer than in town" (*see* declaration of Walter Lee "Butch" Eaton, p. 18.) These accounts describe how the occupiers were deliberately engaged in "taking care of" the property (*see* declaration of Travis Williams, p. 16; declaration of Dillon Banton, p. 40; declaration of Duane Schrock, p. 45) and that the activity inside consisted of "lectures" on the protestors' message (*see* declaration of Jerry Miller, p. 25; declaration of Linsey Tyler, p. 38) and "prayers" (*see* declaration of Walter Lee "Butch" Eaton, p. 18; declaration of Rodney Glen Cooper, p. 33), and that these prayers included express reference to the occupiers desired safety of all – including government agents. (*See* declaration of Travis Williams, p. 16; declaration of Walter Lee "Butch" Eaton, p. 18.) These witnesses also report repeatedly witnessing federal government employees at the occupation, (*see* declaration of Duane Shrock, p. 46) along with elected officials, (*see* declaration of Linsey Tyler, p. 38) and other government agents and employees who were allowed to peacefully enter and retrieve property and engage in discussions with the occupiers (*see* declaration of Vicky Davis, pp. 30-31; declaration of Becky Hudson, p. 36; declaration of Duane Shrock, pp. 45-46; declaration of Michael Emory, p. 47).

[9] *See Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992) ("The Color of Title Act is, in effect, an exception to 28 U.S.C. § 2409a(n) (1988). Section 2409a(n) prevents anyone from acquiring an interest in Government property by adverse possession. The Color of Title Act, however, allows long-term possessory claimants to follow a statutory procedure to acquire a land patent from the Government. 43 U.S.C. § 1068. […] A claimant cannot otherwise obtain an interest in Government property by long-term possession. 28 U.S.C. § 2409a(n).").

is a distortion and an unfair exclusive of the true intentions behind these acts of Ammon and Ryan Bundy, and why the protest took the unique form that it did. The law supports and requires the very conduct often at the center of this controversy, when adverse possession is at issue.

> No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by intent on the part of the occupant to make it so. There must be an intention to claim the property as one's own to the exclusion of all others. But, the doctrine of adverse possession itself is a harsh one, taking real estate from a record owner without express consent or compensation. [Thus,] [b]efore taking such a severe step, the law reasonably requires that the parties' intentions be very clear.

NAC Tex Hotel Co. v. Greak, No. 12-14-00260-CV, 2015 WL 7019738, at *3 (Tex. App. Nov. 12, 2015).

Here, the government has failed to acknowledge that law enforcement was present and invited to the very meeting where Mr. Bundy's proposed occupation and disseisin of the Refuge land and property was presented to the vanguard group of protestors. The government has failed to acknowledge that the alleged "take-over" of the refuge was openly discussed and contemplated based upon the express statutory and common law principles ubiquitous to adverse possession claims, with an understanding that no violence or threats of physical force would be necessary or tolerated. The evidence shows that local law enforcement were fully informed, not alarmed or resistant to the plan, and even contacted local property owners in the area of the Refuge, just to let them know what was going on.[10] Thus, the "circumstances" surrounding the alleged offense(s) favor release.

(2) The Weight of the Evidence Against the Defendant.

This case is not about the weight of the evidence generally. Both Defendants admit that

[10] See e.g. Narrows RV Park owner's video published to YouTube.com discussing the call she received from local law enforcement informing her, in advance, as to the adverse possession claim protesters had announced they were seeking to establish. See https://www.youtube.com/watch?v=2jmfpuiMYHA .

they were part of the occupation of the Refuge. Further, they acknowledge their roles in setting up, organizing and leading the attempt to establish a statutory adverse possession claim. The issue becomes whether those actions in pursuit of their constitutional and statutory rights can simultaneously be criminal. Thus, the majority of evidence that will be in dispute surrounds the intentions of the defendants engaged in a deeply important and passionate political dispute. Thus, since this is the least important factor, and the factor still surrounds the claimed good faith exercise of statutory and constitutional rights – it weighs in favor of release.

(3) The Evidence of Defendant's Character, Physical Condition, Mental Condition, Family and Community Ties, Past Conduct, and History.

Regarding Ammon Bundy, the government has presented no evidence mitigating any of these factors, and the Court apparently by mistake referenced a criminal history. There is none. Ammon Bundy is a well-known and respected family man, who has had no trouble with the law, has been activity engaged with his church and his community for years, and is an active, attentive and involved father (of six children) and a businessman with an unquestioned reputation. His ties to both his Idaho community and generally to his family and the Rocky Mountain West where he has graduated high-school, attended college, engaged in civic affairs and raised his family is more than sufficient under the requirements of the Bail Reform Act. He has no history of drug or alcohol use, and has no history of ever being involved in unlawful violence. The only allegations on this point have to do with Mr. Bundy's prior defense of his family's ranch in 2014, where he has been shown on television interviews repeatedly informing people involved in political protest not to engage in violence, and in 2014 not to bring firearms to the conflict. In the Oregon protest of 2016, Mr. Bundy never carried a personal firearm, and consistently advocated for civic involvement, speech, and responsible protest – while boldly engaging in a principle protest based upon adverse possession. Mr. Bundy's personal

declaration is attached hereto, in further support of this motion for release.

Regarding Ryan Bundy, the only substantial difference between he and his brother, is that the government has made exaggerated reference to a minor list of aging misdemeanors, and a pending failure to appear in Arizona which is the result of a lack of coordinated communication that can be immediately resolved by Ryan upon his release without any significant consequence. Ryan is also an active and attendant husband and father of seven children, a businessman and principled neighbor and active member of his community and church, with strong family and community ties and a well-known reputation as a man of his word, and a man of principle. Like his brother, his only significant conflict with the government has been in two incidents of political protest. But, regarding his willingness to follow the Court's release conditions and orders, and his respect for the law – it must be recognized that on January 26, during the arrest and shooting death of his friend and colleague, LaVoy Finicum, Mr. Ryan Bundy was in the white pickup truck, was shot at by the government, was actually shot in the shoulder himself, and witnessed the shooting death of Mr. Finicum. The government has stated publicly that in the white pickup, Mr. Ryan Bundy was within arms reach of several firearms and a significant amount of ammunition. Nevertheless, and despite all of that, Mr. Bundy never once threatened the arresting officers, exited the vehicle at their command with his hands up, and submitted to arrest and now imprisonment for the last six months. If there is any circumstance that would test a person's desire or character related to a risk of flight or violence, Ryan Bundy's arrest must be on the highest end of the scale of intensity and through it and his conduct in that circumstance – Mr. Ryan Bundy, outstanding among all this Court's likely future defendants seeking release – has proven that he is a man of moral character and integrity and respect for the law. His behavior on that day, as he headed to meet a local county Sherriff at a public meeting, in the

most extreme circumstances, shows that he presents no serious risk of flight or danger.

(4) The nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.

The only danger hinted at by the government for either of these defendants is the suggestion that the activities alleged in federal indictments, pertaining to Nevada in 2014 and in Oregon in 2016, suggest that they might engage in further "dangerous" activities and protests. But the record of these men shows otherwise. This is the first time they have been held to answer for serious criminal charges, and all evidence indicates that they take these charges and this controversy seriously, that they respect this Court and the law and that they have a strong desire to defend themselves and vindicate their principles through legal process. And, that is the point. Given their presumption of innocence, and their overt and stated intention of presenting an innocence defense to the pending charges, the court cannot rely solely on the allegations in the indictments to conclude "serious" danger. Instead, it must find that by "clear and convincing evidence" there are no conditions of release that would reasonably assure that this risk is mitigated. *See United States v. Karper*, 847 F. Supp. 2d 350, 354 (N.D.N.Y. 2011) ("When a court determines that a release on recognizance will not assure a defendant's appearance or ameliorate any danger, it may release the accused, nonetheless, on the "least restrictive" condition or combination of conditions."). And, even on this point, potential dangerousness by itself, is not a sufficient legal basis to deny release. Alleged dangerousness or the theoretical "threat" of danger, by itself, is not sufficient to justify detention. *United States v. Byrd*, 969 F.2d 106, 109-10 (5th Cir. 1992) ("[W]e find ourselves in agreement with the First and Third Circuits: a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention."); *Twine*, 344 F.3d at 987 ("We are not persuaded that the Bail Reform Act authorizes pretrial detention without bail based solely on a finding of dangerousness. This

interpretation of the Act would render meaningless 18 U.S.C. § 3142(f)(1) and (2). Our interpretation is in accord with our sister circuits who have ruled on this issue. *See United States v. Byrd*, 969 F.2d 106 (5th Cir. 1992); *United States v. Ploof*, 851 F.2d 7 (1st Cir. 1988); *United States v. Himler*, 797 F.2d 156 (3d Cir. 1986).").

Finally, the allegations in the indictment are not valid grounds to determine future dangerousness. As the First Circuit has explained, "[t]he seriousness of the crime…may […] distract [] the magistrate's attention from the priorities established by Congress by the Bail Reform Act. Until a defendant has been convicted, the nature of the offense, as well as the evidence of guilt, is to be considered only in terms of the likelihood of his making himself unavailable for trial." *United States v. Edson*, 487 F.2d 370, 372 (1st Cir. 1973)).

CONCLUSION

Section 3142 "does not seek ironclad guarantees, and the requirement that the conditions of release "reasonably assure" a defendant's appearance cannot be read to require guarantees." *United States v. Portes*, 786 F.2d 758, 764 n. 7 (7th Cir.1985); *United States v. Fortna*, 769 F.2d 243, 250 (5th Cir.1985); *United States v. Orta*, 760 F.2d 887, 890–92 (8th Cir.1985). *See also United States v. Tortora*, 922 F.2d 880, 884 (1st Cir.1990) (even where the issue is the safety of the community, Congress did not require guarantees in enacting the Bail Reform Act). The presumption must be in favor of release, and where there is no valid basis for claiming a "crime of violence" and the circumstances of the alleged offense are based upon a good faith effort by defendants engaged in a political protest – to perfect their statutory and Constitutional rights, release is the principled and just course.

As both Defendants have presented to this Court, their six months of pretrial incarceration has been under severe conditions, and despite the accommodations made by the

detention facility and the Court, the conditions have still been extreme and have prejudiced their ability to be meaningfully engaged in their defense, particularly when the bulk of discovery provided by the government includes *gigabytes* of video and audio media that would take years for the defendants to review under present circumstances. Add to this, the dual nature of the prosecution in two separate federal jurisdictions and the restrictions placed upon their ability to communicate among themselves and with their attorneys – let alone the increased stress in trying to maintain their families and their means of temporal support - it is plain that the pretrial incarceration here has worked a severe and unfair toll on these defendants. The Bail Reform Act is designed to present this very thing, and the Court should immediately order the release of Ammon Bundy and Ryan Bundy through to the full resolution of this case.

DATED: July 15, 2016

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

/s/ Ryan Bundy
Ryan Bundy, Pro Se Defendant
Signed Electronically by Permission