ELLEN F. ROSENBLUM
Attorney General
MARC ABRAMS #890149
Assistant Attorney-in-Charge
Department of Justice
100 SW Market Street
Portland, OR 97201
Telephone: (971) 673-1880
Fax: (971) 673-5000
Email: marc.abrams@doj.state.or.us

Attorneys for State of Oregon

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. RYAN BUNDY, Defendant.	Case No. 3:16-cr-00051-BR **REPLY MEMORANDUM IN SUPPORT OF MOTION TO QUASH**

INTRODUCTION

Mr. Bundy has failed to make a showing that Governor Brown has essential knowledge. Mr. Bundy has failed to show that the information is not otherwise available. Mr. Bundy misapprehends what it means for his subpoena to constitute an undue burden. For these reasons, the subpoena should fail. Nor should Mr. Bundy's Sixth Amendment argument that he needs the Governor to present his defense be given credence.

The subpoena of the Governor of Oregon should be quashed.

ARGUMENT

I. Legal Standard/Knowledge Relevant to the Defense

Mr. Bundy asserts, without foundation, that Governor Brown was "actively managing the law enforcement response to the occupation * * *." Response at 1. He provides no affidavit, no declaration, and no documentary evidence. His entire support for that conclusion is to quote from a single Oregon Public Broadcasting news article summarizing the Governor's comments. Those comments, contrary to Mr. Bundy's claim, show no intent, no action that was "management" of federal law enforcement, over whom the Governor has no authority. It demonstrates only her concern — shared doubtless by an overwhelming majority of Oregonians — that the occupation should come to a close, and her further intent to seek reimbursement for costs on behalf of the State. All this article relates is the Governor's expression of opinion. There is no evidence upon which to base a conclusion that the Governor controlled the federal forces. There is no required showing of "extraordinary circumstances." *United States v. Morgan*, 313 U.S. 409 (1941).

Mr. Bundy, moreover, is silent as to any efforts to obtain the purported information from lesser sources. This is because he made no such efforts. That failure, independently, is sufficient to quash the subpoena. *Buono v. City of Newark*, 249 F.R.D. 469, 471 n.2 (D.N.J. 2008); *In re U.S. (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999); *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007).

Mr. Bundy's failures to make an evidentiary showing or to make efforts to obtain the information from lower-ranking sources are fatal to his efforts, and are not offset by his inference that "the official acted with improper motive or acted outside the scope of [her] official capacity." Response at 2. Although Mr. Bundy cites cases for that proposition, thereby inferring it is an issue in the instant situation, he does not provide a single basis for this Court to determine that Governor Brown had improper motives. He provides nothing to bolster any claim that she acted outside the scope of her official capacity. It is most certainly not beyond the scope of the

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Governor's authority to make statements to the media or to hold press conferences. This is a straw man.[1]

Mr. Bundy also does not respond to Governor Brown's assertion of executive privilege. Oregon recognizes executive privilege. *Shearer v. Lambert*, 274 Or. 449, 454 (1976). This is an independent basis for quashing the subpoena that Mr. Bundy, by not making any response, concedes.

II./III. Undue Burden/Disruption

Mr. Bundy makes virtually no response to Governor Brown's discussion of how subpoenas such as his cause a burden and a disruption of State functions. Indeed, his sole response is that it would "only" be two hours in transit and two further hours in testimony. In other words, he merely wants a half day of the Governor's time.

In making this argument, Mr. Bundy misapprehends the case law on the matter. By his approach, arguably no single subpoena would bring about an undue burden on the State by having the Governor otherwise occupied. But, of course, it's not merely one subpoena. The governor is named in hundreds of cases every year, subpoenaed in many more. So it is the *cumulative* impact of all those requests for testimony that gives rise to the protections of the *Morgan* doctrine and of executive privilege.

Nor does Mr. Bundy provide any basis, any case support, for the idea that a half a day of the Governor's time is of no significance to the operation of the State. As the Court might imagine, even twenty such "minor" requests per year could create a significant cumulative burden. Mr. Bundy offers no formula for determining his is the most critical such demand. And, given the lack of basis and the lack of exhaustion of lesser resources, it is clearly not. It is Mr. Bundy's burden, even on the Governor's motion, to demonstrate a basis for commanding

[1] Another straw man is Mr. Bundy's assertion that the Governor has not objected to the production of documentary evidence. This is a misreading of the motion to quash. The Governor has moved to quash the subpoena in its entirety, not merely the testimonial segment.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

testimony. *Warren v. State of Washington*, 2012 WL 2190788, *1 (W.D. Wash. June 14, 2012). No such basis has been fairly presented.

IV. The subpoena contains an error preventing compliance.

Whether or not the Governor's attorney will assist in setting a proper time for any subsequent subpoena, setting the return of the subpoena on a Saturday is a defect and an additional basis for quashing.

V. The subpoena is not essential to Mr. Bundy's right to a defense.

Mr. Bundy makes an assertion that he has the right to make his case through the compelled testimony of Governor Brown, alleging that it is essential to his "opportunity to be heard." Response at 4. In doing so he conflates any right he may have to be heard with an assertion that he can require the speech of others. He provides no case support for this construct.

Much of Mr. Bundy's Sixth Amendment argument is a series of speculative assertions about the centrality of Governor Brown's role in the response to his occupation of the wildlife refuge. With nothing beyond the aforementioned Oregon Public Broadcasting website article, he claims law enforcement was "under enormous pressure by Governor Brown." Response at 5. How the one comment relayed in that article created a change in the nature of the enforcement actions — actions not governed by the State of Oregon — goes unexplained. He implies that the Governor's "pressure" resulted in the "ill-fated roadblock." How, again, is not set forth. He suggests that the Governor "express[ing] anger" publicly is enough to change the shape of the law enforcement-occupier interaction. He does not offer a compelling basis for that conclusion, or, really, any basis. He asserts without foundation that her "decree" "reverberated through government circles" and "unleashed thousands of agents." There is no citation; this is merely speculative fiction. The key issues in dispute here are not those involving the Governor, as they must be to compel her testimony.

The formulation of need itself shows why the Governor's attendance is not needed: the impact of such "decrees" and "reverberations" on others, perforce, is a story best told by those

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

other persons. How she allegedly spoke out is a matter of public record. This is a classic model of the circumstances in which the *Morgan* doctrine and executive privilege apply.

Plaintiff has not demonstrated any 6th Amendment right to compel the Governor's attendance.

CONCLUSION

For the foregoing reasons, Ryan Bundy's subpoena of the Governor should be quashed in its entirety.

DATED August 23, 2016.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Marc Abrams
MARC ABRAMS #890149
Assistant Attorney-in-Charge
Trial Attorney
Tel (971) 673-1880/Fax (971) 673-5000
marc.abrams@doj.state.or.us
Of Attorneys for State of Oregon

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000