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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 **MOTION TO QUASH SUBPOENA OF GOVERNOR BROWN AND MEMORANDUM IN SUPPORT**

MOTION TO QUASH SUBPOENA OF GOVERNOR BROWN

Governor Kate Brown, by and through her attorney, Marc Abrams, Assistant Attorney-in-Charge, Oregon Department of Justice, moves, pursuant to Fed. R. Crim. P. 17(c)(2), to quash the subpoena (attached to this Motion as Exhibit A), issued by defendant Ryan Bundy and seeking the testimony of Governor Brown at his trial. This motion is supported by the *Memorandum of Law in Support of Motion to Quash* (below).

CERTIFICATION OF CONSULTATION

Marc Abrams, counsel for Governor Brown, certifies that he discussed this matter with Lisa Ludwig, standby council, and Ms. Ludwig informed Mr. Abrams that defendant Bundy was not willing to withdraw the subpoena voluntarily, necessitating this motion.

MEMORANDUM OF LAW IN SUPPORT OF

MOTION TO QUASH INTRODUCTION

Defendant Ryan Bundy has issued a subpoena seeking to compel Governor Kate Brown to testify at his criminal trial in this Court. Accordingly, Governor Brown seeks a protective order under Fed. R. Crim. P. 17(c)(2). There is no basis to believe that the Governor of Oregon has information pertinent to Mr. Bundy's guilt or innocence. Moreover, under established doctrine, Mr. Bundy must pursue any information he thinks the State or the Governor may have through less intrusive means.

Federal courts recognize that high-ranking government officials should not be subject to depositions absent "extraordinary circumstances." The *Morgan* Doctrine, derived from *United States v. Morgan*, 313 U.S. 409 (1941), protects high-ranking officials from harassing and burdensome requests for testimony. Under the *Morgan* Doctrine, a party subpoenaing a witness must show a particularized need for testimony from a high-ranking official, and show that there is no other source for the same information.[1] In this case, plaintiff has not established — prior to issuing his subpoena on the Governor of Oregon — and cannot establish, that Governor Brown has relevant information that cannot be obtained from other sources. To avoid impeding the Governor's pressing responsibilities, she should not be called as a witness.

[1] *See, e.g.*, *Bogan v. City of Boston*, 489 F.3d 417, 424 (1st Cir. 2007); *In re F.D.I.C.*, 58 F.3d 1055, 1060-61 (5th Cir. 1995); *In re U.S. (Kessler)*, 985 F.2d 510, 513 (11th Cir. 1993) (noting that "[b]ecause of the time constraints and multiple responsibilities of high [-ranking] officials, courts discourage parties from calling them as witnesses and require exigent circumstances to justify a request for their testimony").

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ARGUMENT

I. Legal Standard

Federal courts have long recognized that, absent extraordinary circumstances, high-ranking officials should not be subjected to depositions. *United States v. Morgan*, 313 U.S. 409 (1941).[2] This is true as to testimony in trials as well. *In re U.S. (Kessler)*, 985 F.2d 510, 513 (11th Cir. 1993); *Coleman v. Schwarzenegger*, 2008 WL 4300437, *2 (E.D. Cal. Sept. 5, 2008). It is also true in the context of a criminal prosecution. *U.S. v. Washington*, 2012 WL 3061519, *1 (D. Mont. July 26, 2012).

Federal courts have limited demands for testimony from high-ranking officials because such officials are otherwise vulnerable to harassing and burdensome requests, particularly where others have relevant knowledge and can provide sufficient information. *See In re F.D.I.C.*, 58 F.3d 1055, 1060-61 (5th Cir. 1995) (stating that party seeking deposition must show "exceptional circumstances" before the involuntary deposition of a high-level government official is permitted); *In re U.S. (Kessler)*, 985 F.2d 510, 513 (11th Cir. 1993) (stating that courts require the showing of a special need or situation before compelling testimony by high-level government officials, and denying right to depose FDA commissioner, citing commissioner's lack of personal knowledge, and the availability of the information from other sources); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) ("top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions").

It is undisputed that Governors are high-ranking officials entitled to the protections of the *Morgan* Doctrine. *Hernandez v. Texas Department of Aging and Disability Services*, 2011 WL 6300852 (W.D. Tex. Dec. 16, 2011) (Texas Governor); *Coleman v. Schwarzenegger*, 2008 WL

[2] The Court found it had been improper to require the deposition and subsequent testimony of the then Secretary of Agriculture regarding a rate-setting decision at issue in the case, because decision-making process of high level public officials needs to be protected from intrusive inquiry. *United States v. Morgan*, 313 U.S. 409, 422 (1941).

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4300437, *2 (E.D. Cal. Sept. 5, 2008) (California Governor); *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982), *abrogated on oth. grounds, O'Hara Truck Service Inc., v. City of North Lake*, 518 U.S. 712 (1986) (Missouri Governor).[3]

As to "extraordinary circumstances," the consensus among federal courts is that, in order to justify the involuntary deposition of a high-ranking official, they only exist when that official has direct personal knowledge concerning a material fact in dispute *and the information cannot be obtained through other sources*.[4] The requisite personal knowledge of the high-ranking official should be more than information obtained through customary briefings.[5] The party seeking to depose a high-ranking official also must clearly demonstrate that other sources of information are insufficient. In *Bogan v. City of Boston*, 489 F3d 417, 424 (1st Cir. 2007), for

[3] In addition to the *Morgan* doctrine, the common law doctrine of executive privilege has prevented litigants from commanding the presence of governors for testimony. *E.g., Freedom foundation v. Gregoire*¸310 P.2d 1252, 1263 (Wash. 2013); *State of Indiana v. International Business Machines Corp.* 964 N.E.2d 206 (Ind. 2012); *State ex rel. Dunn v. Taft*, 848 N.E. 2d 472, 485 (Ohio 2006); *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978); *Guy v. Judicial Nominating commission*, 659 A.2d 777, 785 (Del. Sup. Ct. 1995); *Hamilton v. Verdow*, 414 A.2d 914, 923-24 (Md. Ct. App. 1980). Oregon recognizes executive privilege. *Shearer v. Lambert*, 274 Or. 449, 454 (1976).

[4] The various federal circuits articulate the test differently, but the essential elements are the same. *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) (Party seeking deposition of Attorney General and Deputy Attorney General must "establish at a minimum that the Attorney General and the Deputy Attorney General possess information essential to his case which is not obtainable from another source."); *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) ("Depositions of high-ranking officials may be permitted where the official has first-hand knowledge related to the claim being litigated * * * . However, even in such cases, discovery is permitted only where it is shown that other persons cannot provide the necessary information.").

[5] Given the scope of their authority, high-ranking officials often are briefed on a wide variety of information; thus, courts require a showing that the official was involved directly in the issues in dispute. *See, e.g., Bagley v. Blagojevich*, 486 F.Supp.2d 786, 789 (C.D. Ill. 2007) (permitting deposition where the plaintiffs alleged that the governor ordered their jobs eliminated in retaliation for their attempt to organize on behalf of a union that was a rival to a group that had contributed heavily to the governor's election campaign); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 370 (N.D. Cal. 2000) (permitting deposition of chief of police who took the "unusual" step of intervening personally in disciplinary proceedings against a police officer to ensure lighter discipline for the officer); *Virgo Corp. v. Paiewonsky*, 39 F.R.D. 9, 10 (D.V.I.. 1996) (permitting deposition of governor accused of taking arbitrary actions as a result of Congressional pressures and personal friendships). Absent such direct involvement, testimony is usually not allowed.

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example, although the plaintiffs had identified an issue on which the Mayor of the City of Boston has personal knowledge, a deposition was not permitted. The court explained:

> [T]he identity of the City official who ordered the inspection and the reason for the inspection were disputed issues of fact. The Bogans nevertheless failed to purse discovery from other City employees who could have shed light on the Mayor's involvement. In particular, the Bogans did not seek discovery from any of the Mayor's aides. It is certainly likely that at least one of these employees was involved and could have clarified the Mayor's role. It was therefore incumbent on the Bogans to seek information from these individuals before turning to the Mayor.

Id.

II. Undue Burden

As the case law discussed above makes clear, the burden in the first instance is on the party issuing the subpoena. One cannot simply demand the time of a sitting Governor. In the present case, plaintiff has not made a threshold showing that Governor Brown has direct personal knowledge of any material issue in dispute. Nor has plaintiff identified and sought the information from lower-ranking and potentially more knowledgeable sources. Indeed, such an inquiry is required before seeking the testimony of a high-ranking official. *Halperin v. Kissinger*, 606 F.2d 1192, 1209-10 (D.D.C. 1979), *aff'd*, 452 U.S. 713 (1981).

First, Plaintiff has not made a showing that Governor Brown has any direct personal knowledge of a material fact in dispute.

Second, Plaintiff has the ability to determine through investigation or discovery or even the media — given the coverage of the event underlying his case — who actually was involved in matters material to the defense of his action.

To demand that the Governor put down her significant duties on behalf of the citizens of this State to testify as to matters undefined as to which her knowledge has not been established is not merely a burden on Kate Brown, but a burden on the people of the State of Oregon.

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III. Disruption to the Functioning of the State Government

As the *Morgan* Doctrine recognizes, the Governor is extremely busy and allowing her testimony without adequate showing of need would be disruptive to the functioning of the state. The Governor, as the head of the executive department of state government, provides leadership, planning, and coordination for the entire executive branch. Or. Const., Art V, § 1. She is entrusted with the constitutional duty to see that all laws are faithfully executed. Or. Const., Art V, § 10. To this end, she oversees the work of all state agencies, as well as more than 220 policymaking, regulatory, and advisory boards and commissions. The Governor chairs both the State Land Board, which manages state-owned lands. She appoints agency directors, board members, and judges to fill vacancies in office. Or. Const., Art V., § 16, 17, 18. She also exercises authority to extradite individuals accused of crimes to and from Oregon, and reviews applications for reprieves, commutations and pardons of criminal sentences. Or. Const., Art. V, § 14.

In all legislative sessions, including the upcoming January 2017 session, the Governor works closely with legislative leadership to balance Oregon's budget and set a legislative program. Or. Const., Art V., § 11. If needed, the Governor may order an emergency session to deal with pressing issues. Or. Const., Art V., § 12. She has the constitutional responsibility to review all bills passed by the legislature and may veto measures she believes are not in the public interest. Or. Const., Art V., § 15a, 15b.

The Governor is commander-in-chief of the state's military forces, the Oregon National Guard and Oregon Air National Guard. Or. Const., Art. 10, § 3. During times of emergency, pursuant to ORS Chapter 401, and in response to widespread fires, under the Conflagration Act, the Governor has the responsibility to direct, by emergency declaration, all of the State's resources to protect the life and property of Oregon's citizens.

The Governor directs state government's coordination with federal and local governments, and also serves as a diplomatic and trade emissary overseas to promote and

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develop Oregon. She regularly travels throughout the state, nation, and abroad for diplomatic and trade missions. Finally, the Governor maintains government-to-government relationships with Oregon's nine federally-recognized Indian tribes. In addition, unlike many States, Oregon has no lieutenant Governor to assist with the duties of office.

Plaintiff has not shown that Governor Brown has direct personal knowledge of material facts or that any facts are not otherwise available from another source. Thus, plaintiff has failed to show any need to have the Governor's testimony that outweighs the substantial and undue burden the deposition of the Governor would have on both the State and the Governor. As discussed above, allowing such a deposition would be disruptive to the function of the state government. In addition, the resources the State would need to commit to coordinate discovery, pre-trial, and trial activities around Governor Brown's schedule, or to try to reschedule her governing activities, make this deposition extremely burdensome and unnecessary.

These factors constitute good cause for not permitting the subpoena. The burden therefore becomes defendant Bundy's to demonstrate the "extraordinary circumstances" that would provide a basis for commending testimony. *Warren v. State of Washington*, 2012 WL 2190788, *1 (W.D. Wash. June 14, 2012). He cannot make that demonstration.

IV. The subpoena contains an error preventing compliance.

As a final issue, the subpoena calls for the Governor to testify on September 17, 2016. That is a Saturday, and therefore compliance is presumably not possible.

CONCLUSION

The Court should protect the Governor from burdensome and unwarranted subpoenas. Defendant has not demonstrated a *bona fide* need for Governor Brown's testimony, and has made no showing of "extraordinary circumstances." Defendant Bundy's subpoena lacks the underpinnings to support the conclusion that Governor Brown has direct or personal knowledge of any material disputed fact.

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For all of the reasons set forth above, Defendant Bundy's subpoena is without merit and a Protective Order quashing it is necessary to protect the State and the Governor from undue burden.

DATED August 18, 2016.

Respectfully submitted,

ELLEN F. ROSENBLUM
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s/ Marc Abrams

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AO 89 (Rev. 08/09) Subpoena to Testify at a Hearing or Trial in a Criminal Case

UNITED STATES DISTRICT COURT

for the

District of Oregon

United States of America)
v.)
RYAN BUNDY) Case No. 3:16-cr-00051-BR
Defendant)

SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To: Govenor Kate Brown
State Capitol Building
900 Court Street NE Salem, OR 97301

Care of: Steve Lippold
DOJ
1162 Court Street NE
Salem, OR 97301

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance: U.S. Courthouse 1000 SW 3rd Avenue Portland, OR 97204	Courtroom No.: Judge Brown
	Date and Time: 9:00 AM 9/17/16

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*:

Any and all emails and memos between the Govenor's office and Law Enforcement, FBI or any other agencies regarding the Malheur National Wildlife Refuge occupation that have not already been turned over to the United States Attorney's office.

Date: 8/16/16

MARY L. MORAN
CLERK OF COURT

Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Ryan Bundy
Pro Se Defendant, who requests this subpoena, are:

Lisa Ludwig, Standby Counsel
333 SW Taylor Street
Suite 300
Portland, OR 97204
(503)223-5570
lisa@lzrzlaw.com

Case No. 3:16-cr-00051-BR

PROOF OF SERVICE

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

☒ I served the subpoena by delivering a copy to the named person as follows: I scanned and emailed the Original Subpoena to Steve Lippold, Chief Trial Counsel for the DOJ on *(date)* 8/16/16 ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ 0 for travel and $ 0 for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 8/16/16

CWithycombe
Server's signature

Courtney Withycombe, investigator
Printed name and title

P.O. Box 13544 Portland, OR 97213
Server's address

Additional information regarding attempted service, etc: