**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

CLIVEN BUNDY

Plaintiff,
v.

THE HONORABLE JEFF B. SESSIONS, et al

Defendants.

**Case No: 17-cv-2429**

**PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT FOR EMERGENCY WRIT OF MANDAMUS AND RESPONSE TO OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff Cliven Bundy ("Mr. Bundy") hereby submits the following in opposition to Defendants the Honorable Jeff B. Sessions ("Mr. Sessions") in his official capacity as Attorney General of the United States of America on behalf of the United States Department of Justice ("USDOJ"), the Honorable Robin C. Ashton ("Ms. Ashton") in her official capacity as Director of the Office of Professional Responsibility on behalf of the Office of Professional Responsibility of the United States Department of Justice ("OPR"), the Honorable Michael E. Horowitz ("Mr. Horowitz") in his official capacity as the Inspector General of the Department of Justice on behalf of the Office of the Inspector General of the United States Department of Justice ("IG"), and the Honorable Christopher A. Wray ("Mr. Wray") in his official capacity as Director of the Federal Bureau of Investigation on behalf of the Federal Bureau of Investigation ("FBI") (collectively "Defendants") Motion to Dismiss, and in reply to Defendants' Opposition to Mr. Bundy's Motion for Temporary Restraining Order.

Dated: December 14, 2017

Respectfully submitted,

*/s/ Larry Klayman*

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## MEMORANDUM OF LAW AND OPPOSITION TO MOTION TO DISMISS

## I. INTRODUCTION

Defendants allege that a writ of mandamus is an "extraordinary remedy, to be reserved for extraordinary situations." ECF No. 13-1 at 9. Indeed, these are clearly extraordinary circumstances. Mr. Bundy is facing the possibility of life imprisonment in his criminal prosecution, if convicted. As it stands now, Mr. Bundy faces this possibility of life imprisonment despite the fact that there are substantiated allegations that there has been "unethical, bad faith and gross prosecutorial misconduct perpetrated by the USDOJ, the U.S. Attorney for the District of Nevada, and the FBI, which is now confirmed to include the hiding, burying, and/or destroying of potentially exculpatory evidence."[1] Comp. ¶ 22. At a minimum, a thorough ethics investigation into these substantiated allegations is clearly necessary, even if only to avoid the possibility of wrongfully convicting and imprisoning a man for the rest of his life. Rational minds would have presumed that the only response to these substantiated allegations would be for Defendants, as the heads of the culpable agencies and offices, to *sua sponte* conduct a thorough ethics investigation and mete out appropriate discipline. Yet, the opposite has been true. In fact, it is now clear that this is not simply a case where Defendants have simply not had the time or resources to conduct the requested investigation or were unaware of the substantiated allegations set forth in Mr. Bundy's Complaint. Defendants have "doubled-down" on their positions and are now actively refusing to do so – as evidenced by counsel for Mr. Bundy's settlement attempt at the immediate outset of this case and Defendants' swift rejection. Exhibit 1.

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[1] Indeed, this type of behavior is exactly why the judicial system and the government are suffering from a "crisis of confidence" from the American people, as set forth *infra* section III(C)(4). It is incumbent upon this honorable Court to uphold the interests and fundamental fairness and justice and to begin to restore the faith of the American people in the justice system by holding unethical perpetrators of gross prosecutorial misconduct and bad faith accountable for their actions.

This lawsuit would not have been necessary if Defendants had simply done their jobs, pursuant to their clear and unequivocal duties and oaths of office. Unfortunately, however, it is now evident that Defendants simply refuse to do so, and will continue to refuse, without the requested judicial intervention. Mr. Bundy's Emergency Complaint for Writ of Mandamus simply asks that this Court order Defendants, as the heads of their respective agencies, to conduct an ethics investigation and mete out appropriate disciplinary action for the unethical, bad-faith prosecutorial and other misconduct occurring within <u>their own agencies</u>. Indeed, this matter again could have been settled and disposed of by Defendants simply agreeing to do their jobs and fulfilling their duties and oaths of office, yet Defendants have instead decided to waste this Court's and taxpayer resources to essentially ask this Court to allow them to ignore, if not condone, the unethical and gross prosecutorial misconduct and bad faith occurring within their own agencies. The fact that Defendants have pushed back so hard against such a simple request, including misleading *ad hominem* attacks on Plaintiff's counsel, Larry Klayman ("Mr. Klayman"), raises the strong implication that they have something to hide, which falls in line with the instances of unethical, bad faith and gross prosecutorial misconduct set forth in detail in the Complaint.[2] Lastly, there have been new, groundbreaking revelations of outrageous unethical prosecutorial misconduct use and obstruction of justice in the U.S. District Court for the District of Nevada in Mr. Bundy's Prosecution that is not yet available to the public. Mr. Klayman hopes to be able to properly discuss this new evidence at oral argument, but in any event, reserves the right to supplement this brief with this new evidence as it becomes available.

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[2] It would appear that the U.S. Attorney's Office for the District of Columbia is trying to cover for their counterparts in Nevada, as it is unusual for the U.S. Attorney's 0ffice to be representing Defendants and not the the Federal Programs Branch of the U.S. Department of Justice in this type of action.. This also strongly implies that Defendants have something to hide.

## II. LEGAL STANDARD

Defendants move to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In evaluating a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), the Court must "treat the complaint's factual allegations as true and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc*., 216 F.3d 1111, 1113 (D.C. Cir. 2000) quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979). In any case in federal court, a plaintiff need only establish jurisdiction only by a preponderance of the evidence. *See* Fed. R. Civ. P. 12(b)(1); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). When evaluating a motion to dismiss under Rule 12(b)(1), the court "may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); *see also Jerome Stevens Pharm., Inc., v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

Federal Rule of Civil Procedure 8(a)(2) merely requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To defeat a motion to dismiss under Rule 12(b)(6), a claim must contain "enough factual matter (taken as true) to suggest that an agreement was made," explaining that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading state; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The *Twombly* Court also explained, more generally, that ". . . a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," yet "must be enough to raise a right to relief above the speculative level" and give the defendant fair notice of what the

claim is and the grounds upon which it rests. *Id*. at 555. In other words, Plaintiffs here need only allege "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] the[] claims[] across the line from conceivable to plausible." *Id*. at 570.

Subsequently, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the U.S. Supreme Court elaborated. There, the Court held that a pretrial detainee alleging various unconstitutional actions in connection with his confinement failed to plead sufficient facts to state a claim of unlawful discrimination. The Court stated that the claim for relief must only be "plausible on its face," *i.e.*, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949. In this regard, determining whether a complaint states a plausible claim for relief is necessarily "a context-specific task." *Id*. at 1950. Therefore, if a complaint alleges enough facts to state a claim for relief that is plausible on its face, such as here, a complaint <u>may not be dismissed</u> for failing to allege additional facts that the plaintiff would need to prevail at trial. *Twombly*, 550 U.S. at 570; *see also Erickson v. Pardus*, 551 U.S. 89, 93 (plaintiff need not allege specific facts, the facts alleged must be accepted as true, and the facts need only give defendant "fair notice of what the *** claim is and the grounds upon which it rests" (quoting *Twombly*, 550 U.S. at 555).

Where the requirements of Rule 8(a) are satisfied, "claims lacking merit may be dealt with through summary judgment." *Swierkiewicz v. Sorema N.A*., 534 U.S. 506, 514 (2002). In this regard, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at. 556. Indeed, "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Cotrell, Ltd. V. Biotrol Int'l, Inc*., 191 F.3d 1248, 1251 (10th Cir. 1999). Guided by this presumption, the United States Court of

Appeals for the District of Columbia Circuit ("D.C. Circuit") has held that the long-standing fundamentals of notice pleading remain intact, and the Court must deny a motion to dismiss for failure to state a claim when the complaint contains "a short plain statement of the claim showing that the pleader is entitled to relief." *Aktieselskabet v. Fame Jeans, Inc*., 525 F.3d 8, 15, 17 (D.C. Cir. 2008) (quoting Fed. R. Civ. P. 8(a)(2)) (rejecting that *Twombly* created a heightened pleading standard because "*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim").

## III. LEGAL ANALYSIS

### A. The Court Has Subject Matter Jurisdiction Over This Matter

Defendants intentionally miscast Mr. Bundy's Emergency Complaint for Writ of Mandamus as seeking relief that falls under the umbrella of prosecutorial discretion. That is not the case. It is abundantly clear from the Complaint that an entirely distinct form of relief is actually being sought – and one that this Court clearly has subject matter jurisdiction over.

Crucially, Mr. Bundy is fundamentally not asking Defendants to engage in any type of prosecution, which renders any comparison to *Heckler v. Chaney*, 470 U.S. 821 (1985) moot. In *Heckler*, for instance, the Supreme Court held that a decision by the Food and Drug Administration to exercise enforcement authority over the use of certain drugs was not subject to a complaint in the nature of mandamus. This is factually inapposite to the facts here. Mr. Bundy is not asking Defendants to exercise enforcement authority over third parties, but merely to investigate the unethical gross prosecutorial misconduct occurring within their own agencies.[3] It can hardly be rationally argued that these Defendants have any sort of discretion over whether or

[3] By way of example, a factually analogous situation to *Heckler* would be if Mr. Bundy was requesting enforcement and prosecution of someone outside of the agencies involved. This is not the case here.

not to investigate whether their own employees – over whom they have the clear duty to supervise – are committing acts of gross misconduct. In essence, this would mean that Defendants are arguing that they have free reign to commit unethical gross prosecutorial misconduct without any repercussion of appropriate discipline. This is the exact type of arbitrary and capricious abuse of authority and thus discretion that an action in the nature of mandamus under 28 U.S.C. § 1361 should and must be allowed to redress.

### 1. Defendants Have a Clear Legal Duty to Investigate the Gross Misconduct Set Forth in the Complaint

Defendants somehow assert that they are under no affirmative duty to investigate the unethical and gross prosecutorial misconduct occurring within their own agencies and offices, despite the fact that the duty is explicitly set forth and thus unequivocally and proudly admitted to on their public websites. For instance, the OPR's website states:

> The objective of OPR is to ensure that Department of Justice attorneys continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency.[4]

Furthermore, it is expressly stated that OPR, "reporting directly to the Attorney General, **is responsible for investigating allegations of misconduct involving Department (of Justice) attorneys…as well as allegations of misconduct of law enforcement personnel**...."[5] OPR and the OIG work closely together, as evidenced by the fact that OPR's website delineates its relationship with the OIG, stating that, "[s]ome allegations of misconduct by Department (of Justice) attorneys do not fall within the jurisdiction of OPR and are investigated by [OIG]."[6] In the same vein, the mission of the OIG, as set forth and proudly admitted to on its website is "to **detect and deter** waste, fraud, **abuse, and misconduct in DOJ programs and personnel**, and

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[4] *Office of Professional Responsibility*, USDOJ, available at: https://www.justice.gov/opr.
[5] *Id*. (emphasis added)
[6] *Id*.

to promote economy and efficiency in those programs."[7] The USDOJ, of which OPR and OIG are a part, has an overarching mission statement and thus duty that mandates its employees to "ensure fair and impartial administration of justice for all Americans."[8] Thus, it is abundantly clear that the OIG and the OPR, working directly with the AG, have a clear and unequivocal duty, as set forth and proudly admitted to explicitly on their own websites, to investigate and discipline the exact type of unethical, gross prosecutorial misconduct and bad faith set forth in Mr. Bundy's Complaint.

The unethical gross prosecutorial misconduct and bad faith set forth in Mr. Bundy's Complaint clearly warrants thorough investigation and discipline, as it violates the oath of office as well as the rules of ethics and professional responsibility. Under 5 U.S.C. § 3331, all federal employees elected or appointed to an office of honor or profit must swear that they will "support and defend the Constitution of the United States against all enemies, foreign and domestic; that [they] will bear true faith and allegiance to the same…." The unethical and gross prosecutorial misconduct and bad faith set forth in Mr. Bundy's Complaint runs afoul of the Constitution, in contravention of the administered oath of 5 U.S.C. § 3331 that federal employees have taken.

Additionally, the Model Rules of Professional Conduct Rule 3.3(a) clearly mandate that attorneys shall not knowingly, "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer" or "offer evidence that the lawyer knows to be false." Furthermore:

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. *Id*. at section (b)

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[7] *Meet the Inspector General*, USDOJ, available at: https://oig.justice.gov/about/meet-ig.htm.
[8] *About DOJ*, USDOJ, available at: https://www.justice.gov/about.

A lawyer shall not "unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." *Id*. at 3.4(a) Clearly, the unethical hiding, burying, and destruction of potentially exculpatory evidence falls directly within the scope of conduct forbidden by the Model Rules of Professional Conduct, with which USDOJ attorneys must comply.[9]

**B. <u>Mr. Bundy Has Properly Stated a Claim for Writ of Mandamus</u>**

An action in the nature of mandamus is proper when the plaintiff has a clear right to relief, the defendant has a clear duty to act, and there is no adequate remedy available. *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002). As shown below, each of these elements are met below, and there are clear and compelling reasons why such relief is necessary in the interests of fundamental fairness and substantial justice.

**1. Plaintiff Has No Alternative Remedies**

Much of Defendants argument centers around the false assertion that Mr. Bundy has an alternative remedy in the form of the U.S. District Court for the District of Nevada, which is the court in which the *Bundy* Prosecution is occurring. However, this completely misses the mark. Mr. Bundy's Emergency Complaint for Writ of Mandamus is not asking this Court to directly remedy the unethical, gross prosecutorial misconduct and bad faith occurring in the District of Nevada. That relief would, theoretically, be available in the District of Nevada. However, Mr. Bundy's Complaint asks this Court to order an ethics investigation by Defendants into the unethical bad faith and gross prosecutorial misconduct, pursuant to their independent duty to do so. This is separate and apart and distinct from the authority of the U.S. District Court for the

[9] The District of Columbia Rules of Professional Conduct mirror the ABA's Model Rules of Professional Conduct, and set forth the same obligations and duties.

District of Nevada to, for instance, sanction the U.S. Attorney for the District of Nevada for its gross prosecutorial misconduct.[10] In fact, the relief sought is more closely related to a bar

[10] As a practical matter, relief is highly unlikely in any event to result from the trial judge in the U.S. District Court for the District of Nevada, the Hon. Gloria Navarro, who has been shown to be a highly partisan judge who has bent over backwards for the prosecutors. As observed by the neutral media mainstream Las Vegas Review Journal:

> **Government prosecutors have a friend in U.S. District Judge Gloria Navarro.**
>
> The judge is presiding over the retrial of four defendants charged with various crimes stemming from their participation in the 2014 Bunkerville standoff near Cliven Bundy's ranch. The first trial ended in April with the jury deadlocked on all counts involving the four men.
> On Monday, the judge eviscerated the defense's legal strategy, putting off limits a whole host of issues that might make it more difficult for the government to win convictions. The defendants will be forbidden from arguing that they were exercising their constitutional rights to peaceably assemble and bear arms. They may not highlight the actions of BLM agents in the days leading up to the incident or mention federal gaffes such as the ill-advised "First Amendment" zone created for protesters.
> And if imposing these restrictions on the defense wasn't enough, Judge Navarro ruled that prosecutors may introduce testimony about the four accused men and their associations with so-called militia groups.
> Judge Navarro made a similar ruling before the first trial. She is going to extraordinary lengths to address prosecution fears of "jury nullification," in which jurors refuse to convict based on a belief that the law or potential punishment is unjust. The practice dates to 1734, when a jury ignored statutes and acquitted publisher John Peter Zenger on charges of criticizing New York's new colonial governor, accepting arguments from Mr. Zenger's attorney, Alexander Hamilton, that the newspaper had simply published the truth.
> Federal prosecutors have encountered unexpected difficulty — both here and in Oregon — in securing convictions against those protesting federal control of Western public lands. But the issue here isn't whether one believes the Bundy defendants are courageous freedom fighters or zealous lunatics. Rather it's whether a judge should usurp the rights of the defendants to have a jury of their peers consider their arguments alongside the law, evidence and other testimony.
> Judge Navarro's sweeping order reflects a deep mistrust of the American jury system.

*Editorial: Judge bans defense arguments in Bundy retrial*, Las Vegas Review Journal, July 13, 2017, available at: https://www.reviewjournal.com/opinion/editorials/editorial-judge-bans-defense-arguments-in-bundy-retrial/#!. (emphasis added).

complaint with a state's bar disciplinary counsel, given that the requested investigation centers around attorney misconduct. Indeed, there is existing precedent of the court ordering an investigation into attorney misconduct, as the Honorable Paul F. Harris Jr. ("Judge Harris") of Maryland recently ordered the State Bar of Maryland ("Maryland Bar") to investigate former Secretary of State Hillary Clinton's lawyers of destroying evidence, which is akin the the unethical conduct at issue here (the "Clinton Investigation Case").[11] In the Clinton Investigation Case, public interest attorney Ty Clevenger filed a complaint with the Maryland Bar against Ms. Clinton's attorneys – David Kendall, Cheryl Mills, and Heather Samuelson - for destruction of evidence on behalf of Ms. Clinton. *See Clevenger v. Attorney Grievance Commission et al*, c-02-cv016-003620 (Md. Cir. Ct.). The Maryland Bar Counsel refused to investigate, labelling Mr. Clevenger's complaint as "frivolous."[12] Mr. Clevenger then appealed to Judge Harris, who ordered the Maryland Bar to conduct the requested investigation. Exhibit 2. Judge Harris found that "there exists both a lack of an available procedure for obtaining review *and* an allegation that the denial of Petitioner's request to Bar Counsel and the Attorney Grievance Commission to open an investigation with illegitimate reasons is illegal, arbitrary, capricious, or unreasonable. *See* Exhibit 2.

Similarly, here, Mr. Bundy is asking Defendants, consistent with their managed duties, including OPR and IG – which essentially serves as the "state bar" for DOJ attorneys in that it

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[11] Stephan Dinan, *Judge orders Maryland bar to investigate lawyers who helped Clinton delete emails*, Washington Times, Sept. 11, 2017, available at: https://www.washingtontimes.com/news/2017/sep/11/judge-order-clinton-lawyers-face-bar-investigation/.

[12] Chase Cook, *Anne Arundel judge orders investigation into three of Hillary Clinton's attorneys*, Capital Gazette, Sept. 11, 2017, available at: http://www.capitalgazette.com/news/government/ac-cn-clinton-emails-20170912-story.html.

undeniably wields investigative authority – to conduct a similar investigation also involving the destruction of evidence. Thus, this Court, like Judge Harris, must also order this investigation in the interests of justice and fundamental fairness, and of course to further the rules of ethics that government Justice Department attorneys and their FBI agents must adhere to.

In addition, Mr. Bundy has earnestly attempted to resolve this matter through alternative channels prior to filing this instant lawsuit, but to no avail. Mr. Bundy previously sent a request for expedited investigation to both Defendant Ashton and Defendant Horowitz for the same relief sought in this instant Complaint. *See* Comp. Ex. A. This request was ignored by Defendants Ashton, Horowitz, and Sessions. Incredibly, they would not even acknowledge receipt of Mr. Bundy's Complaint, refusing to even communicate with Plaintiff. As such, Mr. Bundy has no alternative recourse to obtain the relief sought in the Complaint. Again, Defendants would not even confirm to Plaintiff that it had received the complaint, a total derogation of their duties under their "raison d'etre" but also an affront to Mr. Bundy and the other taxpaying public at large, as set forth in *supra* section III(A)(1).

#### a. Defendants' *Ad Hominem* Attacks Against Mr. Klayman Only Further Demonstrate that No Alternative Relief is Available

Defendants tactically resort to launching *ad hominem* attacks on Mr. Klayman, counsel for Mr. Bundy in this matter, in an apparent attempt to not just smear Plaintiff's counsel, but to somehow try to show that Mr. Bundy has alternative channels of relief available. Defendants point to Mr. Klayman's ongoing attempts to be admitted *pro hac vice* onto Mr. Bundy's criminal defense team. Indeed, this only demonstrates the futility of seeking any type of redress from the U.S. District Court for the District of Nevada and the Honorable Gloria Navarro ("Judge Navarro"), as Judge Navarro has already chosen to deny Mr. Bundy his constitutional rights under the Sixth Amendment to counsel of choice, despite the strong and forceful dissent of the

Honorable Ronald M. Gould ("Judge Gould") of the U.S. Court of Appeals for the Ninth Circuit advocating for Mr. Klayman's admission and finding that Mr. Klayman had not done anything wrong and been truthful:

> I agree with Klayman that he was not obligated to re-litigate the D.C. proceeding before the district court and that he did not have to provide the district court with the entire record from D.C. And if his disclosures were selective, still he is an advocate, an advocate representing defendant Cliven Bundy, and after submitting a compliant response to the questions in the pro hac vice application, he had no greater duty to disclose any possible blemish on his career or reputation beyond responding to the district court's further direct requests.

*In re Bundy*, 840 F.3d 1034, 1055 (9th Cir.) (emphasis added). Judge Gould even recognized that sometimes aggressive lawyering is necessary in matters such as Mr. Bundy's criminal prosecution to ensure that Mr. Bundy's rights are protected:

> It may be that Klayman is not an attorney whom all district court judges would favor making an appearance in their courtroom. It seems he has been, and may continue to be, a thorn in the side. Still, concerns about trial judge irritation pale in comparison to a criminal defendant's need for robust defense. In providing a full and fair defense to every criminal defendant, there will by necessity be occasions when the difficult nature of the case evokes sharply confrontational lawyering. In tough cases with skilled prosecutors, aggressive positions by defense lawyers are sometimes an unavoidable part of strong advocacy, and contribute to making the proceeding an ultimately fair one for the defendant. *Id*. at 1055-56.

Similarly, Defendants' *ad hominem* attacks regarding the District of Columbia Bar Proceeding against Mr. Klayman are inaccurate, as there has been no final decision against him, only a recommendation by the hearing committee subject to appeal, and no finding of wrongdoing. Indeed, Mr. Klayman, a former Justice Department prosecutor himself in the Antitrust Division, and later the founder of both Judicial Watch and Freedom Watch, has been a continuous member in good standing for approximately 38 years of the District of Columbia Bar, and has never been found by any bar association to have acted inappropriately before any judge. He has been a licensed attorney for 40 years this last December 7, 2017 and never suspended for

even one day over these four decades of the practice of law.

Furthermore, Defendants argue that Mr. Klayman's action before the Honorable Colleen Kollar-Kotelly ("Judge Kotelly") in *Freedom Watch v. Bureau of Land Management*, 1:16-cv-2320 (D.D.C) (the "FOIA Case") serves as an alternative form of relief. Mr. Klayman has had strong differences of opinion with Judge Kotelly due to her biased prior rulings and conduct, and she has again clearly demonstrated her political biases in the FOIA Case. In a Status Report and Proposed Schedule filed by U.S. Attorney Melanie Hendry on behalf of the FBI in the FOIA Case on May 31, 2017, Ms. Hendry estimates that it will take "**at least 500 months to complete its entire production of responsive documents**…." ECF No. 30 at 2. (emphasis added). 500 months is the equivalent of 41 years! However, as Freedom Watch pointed out in its response:

> [T]he documents at issue have already been culled by the defendants in preparation for and use during the on-going prosecutions related to the successful Bundy ranch standoff in Las Vegas federal court. Thus, estimated time needed to complete production is clearly not made in good faith….

ECF No. 31 at 1. Indeed, Ms. Hendry's estimate simply does not "add-up" given the fact that the responsive documents have already necessarily been separated and culled in preparation for and use during the ongoing criminal trial of Mr. Bundy. Yet, Judge Kotelly has "rubber-stamped" the government's absurd assertion that it would take 41 years to produce responsive documentation, while denying Freedom Watch leave to conduct minimal discovery into the clearly and patently inadequate search that has been performed. Thus, if anything, the FOIA Case demonstrates that Mr. Bundy's instant Emergency Complaint for Writ of Mandamus is the only available channel for relief.

**2. Plaintiff is Entitled to Relief and Defendants Have a Clear Duty to Act**

As set forth previously, the crux of Mr. Bundy's claim is simple – Defendants must simply be made to do their jobs, pursuant to their widely-publicized admitted clear-cut duties on

their own public websites. *See supra* section III(A)(1). The instances of unethical and gross prosecutorial misconduct and bad faith set forth in the Complaint are occurring within the confines of the USDOJ and the FBI, and as such the requested investigation does not fall within the scope of "prosecutorial discretion." It is clear that Mr. Bundy is not requesting the enforcement or prosecution of a third party, but merely that Defendants, as the heads of their respective agencies who oversee OPR and the IG, simply conduct an investigation of the unethical gross misconduct occurring internally. There is no discretion here. There is no discretion for an agency director to allow, if not condone, what amounts manifest unethical behavior of its employees which rises to the level of obstruction of justice. There is a clear duty on the part of the Defendants, as the heads of their respective agencies and offices, to have OPR and the IG investigate and, if the unethical conduct is confirmed, remedy through disciplinary action the misconduct of their employees. This duty, which is engrained in the department's mandate to police its own employees and rectify and discipline those who commit any unethical acts, is separate and apart from what the Nevada court might or might not do. Only in this way can the integrity of the Justice Department and FBI be preserved, integrity which is necessary to maintain the public's trust. The public not coincidentally funds the department's operations with taxpayer dollars and thus has a right to demand its honesty and integrity in carrying out the functions given to it under the Constitution and related legislation and regulations.

### C. Injunctive Relief is Necessary

When ruling on a motion for preliminary injunction, a court must consider "whether (1) the plaintiff has a substantial likelihood of success on the merits; (2) the plaintiff would suffer irreparable injury were an injunction not granted; (3) an injunction would substantially injure other interested parties; and (4) the grant of an injunction would further the public

interest." *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3rd 891, 893 (D.D.C. 2010) (internal quotation marks omitted); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). It has long been established that the loss of constitutional freedoms, `for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion))

The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has traditionally applied a 'sliding scale' approach to these four factors, viewing them as a continuum where greater strength in one factor compensates for less in the other: "If the arguments for one factor are particularly strong, in injunction may issue even if the arguments in other areas are rather weak." *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 739, 747 (D.C. Cir. 1995); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3rd 1288, 1291 (D.C. Cir. 2009). In other words, "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644. F.3d 388, 392 (D.C. Cir. 2011).

**1. Mr. Bundy Has Established Substantial Likelihood of Success on the Merits**

*See supra* section III(A)-(B). It is clear that Defendants have a duty to investigate the unethical prosecutorial misconduct of Department of Justice attorneys and law enforcement officials, as admittedly set forth explicitly on their websites. The alleged unethical gross prosecutorial misconduct set forth in Mr. Bundy's Complaint runs afoul of the Constitution, their statutory oath of office, as well as the rules of ethics and ABA Model Rules of Professional Responsibility.

**2. Mr. Bundy Will Suffer Irreparable Injury**

Mr. Bundy faces the possibility of life imprisonment, if convicted in his criminal trial.

This is clear irreparable injury. Without the requested judicial intervention to redress the ethics violations, Mr. Bundy faces the real possibility being sentenced without the benefit of potentially exculpatory evidence, as it has been hidden, destroyed, and/or buried. At this point, only a thorough investigation by Defendants, as the heads of their respective agencies and offices, into the unethical and gross prosecutorial misconduct and bad faith of their employees can prevent Mr. Bundy from suffering the irreparable injury of possible life imprisonment. As importantly, Mr. Bundy and the public at large, who and which depends on the integrity of Justice Department lawyers, will be harmed if they are not investigated and disciplinary remedies are not imposed to ensure that they adhere to the highest of ethical standards. As a young Justice Department lawyer, the undersigned counsel was told on his first day of employment in the Antitrust Davison that he represented not just the government but also the persons or entities which he was opposing in litigation, such as AT&T. Mr. Klayman was a proud member of the trial team that created competition in the telecommunications industry.

### 3. The Requested Injunctive Relief Would Not Prejudice Defendants

It is impossible for Defendants to credibly assert any type of prejudice, as Mr., Bundy is simply asking them to perform their <u>existing</u> duty to investigate the unethical prosecutorial misconduct of Department of Justice attorneys and the department's law enforcement personnel, as per their proudly admitted duties which are clearly set forth on their own website. *See supra* section III(A)(1). In fact, this type of investigation into unethical and gross prosecutorial misconduct is the sole function of the OPR and the IG, working directly with the AG and Director of the FBI. If not to investigate substantiated allegations of hiding and destroying exculpatory evidence, then what function does the OPR and the OIG – and even the AG and FBI Director - have?

**4. The Balance of Interests Weighs Heavily in Favor of Injunctive Relief**

Defendants contend that the balance of harms and the public interest disfavor the granting of injunctive relief because it would interfere with the Executive Branch's power to exercise prosecutorial discretion. Again, as set forth previously, the "prosecutorial discretion" argument is a "red-herring" attempt to miscast Mr. Bundy's claims. There is no "prosecutorial discretion" invoked in enforcing Defendants' clear and existing duties to investigate and discipline the unethical and gross prosecutorial misconduct occurring within their own agencies and offices. There is no overreach into the Executive because the Executive has already clearly and admittedly set forth this existing duty to investigate and discipline upon Defendants.

In that regard, there is an incredibly strong public interest in favor of granting the requested injunctive relief in that the public has a clear interest in ensuring that government employees, including USDOJ attorneys and FBI agents, are conducting themselves honestly, ethically, and within the confines of the Constitution and the law. Defendants cannot possibly contend that this public interest does not exist, nor can they contend that it is not supremely important. It is crucial that the American public have confidence in the justice system and that legal and judicial proceedings have the faith of the people. This confidence and faith appears to be waning on a daily basis, with new events testing and trying the American peoples' belief in the justice system. By way of example, the investigation of Special Counsel Robert Mueller is another "hot-button" issue that has led many to question the integrity of the legal and judicial system. According to The Hill, "[s]ixty-three percent of polled voters believe that the FBI has

been resisting providing information to Congress on the Clinton and Trump investigations."[13] Furthermore "Fifty-four percent say special counsel Robert Mueller has conflicts of interest that prevent him from doing an unbiased job."[14] Even more, The Hill reported that:

> we learned that rogue agent Peter Strzok and his paramour, Lisa Page, both high-ranking members of the Mueller task force, discussed during the campaign how, in case Trump won, that they were developing, along with deputy FBI director Andrew McCabe, what Strzok called an "insurance policy.[15]

And, there have been almost daily illegal leaks of grand jury information and proceedings. These findings clearly indicate "that there is a crisis in public confidence in both the FBI and Mueller," [16] both of whose are under the authority of the Justice Department and its officials. And, just yesterday in widely viewed and studied testimony before the House Judiciary Committee, Deputy Attorney General Rosenstein declined to answer questions about the ethics and alleged prosecutorial misconduct by Special Counsel Robert Mueller and an FBI agent in particular, by testifying under oath that the IG has a duty to investigate and to take remedial disciplinary action if it found any unethical wrongdoing, and that the committee members and the American public should wait to see the the results of this investigation. This is exactly the case here with the requested investigation by Justice's OPR and IG involving unethical and gross prosecutorial misconduct in the Bundy prosecution.

The legal and judicial system faces a similar "crisis in public confidence" should it allow the government to get simply get away unscathed with the malicious destruction and burying of potentially exculpatory evidence in Mr. Bundy's criminal prosecution. It is clearly strongly in the public's interest to order the investigation sought to begin to restore the public's faith in what has

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[13] Mark Penn, *Mueller, FBI face crisis in public confidence*, The Hill, Dec. 14, 2017, available at: http://thehill.com/opinion/judiciary/364873-mueller-fbi-face-crisis-in-public-confidence.
[14] *Id*.
[15] *Id*.
[16] *Id*.

become perceived as a rapidly deteriorating legal and judicial system. As our Founding Father and second president John Adams proclaimed just days prior to signing the Declaration of Independence, without ethics and morality we will not have a lasting liberty.

## IV. CONCLUSION

Based on the foregoing, Mr. Bundy respectfully requests that this Court deny Defendants' Motion to Dismiss and grant the preliminary injunctive relief requested. Defendants have a clear and unequivocal duty to ethically manage and supervise their employees, and to ensure that they are not running roughshod over the constitutional, statutory, and other rights of Americans, including Mr. Bundy. There is no discretion to do so. Attempts to miscast Mr. Bundy's claims as falling under the purview of "prosecutorial discretion" are meant to distract from the disturbing, unethical and gross prosecutorial misconduct occurring within Defendants' agencies and offices, and the fact that Defendants are fighting tooth and nail – while needlessly wasting this Court's valuable resources and taxpayer money – to avoid having to exercise their duty of ethics oversight, clearly raises the strong presumption that they have something to hide. This Court must, in the interest of ethics, truth, justice, and fundamental fairness, order the requested disciplinary ethics investigation by the Justice Department's OPR and the IG.

Dated: December 14, 2017

Respectfully submitted,

*/s/ Larry Klayman*

Larry Klayman, Esq.
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D.C. Bar No. 334581
2020 Pennsylvania Ave NW, #800
Washington, DC, 20006
Tel: (561)-558-5536
Email: leklayman@gmail.com

Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14th day of December, 2017, a true and correct copy of the foregoing was filed and served and via CM/ECF to all parties and counsel of record.

*/s/ Larry Klayman*

**Oliver Peer <oliver.peerfw@gmail.com>**

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## Bundy v. Sessions, et al. - Civil Action No. 17-2429 (DDC)

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**Schaefer, Daniel (USADC)** <Daniel.Schaefer@usdoj.gov> Mon, Nov 20, 2017 at 8:29 AM
To: Larry Klayman <leklayman@gmail.com>
Cc: Oliver Peer <oliver.peerfw@gmail.com>, Sam Sun <sam.hs.fw@gmail.com>, Dina James <daj142182@gmail.com>

Larry, I will need to see your draft joint report prior to filing. You need to give me an opportunity to review and put in defendants' position statement. It should be understood that you must share the draft with me in advance any time we are to submit a joint filing.

As I indicated to you last week, we plan to file an opposition to your motion and move to dismiss the complaint. We are entitled to a reasonable period of time to complete this briefing.

Dan

Daniel P. Schaefer

(202) 252-2531

**From:** Larry Klayman [mailto:leklayman@gmail.com]
**Sent:** Monday, November 20, 2017 10:16 AM
**To:** Schaefer, Daniel (USADC) <DSchaefer@usa.doj.gov>; Schedule, AG84 (OAG) (JMD) <AG.SCHEDULE84@usdoj.gov>

[Quoted text hidden]

[Quoted text hidden]

**Oliver Peer <oliver.peerfw@gmail.com>**

## Bundy v. Sessions, et al. - Civil Action No. 17-2429 (DDC)

**Larry Klayman** <leklayman@gmail.com> Mon, Nov 20, 2017 at 7:15 AM
To: "Schaefer, Daniel (USADC)" <Daniel.Schaefer@usdoj.gov>, "Schedule, AG84 (OAG)" <ag.schedule84@usdoj.gov>
Cc: Oliver Peer <oliver.peerfw@gmail.com>, Sam Sun <sam.hs.fw@gmail.com>, Dina James <daj142182@gmail.com>

Daniel:

This is a very simple case, which in essence concerns having OPR and the IG do an expeditious and bona fide investigation of the demonstrated prosecutorial misconduct.

As a DOJ lawyer you can appreciate that the OPR and IG have an absolute duty to investigate and take any required remedial action based on the results of the investigation.

Thus, why don't we settle this case by having your clients agree to investigate? That is the right, ethical and legal thing to do. Why waster taxpayer  money to litigate, delay and to have the court order your clients to do what your clients are required to do in any event. To fight this will add to the obstruction that has already occurred resulting in even great prejudice to my client, Cliven Bundy, who is already in trial and if convicted faces possible life imprisonment.

DOJ must act in a manner which not only protects its interests, but also the American people, including my client Cliven Bundy.

Please advise if your clients will entertain expeditious settlement discussions. In the meantime, I will send the proposed joint report to the court this morning,  You will receive it around 1 30 pm your time as I am on Pacific time this week.

LARRY KLAYMAN, ESQ.
COUNSEL TO CLIVEN BUNDY
[Quoted text hidden]

| | | |
|---|---|---|
| **TY CLEVENGER** | * | IN THE |
| *Petitioner,* | * | CIRCUIT COURT |
| v. | * | FOR |
| **ATTORNEY GRIEVANCE COMMISSION, et al** | * | ANNE ARUNDEL COUNTY |
| | * | CASE NO.: C-02-CV-16-003620 |
| *Respondents.* | | |

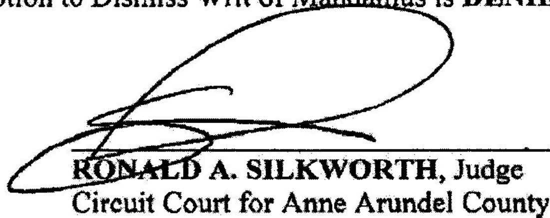
* * * * * * * * * * * * *

**ORDER**

07/25/17 JLB

Upon consideration of Respondent's Motion to Dismiss Writ of Mandamus, and any responses thereto, it is this 24th day of July, 2017, by the Circuit Court for Anne Arundel County, hereby

**ORDERED**, that Respondent's Motion to Dismiss Writ of Mandamus is **DENIED**.[1]



**RONALD A. SILKWORTH**, Judge
Circuit Court for Anne Arundel County

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[1] Maryland Rule 7-401 outlines the requirements for a writ of administrative mandamus:

Rule 7-401. General Provisions.

(a) Applicability. The rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency where review is not expressly authorized by law.

(b) Definition. As used in this Chapter, "administrative agency" means any agency, board, department, district, ***commission***, authority, Commissioner, official, or other unit of the State or of a political subdivision of the State.

(Emphasis added). The plain language of the Rule dictates that in order for administrative mandamus to lie in any given case, the underlying action being reviewed must be quasi-judicial in nature, where quasi-judicial action is synonymous with administrative adjudication, *see Maryland Overpak*, 395 Md. at 33 n. 14, and contrasts with legislative action . . . Decisions that are largely predicated on general facts, and on issues of law and policy, are legislative in nature. *Talbot Cty. v. Miles Point Prop., LLC*, 415 Md. 372, 394 (2010).

An examination of the Office of Bar Counsel's letter dated September 27, 2016, in which it declines to conduct an investigation of the named attorneys in Petitioner's complaint, reveals that Bar Counsel declined to conduct an investigation because "[i]t appears you have no personal knowledge of the allegations presented in your correspondence, nor are you a personally aggrieved client or party possessing material information that would assist the office in reviewing such allegations." Bar Counsel's reasons for declining to conduct an investigation into Petitioner's claims run contrary to the express language of Maryland Rule 19-711(a), which states:

> Bar Counsel may file a complaint on Bar Counsel's own initiative, based on information from any source. ***Any other individual*** also may file a complaint with Bar Counsel. Any communication to Bar Counsel that (1) is in writing, (2) alleges that an attorney has engaged in professional misconduct or has an incapacity, (3) includes the name and address of the individual making the communication, and (4) states facts which, if true, would constitute professional misconduct by or demonstrate an incapacity of an attorney constitutes a complaint (emphasis added).

Additionally, Maryland Rule 19-711(b)(1)-(2) provides:

> (1) Bar Counsel ***shall*** make an appropriate investigation of every complaint that is not facially frivolous or unfounded.
>
> (2) If Bar Counsel concludes that the complaint is either *without merit or does not allege facts which, if true, would demonstrate either professional misconduct or incapacity*, Bar Counsel shall dismiss the complaint and notify the complainant of the dismissal. Otherwise, subject to subsection (b)(3) of this Rule, Bar Counsel shall (A) open a file on the complaint, (B) acknowledge receipt of the complaint and explain in writing to the complainant the procedures for investigating and processing the complaint, (C) comply with the notice requirement of section (c) of this Rule, and (D) conduct an investigation to determine whether reasonable grounds exist to believe the allegations of the complaint.

(emphasis added). Maryland Rule 19-711(a) explicitly permits "any other individual" to file a complaint with Bar Counsel. Maryland Rule 19-711(b)(1) clearly imposes upon Bar Counsel a quasi-judicial duty to "make an appropriate investigation" of every founded or non-frivolous complaint, thus requiring Bar Counsel to rely on specific facts relating to each particular complaint to either decline or open a file on a complaint.

Moreover, in *Goodwich v. Nolah*, the Court of Appeals stated:

> This Court has stated that judicial review is properly sought through a writ of mandamus "where there [is] no statutory provision for hearing or review *and* where public officials [are] alleged to have abused the discretionary powers reposed in them."[11] *State Department of Health v. Walker*, 238 Md. 512, 522–23, 209 A.2d 555, 561 (1965) (emphasis added). *See also State Department of Assessments and Taxation v. Clark*, 281 Md. 385, 399, 380 A.2d 28, 36–37 (1977) (internal citations omitted). Thus, prior to granting a writ of mandamus to review discretionary acts, there must be both a lack of an available procedure for obtaining review *and* an allegation that the action complained of is illegal, arbitrary, capricious or unreasonable (emphasis added).

343 Md. 130, 146 (1996).

Here, there exists both a lack of an available procedure for obtaining review *and* an allegation that the denial of Petitioner's request to Bar Counsel and the Attorney Grievance Commission to open an investigation with illegitimate reasons is illegal, arbitrary, capricious or unreasonable.

**CS 09/22/17**

| | | |
|---|---|---|
| **TY CLEVENGER** | * | IN THE |
| *Petitioner,* | * | CIRCUIT COURT FOR |
| v. | * | ANNE ARUNDEL COUNTY |
| **ATTORNEY GRIEVANCE COMMISSION,** ***et al.*** | * | MARYLAND |
| *Respondents.* | * | Case No.: C-02-CV-16-003620 |

* * * * * * * * * * * * *

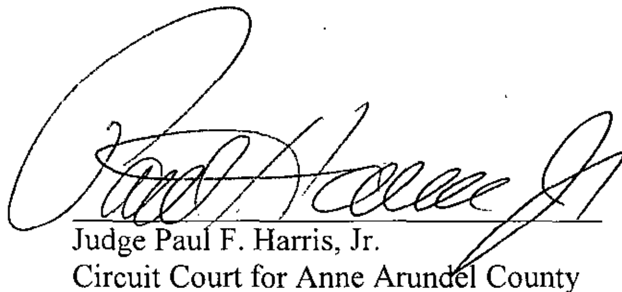
**ORDER GRANTING MANDAMUS**

This matter came before the Court on September 11, 2017 for a hearing on Petitioner's Petition for Writ of Mandamus. Petitioner appeared, *pro se*, and Respondents appeared collectively through Counsel. Upon review of the file and consideration of the relevant law, Md. Rule 19-701 *et seq.*, the arguments advanced by the parties at the hearing, and for the reasons stated on the record, it is, by the Circuit Court for Anne Arundel County, Maryland, hereby

**ORDERED**, that Petitioner's Petition for Writ of Mandamus is **GRANTED**; and it is further

**ORDERED**, that Respondent Attorney Grievance Commission shall conduct an investigation of the of the Petitioner's allegations against David Kendall, Cheryl Mills, and Heather Samuelson.

9-22-17
Date



Judge Paul F. Harris, Jr.
Circuit Court for Anne Arundel County