No. _____

In The

Supreme Court of the United States

IN RE: CLIVEN BUNDY

On Petition For Writ Of Mandamus
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit err in failing to vacate the erroneous denial of Mr. Larry Klayman's ("Mr. Klayman") admission *pro hac vice* in the U.S. District Court for the District of Nevada despite the fact that it is now moot, yet still causing Mr. Klayman grave and serious injury?

PARTIES TO THE PROCEEDINGS

I. Petitioner Cliven D. Bundy

Petitioner was a defendant in a criminal proceeding in which he faced *life imprisonment*, if convicted. Petitioner was arrested on February 11, 2016, and indicted on 17 counts of alleged crimes in the case of *United States of America v. Cliven D. Bundy, et al.*, Criminal Action No. 2:16-CR-00046-GMN-PAL-1, U.S. District Court for the District of Nevada (the "District Court"). The charges against Petitioner were subsequently dismissed because of a continued pattern and practice of gross prosecutorial misconduct, which included the burying, destroying and hiding of exculpatory evidence.

II. Counsel for Petitioner Larry E. Klayman

Mr. Klayman is a former federal prosecutor of the U.S. Department of Justice and criminal defense lawyer who was Petitioner's counsel of choice in the criminal case. Mr. Klayman submitted two applications for admission *pro hac vice* to appear in defense of Petitioner. Mr. Klayman is also the founder, and former chairman and general counsel of non-profit Judicial Watch and founder and current general counsel of non-profit Freedom Watch. He also practices privately.

PARTIES TO THE PROCEEDINGS – Continued

III. Honorable Gloria M. Navarro

The Honorable Gloria M. Navarro ("Judge Navarro") is a federal judge in the U.S. District Court for the District of Nevada. Judge Navarro twice denied Klayman's *pro hac vice* applications on improper and unconstitutional grounds.

IV. Government of the United States of America

The United States of America, by the Office of the U.S. Attorney for the District of Nevada, appeared claiming to be the real party in interest in place of the District Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Order of the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit"), dated April 24, 2018 denying Petitioner's Petition for Writ of Mandamus. App. 1-App. 6.

JURISDICTION

Petitioner seeks this Court's review of the order entered on April 24, 2018 by the Ninth Circuit, by a Petition for Writ of Mandamus pursuant to the jurisdiction conferred by 28 U.S.C. § 1651(a). This petition is timely filed because it was mailed within ninety days of April 24, 2018, the date the Ninth Circuit denied Petitioner's Petition for Writ of Mandamus. Rule 13.3.

The jurisdictional basis for the Ninth Circuit is 28 U.S.C. § 1651(a) and that Real Party in Interest, Government of the United States of America indicted Petitioner in the U.S. District Court for the District of Nevada.

RELEVANT LEGAL PROVISIONS

All Writs Act, 28 U.S. Code § 1651

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE

The U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") has erroneously upheld the District Court's denial of Mr. Klayman's applications to represent Petitioner *pro hac vice* in his criminal trial. The Ninth's Circuit's erroneous decisions were based on the false pretense that Mr. Klayman had been untruthful to the District Court, which the Honorable Ronald M. Gould ("Judge Gould"), in his forceful and compelling dissents, found was not the case. In any event, the Ninth Circuit's decisions are now moot, as the superseding indictment against Petitioner has been dismissed, and the government's motion for reconsideration denied on July 3, 2018.[1] However, these decisions are still being used to severely harm Mr. Klayman, particularly the disproven and incorrect findings that he had been untruthful, given Mr. Klayman's status as a prominent public interest advocate and litigator. Thus, this Court must respectfully step in and order vacatur of the Ninth Circuit's decisions in this matter in the interest of fundamental fairness and justice.

Petitioner was indicted in February of 2016, along with eighteen other co-defendants, on charges

[1] ECF No. 3273.

stemming from a 2014 armed standoff (the "Standoff") with Bureau of Land Management ("BLM") agents. The charges levied against Petitioner were serious enough that he faced the possibility of life imprisonment, if convicted. From the outset, Petitioner was deprived of a litany of his constitutional rights, including, but not limited to, his Sixth Amendment right to counsel of choice – Mr. Klayman. Mr. Klayman has spent the entirety of Petitioner's incarceration attempting to gain entry before the District Court *pro hac vice*, but had been repeatedly denied entry on clearly erroneous grounds. These denials were the subject of two previous Petitions for Writ of Mandamus before this Court, which this Court declined to hear.[2]

In January of 2018, Judge Navarro dismissed the superseding indictment against Petitioner due to gross prosecutorial misconduct, including the burying, destroying, and hiding of exculpatory evidence. At the time of dismissal, Mr. Klayman had a pending motion for reconsideration before Judge Navarro regarding her clearly erroneous denial of Mr. Klayman's entry *pro hac vice*.[3] Given the "precipitous" dismissal of the superseding indictment, the motion for reconsideration was never decided, as it has been rendered moot.

However, the Ninth Circuit's decisions to uphold Judge Navarro's rulings are now being used against Mr. Klayman to harm him. Mr. Klayman does significant amounts of public interest litigation, and political

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[2] Case Nos. 16-908; 17-141.

[3] ECF No. 2827.

and other adversaries who wish to prevent Mr. Klayman from continuing his public interest work and advocacy are using the Ninth Circuit's findings against him. For instance, the Office of Bar Disciplinary Counsel ("ODC") in Washington, D.C. has threatened to file a complaint against Mr. Klayman based on Judge Navarro's clearly erroneous denial of his *pro hac vice* entry, even drafting a Draft Specification of Charges before this matter is ultimately decided. App. 7-App. 29.

It is therefore imperative that this Court step in and remedy this grave error and impending harm to Mr. Klayman, in the interest of fundamental fairness and justice. As the underlying case has been dismissed, Mr. Klayman has no other recourse to seek vacatur of the erroneous denial of his *pro hac vice* entry, which at this point is nothing more than an administrative task. None of the parties suffer any prejudice from such an order, yet Mr. Klayman would be shielded from further harm and damage to his professional and public interest reputation. An order directing the Ninth Circuit to vacate all of its erroneous rulings pertaining to Mr. Klayman's *pro hac vice* entry respectfully must therefore be issued by this Court.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erroneously Found that Mr. Klayman Had Not Been Truthful and Therefore Must Be Vacated

The majority panel for the Ninth Circuit erroneously adopted the findings of the District Court without questions and found that Mr. Klayman had been untruthful to the District Court. Judge Gould, in his forceful, compelling, well-reasoned, and factually accurate dissents emphatically found that this was not the case. Indeed, Mr. Klayman never made any misrepresentation to the District Court, as set forth by Judge Gould. In Mr. Klayman's original *pro hac vice* application before the District Court,[4] Mr. Klayman truthfully answers the question presented regarding disciplinary proceedings, stating that, "[t]here is a disciplinary proceeding pending before the District of Columbia Board of Professional Responsibility that was filed almost 8 years ago. . . ." Mr. Klayman properly opines that "[t]he matter is likely to be resolved in my favor" and points out that " . . . there has been no disciplinary action." Judge Gould made the clear finding that "Klayman properly disclosed the ongoing disciplinary proceeding in his initial application for pro hac vice admission, saying that the proceeding had not yet been resolved. This disclosure was accurate." *See Bundy v. United States Dist. Court (In re Bundy)*, 840 F.3d 1034, 1054 (9th Cir. Oct. 28, 2016. Judge Gould further reasoned:

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[4] ECF No. 166.

> 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*. *Id*. at 1055 (emphasis added).

Indeed, this is clear evidence that Mr. Klayman candidly answered the questions presented to him, and was therefore truthful to the District Court, and the Ninth Circuit. As Judge Gould had correctly found:

> 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*.

Bundy, 840 F.3d at 1055-56 (emphasis added).

Regrettably, however, those who wish to oppose Mr. Klayman's public interest advocacy have seized upon the Ninth Circuit majority panel's erroneous findings that Mr. Klayman was untruthful in an attempt to discredit and silence him. Mr. Klayman's ability to perform his public interest advocacy is entirely contingent upon his reputation as a strong and ethical litigator, which his adversaries recognize as well. In sum, the erroneous findings of the Ninth Circuit are causing Mr. Klayman grave harm and should be vacated on this basis alone. In any event, the Ninth Circuit's findings are now moot given the dismissal of the superseding indictment against Petitioner, and must be vacated on those grounds as well, as set forth below.

Lastly, Judge Gould has himself, in an order from June 15, 2017 in *In re Cliven Bundy*, 17-70700 (9th Cir. 2017), expressly stated that mandamus to this Court is the appropriate remedy for this issue. "Judge Gould joins in the denial order, believing that any remedy for Cliven Bundy here must be given by an en banc panel or the Supreme Court."

II. The Ninth Circuit's Orders Must be Vacated for Mootness under *Munsingwear*

As set forth previously, the majority panel of the Ninth Circuit's Orders in this matter are now moot, by

virtue of the the superseding indictment against Petitioner having been dismissed with prejudice by Judge Navarro. Importantly, before Judge Navarro dismissed the superseding indictment on January 8, 2018, there was a pending Motion for Reconsideration of Mr. Klayman's Application to Practice Pro Hac Vice before her which has since been denied.[5]

In *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950), the Supreme Court stated that the established practice of the Court when the case becomes moot on appeal is vacatur of the lower court's judgment. The Court in *Munsingwear* emphasized the fairness and importance of vacating any judgment that preceded mootness in order "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."

The Ninth Circuit has followed the legal standard set forth in *Munsingwear*. "When a case becomes moot on appeal, the 'established practice' is to reverse or vacate the decision below with a direction to dismiss." *NASD Dispute Resolution, Inc. v. Judicial Council*, 488 F.3d 1065, 1068 (9th Cir. 2007) (internal citations omitted). "Vacatur in such a situation 'eliminat[es] a judgment the loser was stopped from opposing on direct review'. . . . Without vacatur, the lower court's judgment, 'which in the statutory scheme was only preliminary,' would escape meaningful appellate review thanks to the 'happenstance' of mootness." *Id*. "Under the '*Munsingwear* rule,' vacatur is generally

[5] ECF No. 2827.

'automatic' in the Ninth Circuit when a case becomes moot on appeal." *Id.*

Judge Gould also authored a strong, compelling, and well-reasoned dissent based on this Court's precedent in *Munsingwear*, which further warrants the granting of the relief sought herein, especially given the fact that the majority panel failed to issue any opinion. As Judge Gould wrote:

> I dissent also based on the Supreme Court's authority in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), because at this stage the district court has dismissed the criminal claims against Cliven Bundy, based on alleged government misconduct, and so the matter of Mr. Klayman's desired *pro hac vice* application to represent Bundy is currently and effectively moot.

App. 2. Indeed, it is now clearer than ever that the issue has been mooted out, given that no new charges have been levied against Petitioner since Judge Navarro dismissed the superseding indictment over six months ago, and then subsequently denied the government's motion for reconsideration. In any event, the threat of future prosecution, as pointed out by Judge Gould, is nothing more than what now is remote speculation, and therefore cannot be used as a basis to hold *Munsingwear* inapplicable. App. 2. Even more, the prosecuting attorneys' motion for reconsideration of Judge Navarro's decision to dismiss the superseding

indictment against Petitioner has been recently denied.[6]

Furthermore, Judge Gould correctly reasoned that, although Petitioner was involved in a criminal prosecution, the underlying issue – Mr. Klayman's *pro hac vice* status – "cannot be viewed as anything other than a civil proceeding." App. 3. Judge Gould further reasoned, "And even if a mandamus petition related to a representation in a criminal case should be viewed as a criminal matter, there's no sound reason why the reasoning and policy of *Munsingwear* would not make its rule still applicable." App. 3.

Judge Gould correctly recognized, and emphasized, the severe damage to Mr. Klayman resulting from the majority panel of the Ninth Circuit's erroneous findings and the District Court's denial of Mr. Klayman's *pro hac vice* application:

> Although Bundy now is out of his original criminal case which has been dismissed as a result of the government misconduct, the damage to Klayman from wrongful denial of his attempted pro hac vice admission, is still present. So his current mandamus petition is not moot by analogy to the collateral order doctrine of *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).
>
> I respectfully dissent from denial of the current mandamus petition because of what I consider to be an unnecessary and excessive

[6] ECF No. 3273.

> negative impact of the district court's decision denying pro hac vice admission, and our prior decisions denying mandamus relief, on the practice and reputation of Klayman.
>
> But I am motivated to dissent because these proceedings have become overblown. If, as I believe, the criminal case against Bundy is over, with the *pro hac vice* admission issue here being a dead letter, then I see no substantial reason in fairness why the prior decisions of the district court and of our court on this matter need to stand of record, serving no purpose at this stage, and potentially and unfairly being to the detriment of Klayman's practice and reputation. App. 3-App. 4.

As set forth below, Judge Gould's fears, as well as Mr. Klayman's have now come to fruition, as Mr. Klayman's adversaries are actively targeting him using the Ninth Circuit's clearly erroneous rulings as ammunition to try to remove Mr. Klayman from the practice of law, and to impede his public interest work and advocacy.

III. The Ninth Circuit's Erroneous Rulings are Causing Mr. Klayman Grave Continued Harm

The District of Columbia Office of Disciplinary Counsel ("ODC") threatened discipline against Mr. Klayman stemming from the District Court's clearly erroneous denial of his application *pro hac vice*. ODC has gone so far as to prepare a Draft Specification of

Charges against Mr. Klayman in this regard. App. 7-App. 29.

Tellingly, the District Court's rulings and orders, and the Ninth Circuit's subsequent upholding thereof did not even occur in the District of Columbia. The fact that a foreign bar association, located across the country, would be attempting to use the Ninth Circuit's rulings to discipline Mr. Klayman – regardless of the meritless nature of Draft Specification of Charges – shows the type of reach and publicity that Petitioner's case has received. Indeed, if this were a normal criminal case without such overwhelming media interest, it is likely that ODC and others opposed, such as the complainant, to Mr. Klayman's public advocacy work would never have picked up on the Ninth Circuit's erroneous rulings. However, this is not the case. The nature of Petitioner's prosecution and the enormous amount of attention that it has received have amplified the harm done to Mr. Klayman ten-fold. Thus, this Court must step in, as a matter of last resort, to protect the reputation and alleviate the undeserved and unfair damage to Mr. Klayman's professional and public interest reputation caused by the Ninth Circuit's erroneous rulings and orders at issue herein.

CONCLUSION

Mr. Klayman has now suffered serious damage to his professional and public interest reputation as a direct result of the Ninth Circuit's clearly erroneous

rulings and orders at issue here. At this stage of the criminal proceedings, when the charges against Petitioner have been dismissed, the correct, fair, and just thing to do is to order vacatur of these clearly erroneous orders, which at this point, is nothing more than an administrative task. The parties obtain no benefit from maintaining the Ninth Circuit's clearly erroneous rulings, yet, Mr. Klayman is being severely harmed and threatened with disciplinary action.

Given the public interest nature of Mr. Klayman's legal practice, his public reputation is the most important characteristic that allows him to conduct his work. Those who oppose his public interest advocacy clearly recognize this, and have pounced on the Ninth Circuit's clearly erroneous rulings – which are at this point, purely administrative – to attempt to discredit and ultimately silence him. It is therefore incumbent upon this Court, as the court of last resort, to remedy this grave injustice and prevent further harm from befalling Mr. Klayman.

Respectfully submitted,

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