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13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 (Hon. Thomas J. Whelan)

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 DUNCAN D. HUNTER,

20 Defendant.

Case No. 18-CR-3677-W

**MOTION TO DISMISS OR, IN THE
ALTERNATIVE, TO RECUSE THE
UNITED STATES ATTORNEY'S
OFFICE FOR THE SOUTHERN
DISTRICT OF CALIFORNIA**

Date: July 1, 2019
Time: 10:00 a.m.
Judge: Hon. Thomas J. Whelan

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1 **Regulations**

2 San Diego Union Tribune, Aug. 24, 2018; <https://www.sandiegouniontribune.com/news/courts/sd-me-secretservice-20180824-story.html> 8

3

4 The United States Attorney's Manual 6, 7, 12, 13

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1 Defendant DUNCAN D. HUNTER, by and through his attorneys, Gregory A.
 2 Vega, Ricardo Arias and Philip B. Adams respectfully moves the Court to Dismiss the
 3 Indictment, or, in the Alternative to Recuse the United States Attorney's Office for the
 4 Southern District of California.

5 **I. FACTUAL BACKGROUND**

6 On Friday, August 7, 2015, a political fundraiser was held at a private home in La
 7 Jolla, California for Presidential candidate Hillary R. Clinton. The fundraiser was from
 8 9:00 a.m. until approximately noon, and contributors paid from \$1,000 to \$2,700 to
 9 attend. Present at the political fundraiser were First Assistant US Attorney Alana
 10 Robinson and Assistant US Attorney Emily W. Allen.¹ In light of subsequent events
 11 and their initiation of the criminal investigation of Congressman Hunter, their
 12 attendance at the event raises serious concerns regarding a conflict of interest and a loss
 13 of impartiality. In isolation the use of their official position to gain access to meet and
 14 be photographed with candidate Clinton demonstrates bad judgment and an abuse of
 15 their official position. However, subsequent events demonstrate a much more serious
 16 and troubling result. The undeniable facts are that both attended for one purpose and
 17 one purpose only -- they attended to meet the person they believed would be the next
 18 President of the United States. They also attended without making a contribution and
 19 used their official positions as Assistant US Attorneys to gain access not otherwise
 20 available to them or the general public.² Questions must be asked, including why were
 21 they in attendance having not made contributions, why were they at the event during
 22 work hours, and did they take personal leave to attend? Regardless of the answers to
 23 these questions they attended because they were supporters of celebrity candidate
 24 Clinton, wanted to be at an intimate event with her, show their support for her
 25 _____

26 ¹ A third Assistant US Attorney not directly involved in the investigation of
 27 Congressman Hunter also attended the Clinton Fundraiser.

28 ² Publicly available campaign finance records confirm neither individual made a
 contribution to candidate Clinton's campaign.

1 candidacy, and have an opportunity to meet her.³ The totality of their conduct calls into
 2 question the loss of impartiality in the investigation of Congressman Hunter and at a
 3 minimum creates the appearance of a conflict of interest. Subsequent events call into
 4 question the integrity of the indictment.

5 Within months of the fundraiser, on February 24, 2016, Congressman Duncan D.
 6 Hunter became the first sitting member of Congress to publicly endorse the candidacy
 7 of Donald J. Trump for President. The investigation of Congressman Hunter by the
 8 United States Attorney's Office for the Southern District of California began shortly
 9 after his public endorsement of candidate Trump. Even more troubling than an
 10 investigation having begun is the fact that within weeks of Alana Robinson becoming
 11 the Acting US Attorney for the Southern District of California on January 5, 2017, and
 12 one month after President Trump's inauguration, federal search warrants were executed
 13 on Congressman Hunter's home, local Congressional office, storage locker, and the
 14 offices of his campaign treasurer on February 23, 2017. Assistant US Attorney Emily
 15 Allen and Acting US Attorney Alana Robinson were intimately involved in the
 16 investigation throughout and in the decision to seek the execution of search warrants
 17 and bring the instant indictment.

18 The United States Attorney's Manual provides that when a United States
 19 Attorney becomes aware of an actual or apparent conflict of interest that could require a
 20 recusal and the "*conflict of interest exists or there is an appearance of a loss of*
 21 *impartiality,*" the United States Attorney must notify the General Counsel of the
 22 Executive Office of United States Attorneys (EOUSA). *USAM 3-1.140*. Here, the
 23 appearance of the loss of impartiality cannot be more clear. The former Acting US
 24 Attorney for the Southern District of California and the Assistant US Attorney leading
 25 the investigation of Congressman Hunter both attended a political fundraiser for
 26 candidate Clinton and shortly thereafter both were involved in initiating an investigation

27 _____
 28 ³ A campaign photographer took pictures of the attendees with candidate Clinton.

1 of the first Congressman to endorse candidate Trump. These facts alone warranted
2 recusal.

3 On July 30, 2018, I wrote to Adam Braverman, United States Attorney for the
4 Southern District of California and Brian A. Benckowski, Assistant Attorney General of
5 the Criminal Division and requested that the United States Attorney's Office for the
6 Southern District of California be recused from any further participation in the
7 investigation of Congressman Hunter based upon the partisan political activities by
8 Assistant US Attorneys Alana Robinson and Emily W. Allen. On August 1, 2018, my
9 request for recusal was denied in a letter from Jay Macklin, General Counsel for the
10 Executive Office for United States Attorney. (Attached hereto as Exhibit 1) The basis
11 for the denial of my request for recusal was "[A]USA Robinson and AUSA Allen were
12 not at the Hillary Clinton event as Clinton supporters but in their official capacity
13 assisting law enforcement." (*emphasis added*) Mr. Macklin surely inquired of both
14 AUSAs Robinson and Allen or of United States Attorney Braverman the reason why the
15 AUSAs attended the Clinton event in responding to my July 30th letter. Clearly, his
16 response was based on the information provided to him from the United States
17 Attorney's Office for the Southern District of California that AUSA Robinson and
18 AUSA Allen were not at the Hillary Clinton event as Clinton supporters but in their
19 official capacity assisting law enforcement.⁴ Shortly thereafter, Congressman Hunter
20 was indicted on August 21, 2018.⁵

21 I again raised the issue of AUSAs Robinson and Allen's attendance at the Clinton
22 event on the day of Congressman Hunter's arraignment and the political appearance of
23 _____

24 ⁴ Recusal would have been ordered had there not been a cover up and Mr. Macklin
25 known the truth, that AUSAs Robinson and Allen attended the Clinton Event to support
26 her candidacy and not to assist law enforcement. *USAM 3-1.140*.

27 ⁵ The indictment was brought after the June 5, 2018 primary election and only 79 days
28 before the November 6, 2018 general election. Because of the short time before the
November election, the Republican Party was unable to replace Congressman Hunter on
the ballot.

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1 such conduct by the lead prosecutor and the former Acting US Attorney. The next day,
2 the Secret Service issued a statement consistent with what I was told by Mr. Macklin in
3 his letter of August 1, 2018:

4 The Secret Service regularly requests representation from United States
5 Attorney’s Offices around the country during protective mission visits.
6 The in-person representation provides for, and facilitates, real-time direct
7 communications in the event of a protective security related incident where
8 immediate prosecutorial guidance could be necessary.⁶

9 On September 10, 2018, I made a Freedom of Information Act (“FOIA”) request
10 to the United States Secret Service for all documents related to communications
11 between any Secret Service agents that attended the Hillary Clinton fundraiser in La
12 Jolla, California on August 7, 2015 and either Assistant US Attorney Alana Robinson or
13 Assistant US Attorney Emily W. Allen related to attending the Hillary Clinton
14 fundraiser.⁷ If true, that the Secret Service requested their assistance, and that both
15 Assistant US Attorney Robinson and Allen attended in their official capacity to assist
16 law enforcement, there would be a record of such request.

17 A response to the above-mentioned FOIA request to the Secret Service was
18 received on June 12, 2019, less than two weeks ago. The Secret Service had a
19 responsive document. The document conclusively proves that AUSAs Robinson and
20 Allen attended the Clinton fundraiser for partisan political reasons to support and obtain
21 a photo with candidate Clinton and that their attendance had absolutely nothing to do
22 with “assisting law enforcement.” The responsive document is a redacted email from
23 the Secret Service to the United States Attorney’s Office sent on August 5, 2015, two
24 days before the Clinton fundraising event. (Attached hereto as Exhibit 2)

25 _____
26 ⁶ The San Diego Union Tribune, Aug. 24, 2018; <https://www.sandiegouniontribune.com/news/courts/sd-me-secret-service-20180824-story.html>

27 ⁷ An identical FOIA request was made to the United States Department of Justice. To
28 date, the Department of Justice has not responded to the FOIA request.

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1 AUSAs Robinson and Allen surely hoped that the email would never see the light
2 of day for if it did, the charade was over and the public would finally know the truth that
3 the investigation of Congressman Hunter was political from the outset.

4 **From:** [Redacted] (SDO) [Redacted]
5 **Sent:** Wednesday August 5, 2015 9:26 PM
6 **To:** [Refer to EOUSA]
7 (USACAS) [Redacted] (SDO) [Redacted] (SDO)
8 **Subject:** Photo

9 All,

10 Here is the info for your photo with HRC on Friday, 8/7/15. Please meet
11 me at 0900 hours Friday morning at [Redacted] in La Jolla. You can park
12 on [Redacted] and walk to the residence (please don't park on [Redacted]).

13 You do not need to bring anything to the site. I will meet you outside the
14 front door of the residence and lead you inside to the photo op room. If
15 you have any questions / issues feel free to call or email me.

16 I look forward to seeing you on Friday.

17 Thanks,
18 [Redacted]
19 US Secret Service
20 [Redacted]

21 Since his indictment last year, Congressman Hunter has been repeatedly criticized
22 in the media for claiming that the investigation was tainted from the outset because it
23 was conducted by political partisans. The evidence now establishes without question
24 that the Assistant US Attorney's that initiated the investigation had a glaring conflict of
25 interest and loss of impartiality that is intended to separate federal prosecutors from
26 politically influenced decisions. Any explanation the Government gives now for
27 initiating the investigation of Congressman Hunter should be viewed with total
28 skepticism through the lens of their attempts to cover up the partisan political activities
of the prosecutors that initiated the investigation.

1 **II. THE INDICTMENT SHOULD BE DISMISSED**

2 The Fifth Amendment of the United States Constitution provides that no person
3 shall be “deprived of life, liberty, or property, without due process of law.” The Due
4 Process Clause safeguards “fundamental elements of fairness in a criminal trial.” *Rivera*
5 *v. Illinois*, 556 U.S. 148, 158 (2009) (citing *Spencer v. Texas*, 385 U.S. 554, 563-564
6 (1967)). While fundamental fairness encompasses the rights enumerated in the Bill of
7 Rights, *Dowling v. United States*, 493 U.S. 342, 352 (1990), the Supreme Court has
8 repeatedly held that fundamental fairness requires protections that are not mentioned in
9 the Bill of Rights but are essential to a fair trial. *In re Winship*, 397 U.S. 358 (1970)
10 (holding that, despite the absence of a specific constitutional provision requiring proof
11 beyond a reasonable doubt in criminal cases, such proof is a due process requirement).
12 See also *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978) (holding that prosecution
13 “violated the due process guarantee of fundamental fairness in the absence of an
14 instruction as to the presumption of innocence”); *Wardius v. Oregon*, 412 U.S. 470
15 (1973) (holding a rule “fundamentally unfair” that required defendant to disclose an
16 alibi defense unless defendant is given reciprocal discovery rights against the state).

17 “The absence of an impartial and disinterested prosecutor has been held to violate
18 a criminal defendant’s due process right to a fundamentally fair trial.” *State of N.J. v.*
19 *Imperiale*, 773 F. Supp. 747, 750 (D.N.J. 1991) (citing *Ganger v. Peyton*, 379 F.2d 709,
20 714 (4th Cir. 1967)). The Supreme Court has observed that a situation that injects “a
21 personal interest, financial or otherwise, into the enforcement process may bring
22 irrelevant or impermissible factors into the prosecutorial decision and in some contexts
23 raise serious constitutional questions. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249
24 (1980). “Prosecution by someone with conflicting loyalties calls into question the
25 objectivity of those charged with bringing a defendant to judgement.” *Young v. Vuitton*,
26 481 U.S. 787, 810 (1987) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263-264 (1986))
27 (internal quotations marks omitted).

28 The Young Court reasoned:

1 [A]n interested prosecutor creates an appearance of impropriety that
 2 diminishes faith in the fairness of the criminal justice system in general.
 3 The narrow focus of harmless error analysis is not sensitive to the
 4 underlying concern. If a prosecutor uses the expansive prosecutorial
 5 powers to gather information for private purposes, ***the prosecution***
 6 ***function has been seriously abused even if, in the process, sufficient***
 7 ***evidence is obtained to convict a defendant.*** Prosecutors “have available a
 8 terrible array of coercive methods to obtain information,” such as “police
 9 investigation and interrogation, warrants, informers and agents whose
 10 activities are immunized, authorized wiretapping, civil investigative
 11 demands, [and] enhanced subpoena power.” C. Wolfram, *Modern Legal*
 12 *Ethics* 460 (1986). The misuse of those methods “would unfairly harass
 13 citizens, give unfair advantage to [the prosecutor’s personal interests], and
 14 impair public willingness to accept the legitimate use of those powers.”
 15 *Ibid.* Notwithstanding this concern, the determination of whether an error
 16 was harmful focuses only on “whether there is a reasonable possibility that
 17 the [error] complained of might have contributed to the conviction.”
 18 *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v.*
Connecticut, 375 U.S. 85, 86-87 (1963)). ***A concern for actual prejudice***
in such circumstances misses the point, for what is at stake is the public
perception of the integrity of our criminal justice system. “[J]ustice must
 satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 1, 14
 (1954) and a prosecutor with conflicting loyalties presents the appearance
 of precisely the opposite. Society’s interest in disinterested prosecution
 therefore would not be adequately protected by harmless-error analysis, for
 such analysis would not be sensitive to the fundamental nature of the error
 committed. (**emphasis added**)

19 *Young*, 481 U.S. at 811 (citations amended).

20 The investigation and prosecution of Congressman Hunter comes squarely within
 21 the reasoning of the Supreme Court holding in *Young* to dismiss an indictment for the
 22 improper conduct of the investigating prosecutors. The public deserves more from its
 23 Department of Justice. Here we have both the Department of Justice and the Secret
 24 Service, an agency of the Department of Homeland Security, providing the public with
 25 false information to cover up their actions in the investigation of Congressman Hunter.⁸

26 _____
 27 ⁸ Congressman Hunter requests this court to Order the Government to produce the entire
 28 un-redacted email produced by the Secret Service in response to the FOIA request and

1 **III. THE APPEARANCE OF IMPROPRIETY**

2 The appearance of impropriety is critical under these circumstances. Congress
3 has directed that

4 [t]he Attorney General shall promulgate rules and regulations which
5 require the disqualification of any officer or employee of the Department of
6 Justice, including a United States attorney or a member of such attorney's
7 staff, from participation in a particular investigation or prosecution if such
8 participation may result in a personal, financial, or *political* conflict of
9 interest, or the appearance thereof. Such rules and regulations may provide
10 that a willful violation of any provision thereof shall result in removal from
11 office.

12 28 U.S.C. §528. (**emphasis added**)

13 Pursuant to that congressional directive, The United States Attorney's Manual §
14 3-2.170 provides:

15 When United States Attorneys, or their offices become aware of an issue
16 that could require a recusal in a criminal or civil matter or case as a result
17 of a personal interest or professional relationship with parties involved in
18 the matter, they must contact General Counsel's Office (GCO), EOUSA.
19 The requirement of recusal does not arise in every instance, but only where
20 a conflict of interest exists or there is an appearance of a conflict of interest
21 or loss of impartiality.

22 A United States Attorney who becomes aware of circumstances that might
23 necessitate a recusal of himself/herself or of the entire office, should
24 promptly notify GCO, EOUSA, at (202) 252-1600 to discuss whether a
25 recusal is required. If recusal is appropriate, the USAO will submit a
26 written recusal request memorandum to GCO. GCO will then coordinate
27 the recusal action, obtain necessary approvals for the recusal, and assist the
28 office in arranging for a transfer of responsibility to another office,
including any designations of attorneys as a Special Attorney or Special
Assistant to the Attorney General (see USAM 3-2.300) pursuant to 28
U.S.C. Sec. 515.

25 also Order the Government to produce all internal Department of Justice notes,
26 memorandums or communications either written or oral between members of the United
27 States Attorney's Office for the Southern District of California and the Department of
28 Justice that discuss the attendance of AUSA Robinson and Allen attending the Clinton
fundraising event.

1 United States Attorney’s Manual § 3-2.170

2 At a minimum, the lack of impartiality by the United States Attorney’s Office for
3 the Southern District of California in the investigation of Congressman Hunter created
4 the appearance of impropriety that warrants recusal.

5 **IV. CONCLUSION**

6 Accordingly, Defendant DUNCAN D. HUNTER respectfully requests that the
7 Court dismiss the indictment or in the alternative, recuse the United States Attorney’s
8 Office for the Southern District of California from any further participation in this
9 matter. This court must do what the Department of Justice surely would have done had
10 it been provided with the truth regarding the reason for the prosecutor’s attendance at
11 the political fundraiser.

12 Respectfully submitted,

13 Dated: June 24, 2017

14 SELTZER CAPLAN McMAHON VITEK
15 A Law Corporation

16 By: s/ Gregory A. Vega

17 Gregory A. Vega

18 Attorneys for Defendant, DUNCAN D. HUNTER

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TABLE OF EXHIBITS

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1	Letter from Jay Macklin, General Counsel, U.S. Department of Justice to Gregory A. Vega, dated August 1, 2018	15
2	Redacted August 5, 2015 E-mail from Secret Service to the United States Attorney’s Office for the Southern District of California, received June 12, 2019	17
3	Declaration of Gregory A. Vega in Support of Motion to Dismiss or, in the Alternative, to Recuse the United States Attorney’s Office for the Southern District of California, dated June 24, 2019	20

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EXHIBIT 1



U.S. Department of Justice

Executive Office for United States Attorneys

General Counsel's Office

*Three Constitution Square
175 N Street, NE, Ste 5.100
Washington, DC 20530*

*Phone (202) 252-1600
FAX (202) 252-1650*

August 1, 2018

Mr. Gregory Vega
Seltzer Caplan McMahon Vitek
750 B Street, Suite 2100
San Diego, CA 92101

Dear Mr. Vega:

I am in receipt of your letter, dated July 30, 2018 and addressed to Brian A. Benczkowski, Assistant Attorney General of the Criminal Division, regarding "In re Grand Jury Investigation of Congressman Duncan D. Hunter." It has been referred to me for a response.

We have reviewed the points raised in your letter and since, as I believe you already know, AUSA Robinson and AUSA Allen were not at the Hillary Clinton event as Clinton supporters but in their official capacity assisting law enforcement, we do not believe the circumstances necessitate a recusal of the United States Attorney's Office for the Southern District of California (USAO). As a result, you should direct any issues relating to the investigation to the USAO or raise them with the appropriate court.

Sincerely,

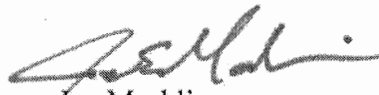
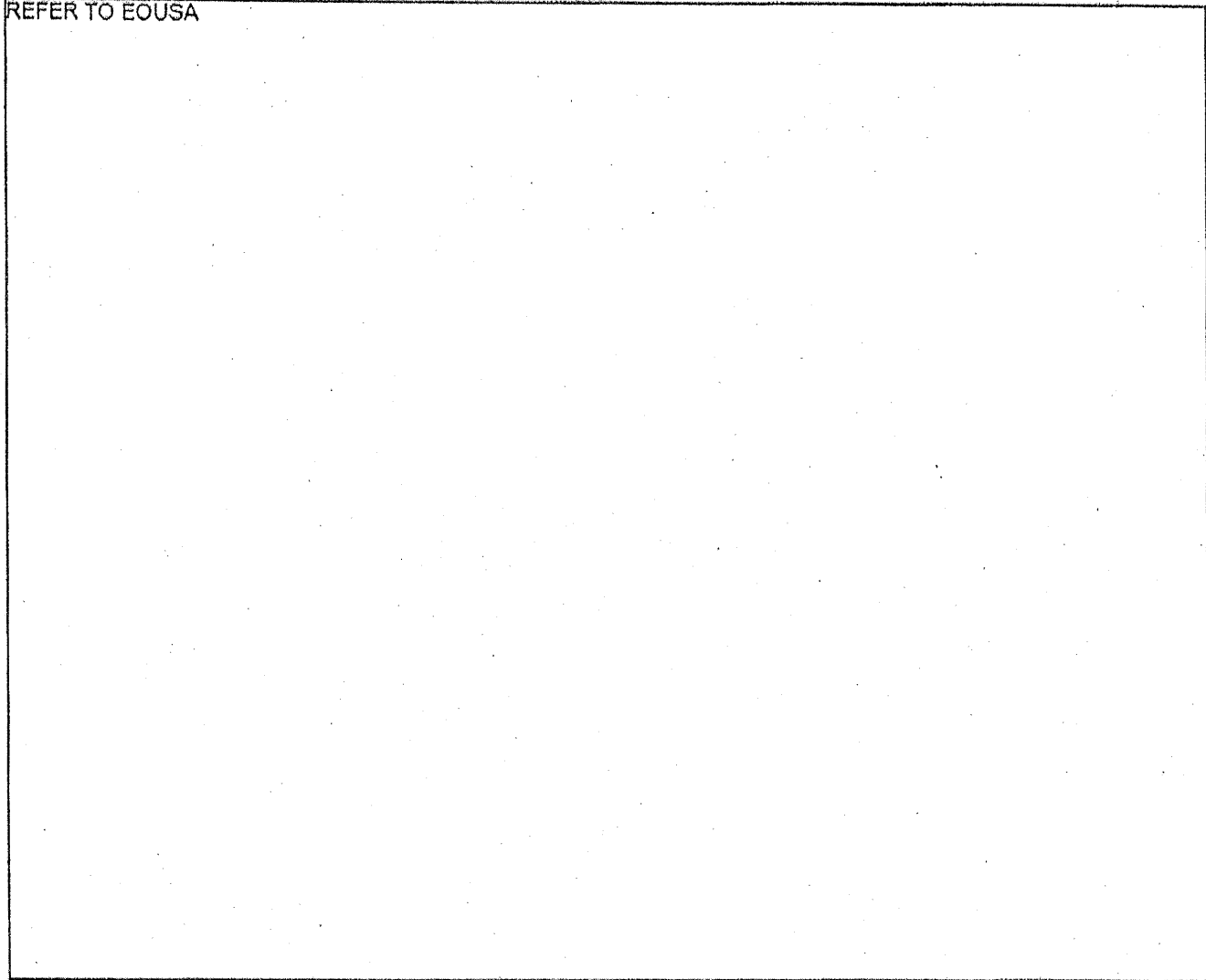

Jay Macklin
General Counsel

EXHIBIT 2

REFER TO EOUSA



From: (b)(6);(b)(7)(C) (SDO) (b)(6);(b)(7)(C)

Sent: Wednesday, August 05, 2015 9:26 PM

To: REFER TO EOUSA

(USACAS) (b)(6);(b)(7)(C) (SDO); (b)(6);(b)(7)(C) (SDO)

Subject: Photo

REFER TO EOUSA

All,

Here is the info for your photo with HRC on Friday, 8/7/15. Please meet me at 0900 hours Friday morning at (b)(6);(b)(7)(C) in La Jolla. You can park on (b)(6);(b)(7)(C) and walk to the residence (please don't park on (b)(6);(b)(7)(C))

You do not need to bring anything to the site. I will meet you outside the front door of the residence and lead you inside to the photo op room. If you have any questions / issues feel free to call or email me.

I look forward to seeing you on Friday.

Thanks,

(b)(6),(b)(7)(C)

US Secret Service

(b)(6),(b)(7)(C)

Sent from my Windows Phone

All e-mail to/from this account is subject to official review and is for official use only. Action may be taken in response to any inappropriate use of the Secret Service's e-mail system. This e-mail may contain information that is privileged, law enforcement sensitive, or subject to other disclosure limitations. Such information is loaned to you and should not be further disseminated without the permission of the Secret Service. If you have received this e-mail in error, do not keep, use, disclose, or copy it; notify the sender immediately and delete it. --

EXHIBIT 3

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1 Gregory A. Vega, Esq. (CABN 141477)
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padams@scmv.com; arias@scmv.com
6

7 Attorneys for Defendant DUNCAN D. HUNTER

8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
10 **(Judge Thomas J. Whelan)**

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 DUNCAN D. HUNTER,
15 Defendant.

Case No. 18-CR-3677-W

DECLARATION OF GREGORY A. VEGA IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO RECUSE THE UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DATE: July 1, 2019
TIME: 10:00 a.m.
COURTROOM: 3C
JUDGE: Hon. Thomas J. Whelan

19 I, Gregory A. Vega, declare as follows:

20 1. I am an attorney licensed to practice law in the State of California, am a
21 shareholder with the law firm Seltzer Caplan McMahon Vitek, a law corporation,
22 attorneys of record for DUNCAN D. HUNTER. I have personal knowledge of the
23 matters stated below, and if called upon to testify could testify competently thereto.

24 2. On July 30, 2018, I wrote to Adam Braverman, United States Attorney for
25 the Southern District of California and Brian A. Benckowski, Assistant Attorney
26 General of the Criminal Division, United States Department of Justice and requested
27 that the United States Attorney's Office for the Southern District of California be
28 recused from any further participation in the investigation of Congressman Duncan D.

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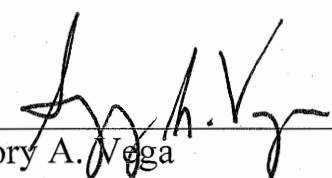
1 Hunter based upon the partisan political activities of Assistant US Attorneys Alana
2 Robinson and Emily W. Allen.

3 3. On August 1, 2018, my request for recusal was denied in a letter from Jay
4 Macklin, General Counsel for the Executive Office for United States Attorney.

5 4. On September 10, 2018, I made a Freedom of Information Act ("FOIA")
6 request to the United States Secret Service for all documents related to communications
7 between any Secret Service agents that attended the Hillary Clinton fundraiser in La
8 Jolla, California on August 7, 2015 and either Assistant US Attorney Alana Robinson or
9 Assistant U.S. Attorney Emily W. Allen related to attending the Hillary Clinton
10 fundraiser.

11 5. On June 12, 2019, the Secret Service responded to the FOIA request and
12 provided a redacted email from the Secret Service to the United States Attorney's Office
13 sent on August 5, 2015.

14 I declare under penalty of perjury under the laws of the United States of America
15 that the foregoing is true and accurate. Executed this 24th day of June, 2019, at San
16 Diego, California.

17
18
19 
20 Gregory A. Vega