U.S. Department of Justice

Special Counsel's Office

January 10, 2025

Dear Attorney General Garland:

You appointed me Special Counsel on August 11, 2023. Pursuant to the appointment order, you charged me with continuing my investigation into "allegations of certain criminal conduct by, among others, Robert Hunter Biden."[1] The Special Counsel regulations require me, at the conclusion of my work, to "provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached."[2] My final report is enclosed.

As Special Counsel, I prosecuted Hunter Biden in two cases and obtained convictions in both—in one case, Mr. Biden pleaded guilty to all counts, and in the other, a jury found him guilty of all counts. In my report, I discuss the prosecution decisions that led to the two charged cases and subsequent convictions.[3] On December 1, 2024, before Mr. Biden could be sentenced in either case, President Biden pardoned his son for all criminal offenses he committed or may have committed over the last eleven years.[4] In light of this pardon, I cannot make any additional charging decisions as to Mr. Biden's conduct during those eleven years. It would thus be inappropriate to discuss whether additional charges are warranted.

The Special Counsel regulations also provide that the "Attorney General may determine that public release of these reports would be in the public interest, to the extent that release would comply with applicable legal restrictions. All other releases of information by any Department of Justice employee, including the Special Counsel and staff, concerning matters handled by Special Counsels shall be governed by the generally applicable Departmental guidelines concerning public comment with

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[1] Appointment Order, Aug. 11, 2023, *available at* https://www.justice.gov/d9/2023-08/order.appointment_of_david_c._weiss_as_special_counsel.pdf.

[2] 28 C.F.R. § 600.8(c).

[3] I have ensured my report complies with 26 U.S.C. § 6103, which generally prohibits the disclosure of tax "returns" and "return information."

[4] Press Release, The White House, Statement from President Joe Biden (December 1, 2024), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2024/12/01/statement-from-president-joe-biden-11/.

respect to any criminal investigation, and relevant law."[5] When appointing me Special Counsel, you stated that you are "committed to making as much of [my] report public as possible, consistent with legal requirements and Department policy."[6]

Therefore, in drafting this report, I was mindful of Department policies that caution restraint when publicly revealing information about uncharged third parties. Specifically, with respect to "public filings and proceedings," Justice Manual § 9-27.760 provides that prosecutors "should remain sensitive to the privacy and reputation interests of uncharged parties," and that it is generally "not appropriate to identify . . . a party unless that party has been publicly charged with the misconduct at issue."[7] The Justice Manual also sets forth factors to guide the disclosure of information about uncharged individuals, such as their privacy, safety, and reputational interests; the potential effect of any statements on ongoing criminal investigations or prosecutions; whether public disclosure may advance significant law enforcement interests; and other legitimate and compelling governmental interests.[8]

Based on these policies, as well as my obligation to abide by them,[9] this report does not discuss the conduct of uncharged third parties.[10] Because I publicly charged former FBI informant Alexander Smirnov for obstruction and lying to federal agents about Mr. Biden and his father, as well as for tax offenses, the report mentions him by name. Otherwise, the report focuses only on my charging decisions as to Mr. Biden.

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[5] 28 C.F.R. § 600.9(c).

[6] Attorney General Merrick B. Garland, Remarks (August 11, 2023), *available at* https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-statement.

[7] Justice Manual § 9-27.760.

[8] *Id.*

[9] *See* 28 C.F.R. § 600.7(a) (stating that a "Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice.").

[10] *See also, e.g.*, Brett M. Kavanaugh, The President and the Independent Counsel, 86 Geo. L.J. 2133, 2156 (1998) (A public report "violates the basic norm of secrecy in criminal investigations, it adds time and expense to the investigation, and it often is perceived as a political act. . . . [A]n independent counsel is appointed only to investigate certain suspected violations of federal criminal law in order to determine whether criminal violations occurred, and to prosecute such violations if they did occur.").

It has been my pleasure to serve as Special Counsel for the last 17 months, alongside my small team of dedicated Department of Justice employees. Thank you for allowing my Office to conduct its investigations and prosecutions independently.[11]

Sincerely,

David C. Weiss
Special Counsel

[11] Under the Special Counsel regulations, "[t]he Special Counsel shall not be subject to the day-to-day supervision of any official of the Department," but "the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued." 28 C.F.R. § 600.7(b). Throughout my tenure as Special Counsel, you never exercised this authority.

Report on the Investigation Into the Criminal Conduct of Robert Hunter Biden

Special Counsel David C. Weiss

Submitted Pursuant to 28 C.F.R. § 600.8(c)

Wilmington, D.E.

January 2025

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I. Introduction

On August 11, 2023, Attorney General Merrick B. Garland appointed me as Special Counsel.[1] My charge was to complete the investigation into "allegations of certain criminal conduct by, among others, Robert Hunter Biden."[2] In the last 17 months, I have obtained convictions in two separate cases against Mr. Biden for tax crimes and firearms offenses. I have also obtained convictions in two additional cases against Alexander Smirnov, who lied to government agents about Mr. Biden and President Joseph R. Biden and committed tax crimes.

I am a federal prosecutor. I have served my country in the U.S. Department of Justice for over 20 years, first as a line prosecutor, then as a supervising prosecutor, and finally as the United States Attorney for the District of Delaware. Throughout my career, I have endeavored to apply the well-established standards for the prosecution of criminal offenses to the facts as I found them. I have followed the evidence and held accountable those who violate the law. And most significantly, I have always done my best to uphold the fundamental values of fairness and justice.

These values are reflected in the Principles of Federal Prosecution, which are some of the most important rules in the federal criminal justice system. Under the Principles, the United States should recommend prosecution if "the person's conduct constitutes a federal offense," and "the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution."[3] I have looked to the Principles to guide my decision-making throughout my career.

I prosecuted the two cases against Mr. Biden because he broke the law. A unanimous jury—who found Mr. Biden guilty of gun charges—and Mr. Biden himself—who pleaded guilty to tax offenses—agreed. As I have done for twenty years, I applied the Principles of Federal Prosecution and determined that prosecution was warranted. My decisions to charge those crimes were based not only upon the Constitution's requirement of probable cause, that is, "reasonable ground for belief of guilt,"[4] but also the Principles' additional requirements that "the person's conduct

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[1] Appointment Order, Aug. 11, 2023, *available at* https://www.justice.gov/d9/2023-08/order.appointment_of_david_c._weiss_as_special_counsel.pdf.

[2] *Id.*

[3] Justice Manual § 9-27.220.

[4] *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

constitutes a federal offense," that "the admissible evidence will probably be sufficient to obtain and sustain a conviction," and that the prosecution "serve [a] substantial federal interest."[5] The successful results obtained in those cases provide confirmation that these requirements were met.

On December 1, 2024, days before Mr. Biden was scheduled to be sentenced for his crimes, President Biden signed a "Full and Unconditional Pardon" for his son covering nearly eleven years of conduct, including conduct related to both of the convictions I obtained during my time as Special Counsel.[6] The pardon also encompasses uncharged conduct over those eleven years. And when he announced the pardon, President Biden simultaneously issued a press release that criticized the prosecution of his son as "selective[]," "unfair[]," "infected" by "raw politics," and a "miscarriage of justice."[7] This statement is gratuitous and wrong.

Other presidents have pardoned family members, but in doing so, none have taken the occasion as an opportunity to malign the public servants at the Department of Justice based solely on false accusations. As Judge Mark C. Scarsi, the judge presiding over Mr. Biden's tax case, stated:

> The Constitution provides the President with broad authority to grant reprieves and pardons for offenses against the United States, U.S. Const. art. II, § 2, cl. 1, but nowhere does the Constitution give the President the authority to rewrite history.[8]

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[5] Justice Manual § 9-27.220.

[6] The complete text of the pardon reads: "A Full and Unconditional Pardon . . . For those offenses against the United States which he has committed or may have committed or taken part in during the period from January 1, 2014 through December 1, 2024, including but not limited to all offenses charged or prosecuted (including any that have resulted in convictions) by Special Counsel David C. Weiss in Docket No. 1:23-cr-00061-MN in the United States District Court for the District of Delaware and Docket No. 2:23-CR-00599-MCS-1 in the United States District Court for the Central District of California."

[7] Press Release, The White House, Statement from President Joe Biden (December 1, 2024), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2024/12/01/statement-from-president-joe-biden-11/ ("Pardon Press Release").

[8] Order Re: Notice of Pardon at 3, *United States v. Robert Hunter Biden*, 2:23-cr-00599-MCS (C.D. Cal. Dec. 3, 2024) ("*Tax Case*"), Doc. 239.

These prosecutions were the culmination of thorough, impartial investigations, not partisan politics. Eight judges across numerous courts have rejected claims that they were the result of selective or vindictive motives.[9] Calling those rulings into question and injecting partisanship into the independent administration of the law undermines the very foundation of what makes America's justice system fair and equitable. It erodes public confidence in an institution that is essential to preserving the rule of law.

In prosecuting these cases, I exercised my best judgment in deciding whether we could prove the cases and whether there was a substantial federal interest. I recognize that reasonable minds may differ about the correctness of my decisions. What should not be questioned, however, is that these decisions were duly considered and made in good faith with fidelity to the Principles of Federal Prosecution. Far from selective, these prosecutions were the embodiment of the equal application of justice—no matter who you are, or what your last name is, you are subject to the same laws as everyone else in the United States.

II. Principles of Federal Prosecution

My prosecution decisions were guided, as they have always been, by the longstanding Principles of Federal Prosecution, which are memorialized in the Department's Justice Manual. They serve as the fundamental framework used to reach the judgments described in this report.

The Principles constrain the prosecutor's substantial power by limiting it to those cases that present real, provable, and blameworthy criminal conduct. They guide prosecutors in exercising their all-important discretion, in Attorney General Jackson's words, "to select the cases for prosecution and to select those in which the

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[9] *See* Order by Judge Mark C. Scarsi Denying Def.'s Motions to Dismiss, *Tax Case*, (Apr. 1, 2024), Doc. 67; Mem. Op. by Judge Maryellen Noreika Denying Def.'s Mot. to Dismiss the Indictment for Selective & Vindictive Prosecution, *United States v. Robert Hunter Biden*, 1:23-cr-00061-MN (D. Del. Apr. 12, 2024) ("*Gun Case*"), Doc. 99; Order Dismissing Def.'s Appeal by Judges William Canby, A. Wallace Tashima, and Lucy Koh, *United States v. Robert Hunter Biden*, 24-2333 (9th Cir. May 14, 2024) ("*Tax Appeal*"), Doc. 16; Order Dismissing Def.'s Appeal by Judges Patty Shwartz, Cindy Chung, and D. Brooks Smith, *United States v. Robert Hunter Biden*, 24-1703 (3rd Cir. May 9, 2024) ("*Gun Appeal I*"), Doc. 17.

offense is the most flagrant, the public harm the greatest, and the proof the most certain."[10]

The threshold requirement for a federal prosecution is probable cause.[11] Probable cause is "a reasonable ground for belief of guilt."[12] While the Constitution requires probable cause for every prosecution, the Principles of Federal Prosecution require more. A prosecutor must reach two conclusions in every case before charges may be brought:

(1) that the person's conduct constitutes a federal offense; and

(2) that the admissible evidence will probably be sufficient to obtain and sustain a conviction.[13]

Under the first requirement, the prosecutor must conclude the person is in fact guilty. Under the second requirement, a prosecutor must conclude "that the person will more likely than not be found guilty beyond a reasonable doubt by an unbiased trier of fact and that the conviction will be upheld on appeal."[14] This second inquiry focuses on a jury's consideration of the admissible evidence and their legal instructions.

Even when a prosecutor determines that the person has committed a federal offense and that the evidence is sufficient to obtain a conviction, the Principles require that he also assess whether three other factors exist that may counsel against prosecution:

(1) the prosecution would serve no substantial federal interest;

(2) the person is subject to effective prosecution in another jurisdiction; or

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[10] Robert H. Jackson, "The Federal Prosecutor," Address at Second Annual Conference of United States Attorneys, Washington, D.C. (Apr. 1, 1940).

[11] *See* Justice Manual § 9-27.200; *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[12] *Pringle*, 540 U.S. at 371.

[13] Justice Manual § 9-27.220.

[14] *Id.*, Comment.

(3) there exists an adequate non-criminal alternative to prosecution.[15]

Several sections of the Principles are devoted to the complex considerations in making these judgments.[16] As relevant here, the Principles state that, in determining whether a prosecution would serve a substantial federal interest, the prosecutor should "weigh all relevant considerations," including:

1. Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others;
7. The person's personal circumstances;
8. The interests of any victims; and
9. The probable sentence or other consequences if the person is convicted.[17]

Therefore, in making my charging decisions, I concluded that Mr. Biden had committed each and every one of the elements of a criminal offense. I determined not only that he had committed federal offenses, but also that a faithful jury would be more likely to convict than acquit him, and that no other factors, individually or collectively, counseled against prosecution.

At no time did my decisions take into account personal opinions—mine or anyone else's—about Mr. Biden's moral character, his popularity or unpopularity among the general public or a certain subgroup like a political party, the ethical propriety of his conduct, or other value judgments that are not embodied in the

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[15] *Id.* § 9-27.220.

[16] *Id.* §§ 9-27.230–9-27.260.

[17] *Id.* § 9-27.230.

elements of the criminal offenses themselves.[18] I also never considered whether my decisions would be viewed favorably or unfavorably by any politicians. And when politicians expressed opinions about my conduct, I ignored them because they were irrelevant. Simply put, my decisions were based on the facts and the law and nothing else.

III. Charging Decisions

As United States Attorney and then as Special Counsel, I supervised investigations of various offenses that may have been committed by Mr. Biden, including tax and firearm offenses. The tax investigation[19] revealed that Mr. Biden engaged in a four-year scheme not to pay at least $1.4 million in federal taxes he owed for tax years 2016 through 2019 and that he evaded taxes for tax year 2018 when he filed a false return for that year in 2020.[20]

More specifically, between 2016 and 2020, Mr. Biden received more than $7 million in income.[21] Instead of paying his taxes, he chose to spend the money on his extravagant lifestyle, including drugs, escorts, luxury hotels, and exotic cars.[22] And, when he did finally pay some of his taxes, he falsely claimed that personal items, including clothing and escort services, were business expenses.[23] The evidence also showed that Mr. Biden's conduct giving rise to the false return and tax evasion

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[18] *See id.* § 9-27.260.

[19] 26 U.S.C. § 6103(a) prohibits the disclosure of "return information," which includes information disclosing "whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing." *Id.* § 6103(b)(2)(A). Accordingly, I cannot publicly discuss any other tax years that may have been under investigation. *See Snider v. United States*, 468 F.3d 500, 508 (8th Cir. 2006).

[20] Indictment ¶ 4, *Tax Case* (Dec. 7, 2023), Doc. 1. A more fulsome discussion of the evidence supporting the tax charges is contained in the indictment.

[21] *Id.* ¶ 5.

[22] *Id.* ¶ 37.

[23] *Id.* ¶¶ 117-37, 141.

charges largely occurred in 2020,[24] the year after he stopped using drugs and alcohol.[25]

Investigators also learned that, in October 2018, Mr. Biden lied on a federal background check form when he purchased a revolver, a Colt Cobra 38SPL.[26] When buying the gun, he purchased a speed loader and 25 cartridges of hollow point ammunition, a type of bullet that expands upon impact and causes significant lethal damage.[27] He then completed an ATF Form 4473 and answered "No" to a question that asked, "Are you an unlawful user of, or addicted to . . . any . . . stimulant, narcotic drug, or any other controlled substance?"[28] The Form 4473 also required Mr. Biden to certify that his answers were true, correct, and complete.[29] Mr. Biden eventually left the gun unsecured in his unlocked truck—alongside crack cocaine—on someone else's property where children lived.[30] Upon finding the firearm and without telling Mr. Biden, his girlfriend threw it in a trashcan at a nearby supermarket, where it was found by an elderly man searching for recyclables.[31]

In 2021, while the investigation was ongoing, Mr. Biden published a memoir, *Beautiful Things*. In the memoir, Mr. Biden admitted to smoking crack "every fifteen minutes, seven days a week" in 2018, the same time period during which he possessed the firearm and lied on the federal forms.[32]

Ultimately, for the reasons set forth below, I concluded that the Principles of Federal Prosecution were satisfied as to both the tax offenses and the gun offenses.

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[24] *Id.* ¶¶ 113-37.

[25] Initial Appearance & Plea Hr'g Tr. at 71, *Gun Case* (July 26, 2023), Doc. 16.

[26] Trial Tr. Vol. 3 at 675-701, *Gun Case* (June 5, 2024), Doc. 257.

[27] *Id.* at 701-07.

[28] Trial Ex. 10A at 1, *Gun Case*.

[29] *Id.* at 2.

[30] Trial Tr. Vol. 4 at 826-33, *Gun Case* (June 6, 2024), Doc. 258.

[31] *Id.* at 833-37, 1030-31, 1033.

[32] Hunter Biden, BEAUTIFUL THINGS (Gallery Books 2021) 190.

A. The Principles of Federal Prosecution Supported Bringing Tax Charges Against Mr. Biden

Based on the evidence gathered during the tax investigation, I concluded that Mr. Biden's conduct constituted a federal offense—specifically, he violated 26 U.S.C. § 7201, which criminalizes willfully attempting to evade or defeat taxes, 26 U.S.C. § 7203, which criminalizes willfully failing to file and pay taxes, and 26 U.S.C. § 7206, which criminalizes willfully filing a false tax return. I also determined that the admissible evidence indicated that a conviction was likely. Pursuant to the Principles, I then evaluated the following factors to determine whether the prosecution "would serve no substantial federal interest."[33] For the reasons explained, these factors weighed in favor of prosecution.

First, I considered the nature and seriousness of Mr. Biden's conduct with respect to his taxes.[34] As a well-educated lawyer and businessman, Mr. Biden consciously and willfully chose not to pay at least $1.4 million in taxes over a four-year period.[35] From 2016 to 2020, Mr. Biden received more than $7 million in total gross income, including approximately $1.5 million in 2016, $2.3 million in 2017, $2.1 million in 2018, $1 million in 2019 and $188,000 from January through October 15, 2020.[36] In addition, in 2020, Mr. Biden received approximately $1.2 million in financial support from a personal friend.[37] Mr. Biden made this money by using his last name and connections to secure lucrative business opportunities, such as a board seat at a Ukrainian industrial conglomerate, Burisma Holdings Limited, and a joint venture with individuals associated with a Chinese energy conglomerate.[38] He negotiated and executed contracts and agreements that paid him millions of dollars

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[33] Justice Manual § 9-27.220.

[34] *See* Justice Manual § 9-27.230.

[35] Indictment ¶¶ 1, 4, *Tax Case*.

[36] Indictment ¶ 5, *Tax Case*.

[37] *Id.* ¶ 17.

[38] *Id.* at ¶¶ 2, 6-18; Biden, BEAUTIFUL THINGS 4 ("There's no question that my last name has opened doors. . . ."); Victoria Thompson, et al., *Exclusive: 'I'm here'*, ABC NEWS (Oct. 15, 2019), *available at* https://abcnews.go.com/Politics/exclusive-hiding-plain-sight-hunter-biden-defends-foreign/story?id=66275416 (When asked, "[i]f your last name wasn't Biden, do you think you would've been asked to be on the board of Burisma?" Mr. Biden responded, "I don't know. I don't know. Probably not, in retrospect.").

for limited work.[39] Despite this, and in furtherance of his multi-year scheme not to pay taxes on this income, Mr. Biden:

- Subverted the payroll and tax withholding process of his own company, Owasco, PC by withdrawing millions from Owasco, PC outside of the payroll and tax withholding process that it was designed to perform;
- Spent millions of dollars on an extravagant lifestyle rather than paying his tax bills;
- In 2018, stopped paying his outstanding and overdue taxes for tax year 2015;
- Willfully failed to pay his 2016, 2017, 2018, and 2019 taxes on time, despite having access to funds to pay some or all of these taxes;
- Willfully failed to file his 2017 and 2018 tax returns on time; and
- When he finally did file his 2018 return in 2020, reported false business deductions—including approximately $388,000 for purported business travel—in order to evade assessment of taxes and to reduce the substantial tax liabilities he faced.[40]

These are not "inconsequential" or "technical" tax code violations.[41] Nor can Mr. Biden's conduct be explained away by his drug use—most glaringly, Mr. Biden filed his false 2018 return, in which he deliberately underreported his income to lower his tax liability, in February 2020,[42] approximately eight months after he had regained his sobriety.[43] Therefore, the prosecution of Mr. Biden was warranted given the nature and seriousness of his tax crimes.

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[39] Indictment ¶¶ 5-18, *Tax Case*; Gov't's Resp. to Def.'s 4th Mot. in Limine to Exclude Reference to Alleged Improper Political Influence and/or Corruption at 3, *Tax Case* (August 7, 2024), Doc. 181.

[40] Indictment ¶¶ 4, 114, *Tax Case*.

[41] Justice Manual § 9-27.230, Comment.

[42] Indictment ¶ 46, *Tax Case*.

[43] Initial Appearance & Plea Hr'g Tr. at 71, *Gun Case*.

Second, I considered the deterrent effect of any prosecution of Mr. Biden for his tax offenses.[44] The Justice Department's Criminal Tax Manual states that general deterrence is a "primary consideration" in criminal prosecutions for violations of the tax code.[45] The Tax Manual further provides that "[c]ivil remedies generally are not an adequate alternative for deliberate and significant tax fraud. The prospect of a criminal conviction and the imposition of jail time are necessary to deter tax crime and punish tax criminals in order to preserve the integrity of the nation's self-assessment tax system."[46] The evidence showed that, during the relevant time period, Mr. Biden had the money to pay his outstanding tax liabilities, but chose to spend that money on personal expenses. Moreover, Mr. Biden failed to timely file and pay his taxes over a four-year period and then, after becoming sober, he chose to file false returns to evade payment of taxes he owed. I concluded that the prospect of criminal penalties was necessary to accomplish the goals of both specific and general deterrence in this case.

Third, I examined Mr. Biden's culpability in connection with his offenses. Mr. Biden had no co-conspirators. The evidence demonstrated that as Mr. Biden held high-paying positions earning him millions of dollars, he chose to keep funding his extravagant lifestyle instead of paying his taxes. He then chose to lie to his accountants in claiming false business deductions when, in fact, he knew they were personal expenses.[47] He did this on his own, and his tax return preparers relied on him, because, among other reasons, only he understood the true nature of his deductions and he failed to give them records that might have revealed that the deductions were bogus.[48] Further, Mr. Biden never disclosed to his tax return preparers that he was using drugs during the years in question, something that might have caused them to more closely examine his representations that he had incurred

[44] *See* Justice Manual § 9-27.230.

[45] Criminal Tax Manual, 1.01[4] Overview of the Federal Criminal Tax Program.

[46] Criminal Tax Manual, 1.04[2][a] Prosecution Authorizations – Standards of Review.

[47] *See* Indictment ¶¶ 110-39, *Tax Case.*

[48] *See id.*

significant business expenses.[49] And his returns were prepared and filed before he published his memoir discussing his drug addiction.[50]

Fourth, I considered federal law enforcement priorities with respect to tax enforcement. The Tax Manual makes clear that criminal enforcement of the tax code is a high priority.[51]

Against these factors, I weighed Mr. Biden's criminal history. As is often the case in tax prosecutions, Mr. Biden did not have a criminal history, although I was aware that he had committed gun offenses. I considered his struggles with addiction and his choice to file false returns after he became sober. I also considered that he violated tax laws over a period of several years, and he therefore had a pattern of misconduct related to his taxes. While Mr. Biden had a personal friend who paid a large portion of his outstanding tax liability in 2021—after Mr. Biden knew he was under investigation[52]—I recognized that this was likely inadmissible evidence at trial[53] and that it did not materially mitigate Mr. Biden's culpability. And although Mr. Biden may have entered into a loan agreement with the personal friend who paid his taxes,[54] there was no evidence that Mr. Biden repaid any of those funds.

Accordingly, I concluded that these factors weighed in favor of prosecuting Mr. Biden for the tax offenses.

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[49] *See id.* ¶ 114.

[50] *See id.* ¶¶ 138-40.

[51] *See* Criminal Tax Manual, 1.01[3] Selection of Charges.

[52] *See* Gov't's 6th Mot. in Limine to Exclude the Delinquent Payment of Def.'s Taxes at 2, *Tax Case* (July 31, 2024), Doc. 151; *see* Transcribed Interview of K. Morris, H. Comm. on Oversight & Accountability & H. Comm. on the Judiciary at 52-53, 87 (Jan. 18, 2024).

[53] *See, e.g., United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004); *United States v. Baras*, 624 F. App'x 560, 560-61 (9th Cir. 2015); *United States v. Beavers*, 756 F.3d 1044, 1050 (7th Cir. 2014); *United States v. Radtke*, 415 F.3d 826, 840-41 (8th Cir. 2005).

[54] *See* Transcribed Interview of K. Morris, at 52-54, 82.

B. The Principles of Federal Prosecution Supported Bringing Gun Charges Against Mr. Biden

I determined that Mr. Biden's conduct with respect to his possession of a firearm violated 18 U.S.C. § 922(g)(3), which criminalizes possessing a firearm when addicted to or using a controlled substance, 18 U.S.C. § 922(a)(6), which criminalizes making a false statement on a federal form in connection with a firearm purchase, and 18 U.S.C. § 924(a)(1)(A), which criminalizes making a false statement related to information required to be kept by a federally licensed firearms dealer. Based on the admissible evidence, I concluded that there would be a high likelihood of conviction. In particular, § 922(g)(3) offenses can be challenging to prove because prosecutors often do not have sufficient evidence to show that a defendant is an "unlawful user of or addicted to" a controlled substance at the time in question. Here, Mr. Biden published a memoir, *Beautiful Things*, in which he admitted to his extensive crack cocaine use and addiction during the same time period when he possessed a firearm. The publication of the memoir significantly alleviated the issue of proof in this case.

I again assessed the factors set forth in the Principles of Federal Prosecution to determine whether prosecution "would serve no substantial federal interest."[55] Like with the tax offenses, I ultimately concluded that these factors weighed in favor of prosecution.

First, I considered the "federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities."[56] Prosecuting firearms offenses has been a top priority for the federal government for many years. For example, in June 2022, President Biden signed the Bipartisan Safer Communities Act,[57] which was enacted to reduce gun violence and strengthen firearms enforcement.[58] Among other things, this statute increased the maximum penalty for a § 922(g)(3) offense from ten to fifteen years' imprisonment.[59] Moreover, pursuant to the Act, in 2023, the Bureau of Alcohol, Tobacco, Firearms,

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[55] Justice Manual § 9-27.220.

[56] *Id.* § 9-27.230.

[57] Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

[58] *See* Office of Mgmt. & Budget, Executive Office of the President, Statement of Administration Policy: S. 2938 – Bipartisan Safer Communities Act (June 23, 2022), *available at* https://www.whitehouse.gov/wp-content/uploads/2022/06/Bipartisan-Safer-Communities-Act-SAP-1.pdf.

[59] Bipartisan Safer Communities Act, § 12004(c)(2), 136 Stat. at 1329.

and Explosives proposed a rule designed "to reduce the number of guns sold without background checks and keep guns out of the hands of criminals" by increasing the number of transactions requiring background checks.[60]

Second, I considered the nature and seriousness of Mr. Biden's gun offenses.[61] At a time in his life when he was regularly engaging in illicit drug deals to purchase crack cocaine, Mr. Biden lied on federal background check forms and illegally bought a revolver, a speed loader, and hollow point bullets. Mr. Biden admitted in his memoir that, during that time period, he was "dependent not only on a criminal subculture to access what you need but the lowest rung of that subculture—the one with the highest probability of violence and depravity."[62] Mr. Biden also described an episode when he had a "gun pointed at [his] face."[63] Further, after Mr. Biden bought the revolver in October 2018, he carelessly left it unsecured on a property where children lived and in a vehicle that also contained crack cocaine and drug paraphernalia. The fact that Mr. Biden's girlfriend tried to dispose of his firearm before violence resulted does not make his crimes any less serious.

As to the specific gun offenses with which Mr. Biden was charged, an analysis of Justice Department data from 2008 to 2017 shows that these charges are brought more frequently than over 90 percent of the other available firearm offenses. Out of the 86 different types of federal gun charges listed in that study, the gun charges filed against Mr. Biden are the fifth, seventh, and eighth most frequently charged offenses,[64] respectively:

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[60] Fact Sheet, The White House, Biden-Harris Administration Takes Another Life-Saving Step to Keep Guns Out of Dangerous Hands (August 31, 2023), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/31/fact-sheet-biden-harris-administration-takes-another-life-saving-step-to-keep-guns-out-of-dangerous-hands/; *see also* Definition of "Engaged in the Business" as a Dealer in Firearms, 88 Fed. Reg. 61,993 (Sept. 8, 2023). ATF issued a final rule on April 19, 2024. *See* 89 Fed. Reg. 28,968 (Apr. 19, 2024).

[61] *See* Justice Manual § 9-27.230.

[62] Biden, BEAUTIFUL THINGS 160.

[63] *Id.* at 190.

[64] TRAC Reports, *Federal Weapons Prosecutions Rise for Third Consecutive Year*, *available at* https://trac.syr.edu/tracreports/crim/492/#:~:text=The%20latest%20case%2Dby%2Dcase,increase%20in%20federal%20weapons%20prosecutions.

Frequency Ranking of Federal Firearm Charges	Statute (and Corresponding Count in Indictment)
5th out of 86	Count 1: False Statement in Purchase of a Firearm, 18 U.S.C. §§ 922(a)(6) and 924(a)(2)
7th out of 86	Count 3: Possession of a Firearm by a Person Who is An Unlawful User of or Addicted to a Controlled Substance, 18 U.S.C. §§ 922(g)(3) and 924(a)(2)
8th out of 86	Count 2: False Statement Related to Information Required to Be Kept by Federally Licensed Firearms Dealer, 18 U.S.C. § 924(a)(1)(A)

The United States Sentencing Commission also recently analyzed the number of sentencings involving § 922(g) offenses and found that in 2021, the second most utilized charge was § 922(g)(3).[65] Indeed, it makes sense that the § 922(g)(3) charge is the second most frequently used gun charge against prohibited persons because "drugs and guns are a dangerous combination."[66] Handling a firearm requires care, caution, and self-control. These qualities are compromised by the psychological and physiological effects of illegal drug use, including cocaine use.[67]

There was also an additional aggravating factor that distinguished Mr. Biden from other defendants who are prosecuted under § 922(g)(3) for illegal possession: Mr. Biden lied on a federal form to obtain the gun. That fact is considered aggravating conduct by the United States Sentencing Commission.[68]

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[65] U.S. SENT'G COMM'N, WHAT DO FEDERAL FIREARMS OFFENSES REALLY LOOK LIKE? at 24 (July 2022) [hereinafter SENT'G COMM'N DATA] *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf.

[66] *Smith v. United States*, 508 U.S. 223, 240 (1993).

[67] *See* NAT'L INST. ON DRUG ABUSE, NAT'L INST. OF HEALTH, What Are the Long-Term Effects of Cocaine Use?, *available at* https://nida.nih.gov/research-topics/cocaine#long-term.

[68] SENT'G COMM'N DATA at 25.

Third, I considered the deterrent effect of prosecuting Mr. Biden for his gun crimes. As the Principles of Federal Prosecution state, criminal law's goal of deterrence "should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community."[69] I determined that holding to account a habitual crack cocaine user who lied to purchase a firearm would promote deterrence. I also considered the deterrence purposes inherent in 18 U.S.C. § 922(g)(3), which was enacted to "keep guns out of the hands of presumptively risky people."[70] Mr. Biden's dangerous possession of the gun while he was using drugs and engaging in drug deals—and while he was in proximity to children—falls squarely within the type of conduct § 922(g)(3) was designed to prevent.

Fourth, I considered Mr. Biden's culpability.[71] As a Yale-educated lawyer and businessperson, he understood that he was lying on the background check form he filled out and the consequences of doing so. But he did it anyway, because he wanted to own a gun, even though he was actively using crack cocaine.

After carefully considering these factors, I determined that they weighed in favor of prosecuting Mr. Biden for the gun offenses.

C. Mr. Biden Was Charged With the Tax and Gun Offenses in Summer 2023

In 2023, before I became Special Counsel, I determined that there was sufficient evidence to charge the tax and gun offenses. Once I made that determination, the parties began plea negotiations, something that often occurs pre-indictment in criminal cases where a defendant is represented by counsel. The discussions included both felony tax violations (tax evasion in violation of 26 U.S.C. § 7201 and filing a false return in violation of 26 U.S.C. § 7206) and misdemeanor tax violations (willful failure to file and willful failure to pay in violation of 26 U.S.C. § 7203).[72] Mr. Biden had signed agreements in 2021 and 2022 that tolled the statute of limitations as to the tax offenses, and he was thus aware that all of these charges

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[69] Justice Manual § 9-27.230, Comment.

[70] *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010).

[71] *See* Justice Manual § 9-27.230.

[72] *See* 2021 Tolling Agreement, *Tax Case*, Doc. 38-1; 2022 Tolling Agreement, *Tax Case*, Doc. 38-2.

were on the table.[73] The discussions also included potential charges related to Mr. Biden's unlawful possession of a firearm while he was using and addicted to crack cocaine.[74]

The plea discussions occurred over several months, and in June 2023, the parties negotiated a potential resolution that did not include all of the charges under consideration. This is a common result when plea negotiations occur pre-indictment. The potential resolution was memorialized in two separate agreements.

First, the parties agreed to enter into a plea agreement resolving the tax offenses, in which Mr. Biden would plead guilty to two counts of willful failure to pay taxes in violation of 26 U.S.C. § 7203.[75] The plea agreement also required Mr. Biden to admit to a statement of facts setting forth the conduct underlying both the misdemeanor and felony tax offenses.[76]

Second, as to the gun offenses, the parties agreed that Mr. Biden would be charged by information with illegal possession of a firearm. They also conditionally agreed to enter into a diversion agreement.[77] Generally, under a diversion agreement, the defendant agrees to satisfy certain requirements in exchange for the government's promise not to prosecute him for a particular crime. Under the diversion agreement here, Mr. Biden agreed to comply with a number of terms and conditions for a two-year period—including that he relinquish any firearms, refrain from using drugs and alcohol, and otherwise abide by the law—after which time the United States would agree to dismiss the firearms charge.[78]

During this two-year diversion period, the diversion agreement would have immunized Mr. Biden for any federal crimes encompassed by the statement of facts set forth in the plea agreement—which were related to the tax charges—as well as

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[73] *See id.*

[74] *See* October 31, 2022 Letter From Def. Counsel to Gov't, *Gun Case*, Doc. 68-1.

[75] Mem. of Plea Agreement ¶ 1, *Tax Case* ("Plea Agreement"), Doc. 25-4.

[76] *Id.* ¶ 3; *id.* Ex. 1.

[77] Diversion Agreement, *Tax Case*, Doc. 25-3.

[78] *Id.* ¶¶ 1, 4, 9-10.

an additional statement of facts in the diversion agreement that addressed Mr. Biden's conduct with respect to the gun offense.[79] Specifically, that section stated:

> The United States agrees not to criminally prosecute Biden, outside of the terms of this Agreement, for any federal crimes encompassed by the attached Statement of Facts (Attachment A) and the Statement of Facts attached as Exhibit 1 to the Memorandum of Plea Agreement filed this same day. This Agreement does not provide any protection against prosecution for any future conduct by Biden or by any of his affiliated businesses.[80]

The diversion agreement also contained a dispute resolution procedure.[81] Pursuant to this provision, the United States could seek a determination by the U.S. District Court for the District of Delaware that Mr. Biden had breached his obligations.[82] Upon such a finding, the government could prosecute him for any federal criminal violation of which it had knowledge.[83]

On June 20, 2023, the United States filed in the U.S. District Court for the District of Delaware a one-count information charging Mr. Biden with illegally possessing a firearm as a drug user or addict, in violation of 18 U.S.C. § 922(g)(3),[84] and a two-count information charging Mr. Biden with failing to pay his income taxes for the 2017 and 2018 tax years, in violation of 26 U.S.C. § 7203.[85] The parties then submitted the proposed agreements to the court.

On July 26, 2023, Judge Maryellen Noreika held a hearing on the agreements. During the hearing, Judge Noreika asked Mr. Biden if he was relying on any promises other than those in the plea agreement.[86] Federal Rule of Criminal Procedure

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[79] *Id.* ¶ 15.

[80] *Id.*

[81] *Id.* ¶ 14.

[82] *Id.*

[83] *Id.*

[84] Information, *Gun Case* (June 20, 2023), Doc. 2.

[85] Information, *United States v. Robert Hunter Biden*, 2:23-mj-00274-MN (D. Del. June 20, 2023), Doc. 2.

[86] Initial Appearance & Plea Hr'g Tr. at 39, *Gun Case*.

11(b)(2), which is titled "Ensuring That a Plea Is Voluntary," provides that "[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)."[87] If a defendant answers that he is relying on promises outside of a plea agreement, a court must reject the agreement.

Mr. Biden and his counsel told Judge Noreika that Mr. Biden was relying on promises outside of the plea agreement, and his counsel specifically referenced the separate diversion agreement.[88] However, this contradicted the plain text of the plea agreement, which stated that "any and all promises, representations, and statements made prior to or after this Memorandum are null and void and have no effect whatsoever."[89] The United States raised this provision with Judge Noreika, and she recessed the proceedings to allow the parties to confer.[90] After a brief recess, Mr. Biden's counsel insisted that he was "ready to enter a plea to that plea agreement without contingency, without reservation, and without connection" to the diversion agreement and its immunity provision.[91]

As the hearing continued, Judge Noreika asked the parties about the immunity provision in the diversion agreement.[92] The United States represented that, under the immunity provision, it could not bring tax charges based on the conduct set forth in the statement of facts in the plea agreement or firearm charges related to the particular firearm identified in the diversion agreement.[93] Judge Noreika then asked whether the United States could bring unrelated charges, such as those under the Foreign Agents Registration Act, and the United States responded that it could.[94] Mr. Biden's counsel disagreed.[95] The hearing recessed again, and Mr. Biden once again

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[87] Fed. R. Crim. P. 11(b)(2).

[88] Initial Appearance & Plea Hr'g Tr. at 39-41, *Gun Case.*

[89] Plea Agreement ¶ 13.

[90] Initial Appearance & Plea Hr'g Tr. at 41-43, *Gun Case.*

[91] *Id.* at 43-45.

[92] *Id.* at 45-46.

[93] *Id.* at 54-55.

[94] *Id.* at 55.

[95] *Id.*

reversed course, with his counsel stating that the immunity provision only covered crimes related to his "gun possession, tax issues, and drug use."[96]

Judge Noreika then focused her questioning on another provision of the diversion agreement—the provision stating that, if the United States believed Mr. Biden had breached the agreement, the U.S. District Judge for the District of Delaware would determine whether a breach had occurred.[97] She raised concerns about the court's role in overseeing whether the United States could bring additional charges in the event of a breach.[98] At the conclusion of the hearing, Judge Noreika deferred on whether to accept or reject the plea agreement or whether she had the authority to do either.[99] In response, Mr. Biden elected to plead not guilty to the charges, as was his right.[100]

After the hearing, the parties continued to communicate regarding proposed changes to the diversion agreement and plea agreement. On July 26, 2023, Mr. Biden's counsel proposed three alternatives to the diversion agreement and plea agreement.[101] First, he suggested changing the plea agreement to a Rule 11(c)(1)(A) agreement, a form of plea agreement that requires approval by the court.[102] Second, he suggested changing the plea agreement to a Rule 11(c)(1)(C) agreement, which would have contained a stipulated sentence.[103] If the court did not accept that sentence, Mr. Biden could withdraw the agreement and proceed to trial on the tax charges.[104] Third, he suggested "re-drafting everything."[105] On July 31, 2023, the United States made a counterproposal that revised only the paragraphs about which Judge Noreika had raised questions—specifically, removing the provision about

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[96] *Id.* at 57-58.

[97] *Id.* at 92-93.

[98] *Id.* at 93-104.

[99] *Id.* at 108.

[100] *Id.* at 109.

[101] Aug. 9, 2023 Letter From Gov't to Def. Counsel at 1, *Tax Case*, Doc. 58-1.

[102] *Id.* at 1-2.

[103] *Id.* at 2.

[104] *Id.*

[105] *Id.*

immunity in the diversion agreement and inserting into the diversion agreement a mechanism for determining whether a breach occurred that did not involve the court.[106]

On August 7, 2023, Mr. Biden rejected the United States' proposal.[107] Accordingly, the proposed plea agreement and diversion agreement were withdrawn, and the United States informed Judge Noreika of its intention to seek indictments.[108]

D. After Plea Discussions Failed, Mr. Biden Was Indicted for the Tax and Gun Offenses

On September 14, 2023, a grand jury in the District of Delaware returned an indictment charging Mr. Biden with three counts: Count One charged that Mr. Biden knowingly made a false statement in the purchase of a firearm, in violation of 18 U.S.C. § 922(a)(6); Count Two charged that Mr. Biden made a false statement related to information required to be kept by a federally licensed firearms dealer, in violation of 18 U.S.C. § 924(a)(1)(A); and Count Three charged that Mr. Biden, knowing that he was an unlawful user of a controlled substance or addicted to a controlled substance, did knowingly possess a firearm, in violation of 18 U.S.C. § 922(g)(3).[109]

Over the next few months, Mr. Biden filed four separate motions to dismiss—including a motion to dismiss based on selective and vindictive prosecution—and they were all rejected.[110] He appealed all four of these decisions, and two separate three-

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[106] *Id.*

[107] *Id.*; *see also* Aug. 7, 2023 Letter From Def. Counsel to Gov't, *Tax Case*, Doc. 48-3.

[108] Mot. to Vacate Briefing Order, *Gun Case* (Aug. 11, 2023), Doc. 25; United States' Status Report, *Gun Case* (Sept. 6, 2023), Doc. 37.

[109] Indictment, *Gun Case* (Sept. 14, 2023), Doc. 40.

[110] Mem. Op. Denying Def.'s Mot. to Dismiss the Indictment for Selective & Vindictive Prosecution, *Gun Case*; Mem. Op. Denying Def.'s Mot. to Dismiss the Indictment Based on the Diversion Agreement, *Gun Case* (Apr. 12, 2024), Doc. 97; Mem. Order Denying Def.'s Mot. to Dismiss the Indictment Based on Unlawful Appointment & Appropriations Clause Violation, *Gun Case* (Apr. 12, 2024), Doc. 101; Mem. Order Denying Def.'s Mot. to Dismiss the Indictment Based on the 2nd Amendment, *Gun Case* (May 9, 2024), Doc. 114.

judge panels of the Third Circuit unanimously rejected his claims.[111] Mr. Biden sought *en banc* review in the Third Circuit and was denied.[112] Accordingly, the case proceeded to trial on June 3, 2024. After a six-day trial, the jury convicted Mr. Biden of all three offenses with which he had been charged.[113] Mr. Biden was scheduled to be sentenced on December 12, 2024.[114] President Biden pardoned his son on December 1, 2024, and two days later, Judge Noreika administratively terminated the case.[115]

Separately, on December 7, 2023, a grand jury in the Central District of California returned an indictment against Mr. Biden for nine counts: failure to pay taxes for tax years 2016, 2017, 2018, and 2019 in violation of 26 U.S.C. § 7203 (Counts One, Two, Four, and Nine); failure to file a 2017 Form 1040 and 2018 Form 1040 in violation of 26 U.S.C. § 7203 (Counts Three and Five); attempting to evade his taxes for tax year 2018 in violation of 26 U.S.C. § 7201 (Count Six); and filing a false 2018 Form 1040 and false 2018 Form 1120 in violation of 26 U.S.C. § 7206 (Counts Seven and Eight).[116]

Like in the gun case, Mr. Biden filed a number of motions to dismiss—nine total—and again, each one was rejected, including another motion to dismiss for selective and vindictive prosecution.[117] Mr. Biden again appealed these decisions, this time to the Ninth Circuit, and his appeals were again all denied.[118] He also sought *en banc* review, but he was denied.[119] A jury trial was scheduled for September 5, 2024.

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[111] Order Dismissing Def.'s Appeal, *Gun Appeal I*; Order Dismissing Def.'s Appeal, *United States of America v. Robert Hunter Biden*, 24-1938 (3d Cir. May 28, 2024) ("*Gun Appeal II*"), Doc. 16.

[112] Order Denying Def.'s Pet. for Reh'g *En Banc*, *Gun Appeal I* (May 31, 2024), Doc. 21.

[113] Trial Tr. Vol. 7 at 1425-26, *Gun Case* (June 11, 2024), Doc. 261.

[114] Order Continuing Sentencing, *Gun Case* (Sept. 26, 2024), Doc. 269.

[115] Termination Order, *Gun Case* (Dec. 3, 2024), Doc. 277.

[116] Indictment, *Tax Case*.

[117] Order Denying Def.'s Mots. to Dismiss, *Tax Case*.

[118] Order Dismissing Def.'s Appeal, *Tax Appeal*.

[119] Order Denying Mot. for Recons. *En Banc*, *Tax Appeal* (June 25, 2024), Doc. 18.

On September 5, 2024, before jury selection could begin, Mr. Biden informed both the United States and the presiding judge, Judge Mark C. Scarsi, that he intended to change his plea of not guilty to an *Alford* plea, or a plea in which the defendant maintains his innocence.[120] He did so without having either sought or secured the consent of the United States.[121] The United States told Judge Scarsi that it would oppose an *Alford* plea,[122] and Judge Scarsi indicated he would follow the procedure in Federal Rule of Criminal Procedure 11(a)(3) for a *nolo contendere* plea, which Judge Scarsi described as an "analogue" to an *Alford* plea.[123] Under this procedure, Judge Scarsi stated that he would consider the United States' position and the public interest before accepting the plea.[124] After a brief recess, Mr. Biden then changed his position and stated that he intended to plead "open" to all of the charges in the indictment, meaning that he chose to plead guilty to all of the charges in the indictment without a plea agreement.[125]

Sentencing was scheduled for December 16, 2024.[126] After Mr. Biden was pardoned on December 1, 2024, Judge Scarsi terminated proceedings.[127]

E. During the Investigation, Alexander Smirnov Made False Statements to Law Enforcement Agents and Was Subsequently Charged

In 2020, an individual named Alexander Smirnov—who served as an FBI confidential human source—told an FBI agent that Mr. Biden and his father received $5 million bribe payments from a Burisma executive.[128] These statements were

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[120] Trial Tr. Vol. 1 at 8, *Tax Case* (Sept. 5, 2024), Doc. 228.

[121] *Id.* at 10.

[122] Change of Plea Hr'g. Tr. at 4-5, *Tax Case* (Sept. 5, 2024), Doc. 233.

[123] *Id.* at 27-28, 30.

[124] *Id.* at 27-28.

[125] *Id.* at 32.

[126] Sept. 5, 2024 Minute Order, *Tax Case*, Doc. 231.

[127] *See* Docket Report, *Tax Case*.

[128] Indictment ¶ 6, *United States v. Alexander Smirnov*, 2:24-cr-00091-ODW (C.D. Cal. Feb. 14, 2024) ("*Smirnov False Statements Case*"), Doc. 1. A more fulsome discussion of the evidence is contained in the indictment.

recorded in a Form 1023, an official FBI record.[129] During the investigation of Mr. Biden, in July 2023, the FBI requested that the United States Attorney's Office for the District of Delaware investigate Mr. Smirnov's allegations.[130] My team subsequently determined that his allegations were fabricated.[131] On February 14, 2024, a grand jury in the Central District of California returned a two-count indictment against Mr. Smirnov, charging him with making a false statement, in violation of 18 U.S.C. § 1001, and creating a false and fictitious record, in violation of 18 U.S.C. § 1519.[132]

Investigators also learned that Mr. Smirnov had committed tax crimes to conceal millions of dollars in income. On November 21, 2024, a grand jury in the Central District of California returned a ten-count tax indictment against Mr. Smirnov alleging tax evasion for tax years 2020, 2021, and 2022 in violation of 26 U.S.C. § 7201 (Counts One, Five, and Eight); filing a false IRS Form 1040 for tax years 2020, 2021, and 2022 on his own behalf and on behalf of his domestic partner in violation of 26 U.S.C. § 7206 (Counts Two, Three, Six, Seven, Nine, and Ten), and filing a false IRS Form 1120-S for tax year 2020 on behalf of Goldman Investments Group in violation of 26 U.S.C. § 7206 (Count Four).[133]

Mr. Smirnov pleaded guilty to four felony counts on December 16, 2024, including creating a false and fictious record and three counts of tax evasion.[134] Mr.

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[129] *Id.* ¶ 23.

[130] *Id.* ¶ 41.

[131] *See, e.g., id.* ¶ 6.

[132] *See generally id.*

[133] Indictment, *United States v. Alexander Smirnov,* 2:24-cr-00702-ODW (C.D. Cal. Nov. 21, 2024) ("*Smirnov Tax Case*"), Doc. 1. A more fulsome discussion of the evidence is contained in the indictment.

[134] Plea Agreement, *Smirnov False Statements Case* (Dec. 12, 2024), Doc. 195; Plea Hr'g Tr., *Smirnov False Statements Case* (Dec. 16, 2024), Doc. 201; Plea Hr'g Tr., *Smirnov Tax Case* (Dec. 16, 2024), Doc. 20.

Smirnov was sentenced to six years' incarceration.[135] He paid full restitution to the IRS in the amount of $675,502.[136]

IV. The Prosecutions of Mr. Biden Were Not Vindictive or Selective

The results obtained in the prosecutions of Mr. Biden confirm that I faithfully adhered to the Principles of Federal Prosecution. In the gun case, a jury of twelve of Mr. Biden's peers sitting in Delaware, his home state, unanimously found him guilty on all charges. In the tax case, by pleading guilty, Mr. Biden admitted that the facts supported all of the elements of the crimes alleged in the indictment. Not only were both cases proven beyond a reasonable doubt, but they resulted in a verdict lawfully rendered by a jury and an admission of guilt.

In making my decisions, I remained impervious to political influence at all times. However, Mr. Biden and his counsel have continuously accused me of vindictively and selectively prosecuting him.[137] And in the press release accompanying his son's pardon, President Biden echoed these claims, stating that he believed Mr. Biden was "selectively, and unfairly, prosecuted."[138] These baseless accusations have no merit and repeating them threatens the integrity of the justice system as a whole.

Eight different Article III judges appointed by six different presidents—including Mr. Biden's father—considered and rejected Mr. Biden's claims that these prosecutions only came because of political pressure from Congressional Republicans.[139] Indeed, two district courts held that Mr. Biden had not identified any

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[135] Judgment and Commitment Order, *Smirnov False Statements Case* (Jan. 8, 2025), Doc. 216.

[136] Notice of Restitution Payment, *Smirnov Tax Case* (Jan. 7, 2025), Doc. 33.

[137] *See, e.g.*, Def.'s Mot. to Dismiss for Selective & Vindictive Prosecution & Breach of Separation of Powers, *Tax Case* (Feb. 20, 2024), Doc. 27; Def.'s Mot. to Dismiss for Selective & Vindictive Prosecution & Breach of Separation of Powers, *Gun Case* (Dec. 11, 2023), Doc. 63.

[138] Pardon Press Release.

[139] *See* Order Denying Def.'s Motions to Dismiss, *Tax Case*; Mem. Op. Denying Def.'s Mot. to Dismiss the Indictment for Selective & Vindictive Prosecution, *Gun Case*; Order Dismissing Def.'s Appeal, *Tax Appeal*; Order Dismissing Def.'s Appeal, *Gun Appeal I*.

evidence that he was being selectively or vindictively prosecuted.[140] Judge Scarsi stated that there were "no facts indicating that the Government undertook charging decisions in any respect because of public statements by politicians, let alone based on Defendant's familial and political affiliations."[141] Judge Noreika likewise held that Mr. Biden offered "nothing credible to suggest that the conduct of [Republican] lawmakers (or anyone else) had any impact whatsoever on the Special Counsel."[142] Judge Noreika explained:

> To the extent that Defendant's claim that he is being selectively prosecuted rests solely on him being the son of the sitting President, that claim is belied by the facts. The Executive Branch that charged Defendant is headed by that sitting President—Defendant's father. The Attorney General heading the DOJ was appointed by and reports to Defendant's father. And that Attorney General appointed the Special Counsel who made the challenged charging decision in this case—while Defendant's father was still the sitting President. Defendant's claim is effectively that his own father targeted him for being his son, a claim that is nonsensical under the facts here. Regardless of whether Congressional Republicans attempted to influence the Executive Branch, there is no evidence that they were successful in doing so and, in any event, the Executive Branch prosecuting Defendant was at all relevant times (and still is) headed by Defendant's father.[143]

In rejecting Mr. Biden's argument that he was selectively prosecuted because the United States was no longer pursuing the diversion agreement, Judge Noreika wrote:

> The problem with this argument is that the charging decision at issue was made during this administration—by Special Counsel Weiss—at a time when the head of the Executive Branch prosecuting Defendant is Defendant's father. Defendant has offered nothing credible to support a

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[140] Order Denying Def.'s Mots. to Dismiss at 33, 46-47, 49-50, *Tax Case*; Mem. Op. Denying Def.'s Mot. to Dismiss the Indictment for Selective & Vindictive Prosecution at 8-15, 18, *Gun Case*.

[141] Order Denying Def.'s Mots. to Dismiss at 46-47, *Tax Case*.

[142] Mem. Op. Denying Def.'s Mot. to Dismiss the Indictment for Selective & Vindictive Prosecution at 13, *Gun Case*; *see also id.* at 14 (Mr. Biden "offers nothing concrete to support a conclusion that any member of Congress—or anyone else—actually influenced the Special Counsel or his team.").

[143] *Id.* at 8 n.2.

finding that anyone who played a role in the decision to abandon pretrial diversion and move forward with indictment here harbored any animus towards Defendant.[144]

Judge Noreika also recognized that in this case, there were "legitimate considerations that support the decision to prosecute," including the fact that the "government has an interest in deterring criminal conduct that poses a danger to public safety."[145] In sum, the President's statements squarely contradict the findings of the federal judges presiding over both of Mr. Biden's cases.

Moreover, throughout this prosecution, President Biden and his spokesperson have repeatedly and emphatically asserted that the prosecution "has been done in an independent way by the Department of Justice,"[146] that the President would "abide by the jury's decision,"[147] and that he would not pardon his son.[148] These remarks stand in stark contrast to the President's recent assertion that the jury's verdict and Mr. Biden's admission of guilt amounted to a "miscarriage of justice."[149] Only after Mr. Biden's guilt had been fully and fairly adjudicated did the President claim that this prosecution was the result of "raw politics" and that "[n]o reasonable person who looks at the facts of Hunter's cases can reach any other conclusion than Hunter was singled out only because he is my son."[150]

Politicians who attack the decisions of career prosecutors as politically motivated when they disagree with the outcome of a case undermine the public's confidence in our criminal justice system. The President's statements unfairly

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[144] *Id.* at 16.

[145] *Id.* at 14-15.

[146] Press Briefing by Press Secretary Karine Jean-Pierre, The White House (July 27, 2023), *available at* https://www.whitehouse.gov/briefing-room/press-briefings/2023/07/27/press-briefing-by-press-secretary-karine-jean-pierre-46/.

[147] Jonathan Lemire, *President says he won't pardon Hunter Biden*, POLITICO (June 13, 2024), *available at* https://www.politico.com/news/2024/06/13/president-says-he-wont-pardon-hunter-biden-00163281.

[148] *See, e.g.*, Fritz Farrow, *Exclusive: Biden tells Muir he wouldn't pardon son Hunter*, ABC NEWS (June 6, 2024), *available at* https://abcnews.go.com/Politics/biden-tells-muir-wouldnt-pardon-son-hunter/story?id=110904482.

[149] Pardon Press Release.

[150] *Id.*

impugn the integrity not only of Department of Justice personnel, but all of the public servants making these difficult decisions in good faith. As Judge Scarsi stated in response to these remarks:

> [T]he President's own Attorney General and Department of Justice personnel oversaw the investigation leading to the charges. In the President's estimation, this legion of federal civil servants, the undersigned included, are unreasonable people.[151]

The President's characterizations are incorrect based on the facts in this case, and, on a more fundamental level, they are wrong.

V. Additional Charging Decisions

President Biden has chosen to issue a "Full and Unconditional Pardon" for Mr. Biden covering "those offenses against the United States which he has committed or may have committed or taken part in during the period from January 1, 2014 through December 1, 2024, including but not limited to all offenses charged or prosecuted (including any that have resulted in convictions) by Special Counsel David C. Weiss in Docket No. 1:23-cr-00061-MN in the United States District Court for the District of Delaware and Docket No. 2:23-CR-00599-MCS-1 in the United States District Court for the Central District of California."[152] Accordingly, I cannot make any additional charging decisions as to Mr. Biden's conduct during that time period. It would be inappropriate to discuss whether additional charges are warranted.

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[151] Order Re: Notice of Pardon, *Tax Case*, at 3.

[152] Pardon Press Release.

Appendix A:
Indictment
United States v. Robert Hunter Biden,
2:23-cr-00599-MCS
(C.D. Cal. Dec. 7, 2023)

FILED
CLERK, U.S. DISTRICT COURT
12/07/2023
CENTRAL DISTRICT OF CALIFORNIA
BY: TV DEPUTY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

October 2023 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT HUNTER BIDEN, Defendant.	No. 2:23-cr-00599-MCS I N D I C T M E N T [26 U.S.C. § 7201: evasion of assessment; 26 U.S.C. § 7203: failure to file and pay taxes; 26 U.S.C. § 7206: false or fraudulent tax return]

The Grand Jury charges:

INTRODUCTORY ALLEGATIONS

At times relevant to this Indictment:

1. Defendant ROBERT HUNTER BIDEN (hereafter "the Defendant") was a Georgetown- and Yale-educated lawyer, lobbyist, consultant, and businessperson and, beginning in April 2018, a resident of Los Angeles, California.

2. At times relevant to this Indictment, the Defendant served on the board of a Ukrainian industrial conglomerate and a Chinese private equity fund. He negotiated and executed contracts and agreements for business and legal services that paid millions of

1 dollars of compensation to him and/or his domestic corporations,
2 Owasco, PC and Owasco, LLC.

3 3. In addition to his business interests, the Defendant was an
4 employee of a multi-national law firm working in an "of counsel"
5 capacity from 2009 through at least 2017.

6 4. The Defendant engaged in a four-year scheme to not pay at
7 least $1.4 million in self-assessed federal taxes he owed for tax
8 years 2016 through 2019, from in or about January 2017 through in or
9 about October 15, 2020, and to evade the assessment of taxes for tax
10 year 2018 when he filed false returns in or about February 2020. In
11 furtherance of that scheme, the Defendant:

12 a. subverted the payroll and tax withholding process of
13 his own company, Owasco, PC by withdrawing millions from Owasco, PC
14 outside of the payroll and tax withholding process that it was
15 designed to perform;

16 b. spent millions of dollars on an extravagant lifestyle
17 rather than paying his tax bills;

18 c. in 2018, stopped paying his outstanding and overdue
19 taxes for tax year 2015;

20 d. willfully failed to pay his 2016, 2017, 2018, and 2019
21 taxes on time, despite having access to funds to pay some or all of
22 these taxes;

23 e. willfully failed to file his 2017 and 2018 tax returns
24 on time; and

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f. when he did finally file his 2018 returns, included false business deductions in order to evade assessment of taxes to reduce the substantial tax liabilities he faced as of February 2020.

A. The Defendant made millions of dollars in income from 2016-2020.

5. Between 2016 and October 15, 2020, the Defendant individually received more than $7 million in total gross income. This included in excess of $1.5 million in 2016, $2.3 million in 2017, $2.1 million in 2018, $1 million in 2019 and approximately $188,000 from January through October 15, 2020. In addition, from January through October 15, 2020, the Defendant received approximately $1.2 million in financial support to fund his extravagant lifestyle.

i. Burisma Holdings Limited

6. In or around April 2014, the Defendant joined the board of directors of Burisma Holdings Limited ("Burisma"), a Ukrainian industrial conglomerate. Burisma agreed to pay the Defendant an annual salary of approximately $1,000,000, to be paid in monthly disbursements. In March 2017, Burisma reduced his compensation to approximately $500,000 a year but he continued to serve on the board of directors until in or around April 2019. As a result, he received a total of approximately $1,002,016 in 2016, $630,556 in 2017, $491,939 in 2018, and $160,207 in 2019.

ii. The Romanian Contract

7. In the fall of 2015, the Defendant entered into an oral agreement with Business Associate 1 purportedly to help a Romanian businessperson, G.P., contest bribery charges he was facing in his home country. G.P. paid an entity associated with Business Associate 1, through G.P.'s Romanian business. Between November 2015 and May

1 2017, Business Associate 1's entity received approximately
2 $3,101,258, which was split roughly into thirds between the
3 Defendant, Business Associate 1, and Business Associate 2.

4 *iii. CEFC China Energy Co Ltd.*

5 8. In the late fall of 2015, the Defendant, Business Associate
6 1, and Business Associate 2 began to investigate potential
7 infrastructure projects with individuals associated with CEFC China
8 Energy Co Ltd. (CEFC), a Chinese energy conglomerate.

9 9. In or around December of that year, the Defendant met in
10 Washington, D.C., with individuals associated with CEFC. During the
11 next two years the Defendant, Business Associate 1, and Business
12 Associate 2 continued to meet with individuals associated with CEFC,
13 including in February 2017, with CEFC's then-Chairman (hereafter "the
14 Chairman").

15 10. On or about March 1, 2017, State Energy HK, a Hong Kong
16 entity associated with CEFC, paid approximately $3 million to
17 Business Associate 1's entity for sourcing deals and for identifying
18 other potential ventures. The Defendant had an oral agreement with
19 Business Associate 1 to receive one-third of those funds, or a
20 million dollars. The Defendant, in turn, directed a portion of those
21 million dollars to Business Associate 3.

22 11. After the State Energy HK payment, the Defendant, Business
23 Associate 1, and Business Associate 2 began negotiating a joint
24 venture with individuals associated with CEFC, which they called
25 SinoHawk.

26 12. Over the summer of 2017, the Defendant cut out his SinoHawk
27 business partners and separately negotiated a venture with
28 individuals associated with CEFC called Hudson West III ("HWIII").

1 13. On or about August 2, 2017, the Defendant executed, on
2 behalf of Owasco, PC the operating agreement for HWIII. HWIII was
3 funded with an initial $5,000,000 capital contribution from an entity
4 that was not owned or controlled by the Defendant. The contract
5 further named the Defendant as a "manager" of HWIII and specified
6 that he would receive "compensation" of $100,000 per month and a one-
7 time retainer fee of $500,000. Owasco, PC paid no capital
8 contribution for its ownership share of HWIII.
9 14. Shortly after execution of the contract, on or about August
10 8, 2017, HWIII transferred approximately $400,000 to Owasco, PC.
11 Thereafter, Owasco, PC received monthly transfers of approximately
12 $165,000. In total, HWIII made seven transfers to Owasco, PC in 2017
13 totaling approximately $1.445 million. The Defendant then transferred
14 approximately $555,000 of these funds from Owasco, PC's Wells Fargo
15 Account to Business Associate 3. In 2018, HWIII made another 15
16 transfers to Owasco, PC, totaling approximately $2.1 million, and the
17 Defendant transferred approximately $843,999 of these funds to
18 Business Associate 3.
19 *iv. Skaneateles*
20 15. On or about September 21, 2017, the Defendant received a
21 transfer of approximately $666,572 from Skaneateles, which was a
22 partnership owned 75 percent by the Defendant and 25 percent by
23 Business Associate 4. The Defendant and Business Associate 4 had a
24 variety of business interests and investments.
25 *v. "Global"*
26 16. "Global" was a venture capital firm founded and operated by
27 a "Trial Attorney." The Defendant and Business Associate 4 received
28 equity in Global in exchange for introducing Trial Attorney to their

1 contacts in China and India. On or about March 21, 2019, the
2 Defendant received a distribution of approximately $619,000 from
3 Global via Skaneateles.

4 *vi. Financial Support from Personal Friend*

5 17. From January through October 15, 2020, an entertainment
6 lawyer (hereafter "Personal Friend") provided the Defendant with
7 substantial financial support including approximately $200,000 to
8 rent a lavish house on a canal in Venice, California; $11,000 in
9 payments for his Porsche; and other individual items. In total, the
10 Defendant had Personal Friend pay over $1.2 million to third parties
11 for the Defendant's benefit from January through October 15, 2020.

12 *vii. Beautiful Things*

13 18. In 2019, the Defendant began writing a non-fiction memoir
14 where he described his substance abuse and addiction issues that was
15 ultimately titled *Beautiful Things*. On November 25, 2019, the
16 Defendant signed a contract with a publishing house. From January
17 through October 15, 2020, the Defendant received approximately
18 $140,625 paid into his wife's bank account related to the book.

19 B. The Defendant had a legal obligation to file and pay taxes.

20 19. The U.S. income tax system (hereafter "the U.S. system")
21 imposes a tax base on income on individuals and corporations. The
22 tax is taxable income, as defined, times a specified tax rate. The
23 U.S. system allows reduction of taxable income for both business and
24 some nonbusiness expenditures, called deductions. Business
25 deductions must be both necessary and ordinary.

26 20. The U.S. system is based on self-assessment. That means
27 that taxpayers must declare and pay tax without being told the amount
28 that is due by the taxing authority.

1 21. The U.S. system is also pay-as-you-go, meaning that taxes
2 must either be withheld from wages and paid over to the U.S. Treasury
3 in the year in which income is earned, which is the case with most
4 taxpayers, or be paid quarterly to the U.S. Treasury on an estimated
5 basis, again during the year in which the income that is taxed is
6 earned. When taxes are filed in the following year, any withholdings
7 or estimated tax payments are applied against what a taxpayer owes,
8 resulting either in a refund or an amount due to the U.S. Treasury.
9 22. The U.S. system relies on the honesty and integrity of
10 individual taxpayers. While the Internal Revenue Service ("IRS")
11 audits some tax returns each year, as a practical matter it can only
12 audit a tiny fraction of taxpayers.
13 23. Tax returns are typically due on April 15 of the calendar
14 year following the tax year. A taxpayer may request and receive an
15 extension to file his return, which generally makes the due date
16 October 15. Taxpayers are required to pay any taxes owed on April
17 15, regardless of whether they file a return on that date. In other
18 words, an extension to file a return does not entitle a taxpayer to
19 delay paying taxes—those are still due on or about April 15.
20 24. Form 1040, U.S. Individual Income Tax Return, is the
21 standard IRS form that individual taxpayers use to file their annual
22 income tax returns. The form contains sections that require taxpayers
23 to disclose their taxable income for the year to determine whether
24 additional taxes are due and owing or whether the filer will receive
25 a tax refund.
26 25. Form 1120, U.S. Corporation Income Tax Return, is the
27 standard IRS form that domestic corporations, also referred to as "C
28 Corporations," use to file their annual income tax returns. C

1 Corporations report their income, gains, losses, deductions, and
2 credits on Form 1120 and use it to determine their income tax
3 liability. Owasco, PC of which the Defendant was the 100 percent
4 owner, was a C Corporation that had to file a U.S. Corporate Income
5 Tax Return, on Form 1120, and pay taxes on its income.
6 26. The Defendant had a legal obligation to pay taxes on all
7 his income, including income earned in Ukraine from his service on
8 Burisma's Board, fees generated by deal-making with the Chinese
9 private equity fund, as well as income derived from his work as a
10 lawyer and other sources.
11 C. The Defendant owed substantial individual income taxes in tax
12 years 2016, 2017, 2018, and 2019.
13 27. The following is a summary of the self-assessed taxes that
14 the Defendant reported he owed on his Forms 1040 and failed to timely
15 pay:
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TAX YEAR	RETURN DUE DATE	DATE RETURN FILED	GROSS TOTAL INCOME	REPORTED TAXABLE INCOME	SELF-ASSESSED TAX DUE AT TIME OF FILING
2016	10/16/2017	6/12/2020	$1,580,283	$1,276,499	$45,661
2017	10/15/2018	2/18/2020	$2,376,436	$1,956,003	$581,713
2018	10/15/2019	2/18/2020	$2,187,286	$1,688,495	$620,901
2019	10/15/2020	10/15/2020	$1,045,850	$843,577	$197,372

23
24 D. The Defendant knew he had to file and pay taxes.
25 28. Because of his varied income streams and to facilitate the
26 withholding and payments of taxes to the IRS, the Defendant formed
27 Owasco, PC, a C Corporation, in or about 2006. Owasco, PC's sole
28 purpose was to ensure that there were sufficient withholdings from

1 all the streams of the Defendant's income to pay his taxes. Instead
2 of receiving income directly into his personal bank account, the
3 Defendant directed third parties to pay Owasco, PC, which had its own
4 bank account, any income owed to him. Owasco, PC then used a payroll
5 service to pay the Defendant a salary out of the income it received.
6 The payroll service made tax withholdings on behalf of the Defendant,
7 which it paid over to the IRS, and the Defendant also made quarterly
8 payments and payments with extensions to the IRS, all in anticipation
9 of when the Defendant filed his individual income tax return.
10 Because the Defendant's income varied from year to year, the
11 Defendant, in consultation with his Washington, D.C.-based accountant
12 (hereafter "D.C. Accountant") and Business Associate 4, periodically
13 adjusted his tax withholdings to ensure that he did not generate
14 additional tax liabilities.
15 29. The Defendant and Business Associate 4 also created a
16 standalone bank account that they referred to as a "tax account,"
17 into which the Defendant deposited funds to pay taxes if he owed
18 anything beyond the withholdings made by Owasco, PC.
19 30. This arrangement meant that the Defendant had to file an
20 individual income tax return, on IRS Form 1040, where he reported the
21 income he earned from Owasco, PC and other sources, and could pay
22 taxes on that income using the withholdings Owasco, PC had made, and
23 funds from his tax account. The Defendant also had to file a
24 separate corporate income tax return for Owasco, PC on IRS Form 1120,
25 and could pay any taxes it owed from Owasco, PC's bank account. This
26 structure generally functioned effectively until 2017 when the
27 Defendant, as detailed below, subverted it.
28

31. Irrespective of the Owasco, PC structure and his standalone "tax account," the Defendant knew he had to file individual and corporate income tax returns and pay tax on the income that he earned in 2016, 2017, 2018, and 2019. He had done so for tax years 2014 and 2015, the two years preceding his scheme to not pay taxes.

a. The Defendant timely filed, after requesting an extension, his 2014 individual income tax return on IRS Form 1040 on October 9, 2015. The Defendant reported owing $239,076 in taxes, and having already paid $246,996 to the IRS, the Defendant claimed he was entitled to a refund of $7,920. The Defendant did not report his income from Burisma on his 2014 Form 1040. All the money the Defendant received from Burisma in 2014 went to a company, hereafter "ABC", and was deposited into its bank account. ABC and its bank account were owned and controlled by a business partner of the Defendant's, Business Associate 5. Business Associate 5 was also a member of Burisma's Board of Directors. The Defendant received transfers of funds from the ABC bank account and funds from the ABC bank account were used to make investments on the Defendant's behalf. Because he owned ABC, Business Associate 5 paid taxes on income that he and the Defendant received from Burisma. Starting in November 2015, the Defendant directed his Burisma Board fees to an Owasco, PC bank account that he controlled.

b. The Defendant timely filed, after requesting an extension, his 2015 individual income tax return on IRS Form 1040 on October 17, 2016. The Defendant reported owing $820,801 in taxes and having withheld $644,781, he owed the IRS $176,550. For tax year 2015, the Defendant declared income he received from Burisma on his Form 1040.

1 32. From at least January 2017 through April 2017, Business
2 Associate 4 and Personal Assistant 1 provided the Defendant with
3 periodic updates regarding his cashflow and outstanding liabilities,
4 including his various income tax liabilities.
5 33. From April 2017 to September 2017, Personal Assistant 1
6 sent the Defendant, a "weekly bill update" detailing his IRS
7 liabilities and other outstanding bills.
8 34. The Defendant controlled his finances and directed Business
9 Associate 4 and Personal Assistant 1 to pay certain bills and not
10 others. The Defendant routinely chose to pay personal expenses and
11 not pay his outstanding tax liabilities.
12 35. Further, beginning in or around May 2017, the Defendant
13 began to make periodic $10,000 payments to the IRS towards his
14 outstanding 2015 individual income tax liability. Between May 2017
15 and March 2018, he made seven such payments totaling $70,000 but made
16 no further payments after March 2018. At that time, he still owed
17 $106,020 for tax year 2015.
18 36. The Defendant used the services of D.C. Accountant from
19 January 1, 2017, until D.C. Accountant's death in or about June 2019.
20 In November 2019, the Defendant engaged the services of an accounting
21 firm in Los Angeles, California (hereafter the "CA Accountants").
22 E. Rather than pay his taxes, the Defendant spent millions of
23 dollars on an extravagant lifestyle.
24 37. The Defendant spent millions of dollars on an extravagant
25 lifestyle at the same time he chose not to pay his taxes. The
26 Defendant spent approximately $1 million in 2016, $1.4 million in
27 2017, $1.8 million in 2018, and $600,000 in 2019. From January
28 through October 15, 2020, the Defendant received more than $1.2

1 million in financial support that was used to pay various personal
2 expenses but not any of his federal individual income tax liabilities
3 for 2016-2019. Between 2016 and October 15, 2020, the Defendant
4 spent this money on drugs, escorts and girlfriends, luxury hotels and
5 rental properties, exotic cars, clothing, and other items of a
6 personal nature, in short, everything but his taxes.
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1 38. The following is a summary of the approximate expenditures
2 that the Defendant made instead of paying his taxes:

Summary of Approx. Expenses Made from Owasco, PC and the Defendant's Bank Accounts (2016 to 2019)					
Description	**2016**	**2017**	**2018**	**2019**	**Grand Total**
ATM / Cash Withdrawal	$200,922	$503,614	$772,548	$186,920	**$1,664,004**
Payments - Various Women	$4,400	$138,837	$383,548	$156,427	**$683,212**
Clothing & Accessories	$78,580	$113,905	$151,459	$53,586	**$397,530**
Tuition/ Education/ Extracurricular	$117,281	$94,497	$93,213	$4,286	**$309,277**
Health, Beauty, Pharmacy	$54,789	$110,239	$46,347	$26,121	**$237,496**
Misc. Retail Purchases	$51,629	$75,941	$78,135	$30,929	**$236,634**
Food, Groceries, Restaurants	$67,281	$73,219	$40,590	$33,833	**$214,923**
Insurance	$41,808	$47,060	$90,535	$24,412	**$203,815**
Loan / Mortgage Payments	$144,396	$43,647	$500	$3,330	**$191,873**
Adult Entertainment	$4,411	$56,846	$100,330	$27,373	**$188,960**
Legal & Accounting Fees	$33,379	$103,745	$9,745	$700	**$147,566**
Telephone / Utilities	$37,319	$29,623	$22,977	$28,521	**$118,440**
Rehab (Drug & Alcohol)	$7,600	$28,600	$35,669		**$71,869**
Wells Fargo Advisors - Roth IRA	$53,000				**$53,000**
Credit Card Payments	$7,464	$18,479	$12,000	$20,599	**$58,542**
Home Improvement / Maintenance	$33,168	$3,574	$5,763	$351	**$42,856**
Home Help / Cleaning / Childcare	$22,855	$16,946			**$39,801**
Entertainment	$8,172	$6,148	$7,500	$2,625	**$24,445**
Sports / Recreation	$22,387	$8	$1,172		**$23,567**
Grand Total	**$990,841**	**$1,464,928**	**$1,852,031**	**$600,013**	**$4,907,813**

F. <u>The Defendant late filed his taxes when facing contempt charges in two civil lawsuits</u>.

39. In 2019 and early 2020, the Defendant became embroiled in two civil lawsuits. As part of the lawsuits, he had to produce financial records, including his tax returns. These lawsuits forced the Defendant to file his outstanding tax returns for 2017 and 2018.

40. Beginning in May 2019, Person 1 brought a paternity and child-support action in Arkansas state court against the Defendant. In June 2019, the Defendant's ex-wife brought a motion to enforce a marital separation agreement between herself and the Defendant in the Superior Court of the District of Columbia ("D.C. Superior Court") because the Defendant had stopped making spousal support payments and refused to provide financial records, including his tax returns, that were necessary to calculate the amount of spousal support he owed, per his agreement with his ex-wife.

41. In 2019, the Defendant continually stonewalled the production of financial records through which Person 1 and the Defendant's ex-wife and the courts sought to ascertain the Defendant's financial situation and ability to pay.

42. The demands for the Defendant's tax returns steadily increased, escalating in November 2019. That month the Defendant hired the CA Accountants to prepare his late and unfiled individual income tax returns and Owasco, PC's corporate returns for the 2017 and 2018 tax years.

43. Subsequently, an Arkansas court issued an order that the Defendant had until January 16, 2020, to produce his individual income tax returns for 2017 and 2018. The D.C. Superior Court likewise ordered the Defendant to produce the same returns by January

1 17, 2020. The Defendant missed both deadlines, prompting counsel in
2 the Arkansas case and in the D.C. Superior Court case to move for
3 contempt. If the Defendant were found to be in contempt, either
4 court could incarcerate the Defendant for his failure to comply with
5 court orders.

6 44. On January 21, 2020, the Arkansas court issued an order
7 that the Defendant appear and show cause why he should not be held in
8 contempt. After the Defendant entered into a temporary child support
9 agreement with Person 1, the court continued the hearing on the
10 motion for contempt and gave the Defendant until March 1, 2020, to
11 provide the missing records, including his 2017 and 2018 individual
12 income tax returns.

13 45. On or about February 18, 2020, the Defendant late filed his
14 2017 Form 1040. On the 2017 Form 1040, the Defendant reported
15 $1,956,003 in taxable income and $581,713 in tax due and owing. The
16 Defendant chose not to pay any of his outstanding 2017 tax liability
17 when he late filed his 2017 Form 1040 in February 2020.

18 46. That same day, the Defendant also late filed his 2018 Form
19 1040. On the 2018 Form 1040, the Defendant reported $1,688,495 in
20 taxable income for 2018 and $620,901 in tax due and owing. The
21 Defendant again chose not to pay any of his outstanding 2018 tax
22 liability when he late filed his 2018 Form 1040 in February 2020.

23 47. On June 12, 2020, the Defendant late filed his 2016 Form
24 1040. On the 2016 Form 1040, the Defendant reported $1,276,499 in
25 taxable income for 2016 and $45,661 in tax due and owing. The
26 Defendant chose not to pay any of his outstanding 2016 tax liability
27 when he late filed his 2016 Form 1040 in June 2020.
28

G. The Defendant had the funds to pay his taxes in 2017, 2018, 2019, and 2020.

48. As described in more detail below, in each year in which he failed to pay his taxes, the Defendant had sufficient funds available to him to pay some or all of his outstanding taxes when they were due. But he chose not to pay them. Notably, in 2020, well after he had regained his sobriety, and when he finally filed his outstanding 2016, 2017, and 2018 Forms 1040, the Defendant did not direct any payments toward his tax liabilities for each of those years. At the same time, the Defendant spent large sums to maintain his lifestyle from January through October 15, 2020. In that period, he received financial support from Personal Friend totaling approximately $1.2 million. The financial support included hundreds of thousands of dollars in payments for, among other things, housing, media relations, accountants, lawyers, and his Porsche. For example, the Defendant spent $17,500 each month, totaling approximately $200,000 from January through October 15, 2020, on a lavish house on a canal in Venice Beach, California. Thus, the Defendant's practice of tax non-compliance in the 2017 and 2018 tax years – where the IRS stood as the last creditor to be paid – persisted into later tax years.

COUNT ONE

[26 U.S.C. § 7203: failure to pay 2016 Form 1040]

49. The Grand Jury re-alleges paragraphs 1 through 48 of this Indictment here.

A. The Defendant earned a substantial income in 2016.

50. Over the course of 2016, the Defendant earned approximately $1,580,283 in gross income from the sources identified above.

B. The Defendant had a legal obligation to file a U.S. Individual Income Tax Return for 2016.

51. For tax year 2016, anyone under 65, filing jointly with their spouse, or individually, and who made more than $20,700, or $10,350, respectively, had to file a federal tax return by April 18, 2017, unless granted an extension to October 16, 2017.

C. The Defendant did not timely file a U.S. Individual Income Tax Return for 2016.

52. The Defendant filed a request for an extension in 2017 which meant that his 2016 Form 1040 was due no later than October 16, 2017. The Defendant did not timely file his 2016 Form 1040 by that date.

D. The Defendant knew he had to file and pay taxes for 2016.

53. On or about April 21, 2016, Defendant made an estimated tax payment of $30,000 towards his 2016 individual income tax liability.

54. In 2017, Business Associate 4 and Personal Assistant 1 frequently apprised the Defendant that he owed taxes for the 2016 tax year. For example, on April 15, 2017, Business Associate 4 forwarded the Defendant an email from D.C. Accountant, which stated, "Looks like Owasco will owe about $52,000 and Hunter (individually) will owe about $26,000." The taxes the Defendant owed individually were in

1 addition to the $30,000 estimated payment he had made the previous
2 year. On or about April 15, 2017, an extension was filed but no
3 further payment was made.
4 55. In October 2017, D.C. Accountant used information provided
5 by Business Associate 4 and Personal Assistant 1 to prepare a Form
6 1040 for the Defendant and a Form 1120 for Owasco, PC. The Form 1040
7 indicated that the Defendant owed taxes in addition to what he had
8 already paid. Business Associate 4 reviewed the prepared returns and
9 left them for the Defendant at his office. Business Associate 4 then
10 emailed the Defendant advising him as much. The Defendant was
11 responsible for signing and mailing his returns.
12 56. On or about November 27, 2017, the Defendant sent the
13 following email to Business Associate 4 and Personal Assistant 1:
14 Also I just saw last week the unmarked envelope in. The
15 office e (sic) requiring signatures for my taxes. I wish
someone had told me- but its my fault for to (sic) thinking
16 of that or for having ignored an email im sure Ione (sic)
of you sent saying there is a large envelope in the office
17 sitting b (sic) the door which requires 50 signatures
including [ex-wife's] . . .
18
19 57. The Defendant brought the 2016 Form 1040 to his ex-wife and
20 asked her to sign it. She said she would, after reviewing the return
21 with her accountant. She did so and sent the signed return to the
22 Defendant the next day.
23 58. On March 9, 2018, the Defendant's ex-wife texted him that
24 she had discovered their unfiled 2016 tax returns in the trunk of his
25 car. The Defendant responded telling her, "The taxes are filed those
26 were copies with [Personal Assistant 1]'s notes." The tax returns
27 had not been filed. The Defendant's ex-wife responded telling him
28

they were not copies because they still had checks attached to them and were originals.

59. On or about July 18, 2018, the IRS received a late filed 2016 Form 1120 for Owasco, PC. The Defendant did not submit an individual income tax return when he mailed the corporate one.

E. The Defendant owed taxes for 2016, which he did not timely pay.

60. The Defendant owed individual income taxes for 2016 which were due on or before April 18, 2017.

61. The Defendant knew he had to pay taxes for the 2016 tax year in 2017 because on or about April 21, 2016, he made a payment of $30,000 towards his 2016 tax liability and on or about April 18, 2017, the D.C. Accountant told him he owed an additional $26,000.

62. In 2019, as described above, the Defendant retained the CA Accountants. The CA Accountants contacted the IRS on January 22, 2020, and learned that the Defendant had not filed an individual income tax return for 2016. They then prepared a Form 1040 for the Defendant, which he reviewed and late filed on June 12, 2020. In that return, the Defendant self-assessed that he owed an additional $45,661 in taxes. He did not pay the $45,661 when he filed in June 2020.

F. The Defendant had the funds available to pay his taxes when they were due.

63. When the Defendant finally filed his 2016 Form 1040, on June 12, 2020, he had funds available to pay some or all of his taxes owed for 2016 but chose not to do so.

G. Rather than pay his taxes, the Defendant spent millions of dollars on an extravagant lifestyle.

64. From January to June of 2020, the Defendant spent approximately $187,000 on personal expenses rather than pay the $45,661 he owed when he finally filed his 2016 Form 1040 in June of 2020. The Defendant also received more than $500,000 in financial support from Personal Friend during this period that he used to fund his lifestyle and did not use any of those funds to pay any of his outstanding taxes for 2016.

The Charge

65. During the calendar year 2016, the Defendant ROBERT HUNTER BIDEN had and received taxable income of $1,276,499, on which taxable income there was owing to the United States of America an income tax of $45,661. He was required by law to pay, on or before April 18, 2017, that income tax to the Internal Revenue Service. Well knowing all of the foregoing, he did willfully fail, on June 12, 2020, in the Central District of California and elsewhere, to pay the income tax due to the Internal Revenue Service Center at San Francisco, California, or to another Internal Revenue Service office permitted by the Commissioner of Internal Revenue, including the Internal Revenue Service office in Los Angeles, California.

In violation of Title 26, United States Code, Section 7203.

COUNT TWO

[26 U.S.C. § 7203: failure to pay 2017 Form 1040]

66. The Grand Jury re-alleges paragraphs 1 through 48 of this Indictment here.

A. The Defendant earned a substantial income in 2017.

67. Over the course of 2017, the Defendant earned approximately $2,376,436 in gross income from the sources identified above.

B. The Defendant had a legal obligation to file a U.S. Individual Income Tax Return for 2017.

68. For tax year 2017, anyone under 65, filing jointly with their spouse, or individually, and who made more than $20,800 or $10,400, respectively, had to file a federal tax return by April 17, 2018, unless granted an extension to October 15, 2018.

C. The Defendant did not timely file a U.S. Individual Income Tax Return for 2017.

69. The Defendant did not timely file his 2017 Form 1040 by October 15, 2018, when it was due.

D. The Defendant knew he had to file and pay taxes for 2017.

70. Beginning in early 2017, the Defendant withdrew and transferred funds from Owasco, PC's corporate accounts for his personal benefit. He transferred these funds outside of Owasco, PC's established payroll system, which meant that taxes were not withheld from these transfers. When Business Associate 4 discovered that the Defendant was subverting the established payroll and tax withholding process, Business Associate 4 met with and advised the Defendant that he was not withholding enough money in taxes and that he would have a large tax liability due at the end of the year unless he allocated sufficient withholdings.

1 71. From September 1 to December 31, 2017, at the Defendant's
2 direction, Owasco, PC made approximately $590,719 in direct payments
3 to the Defendant or indirect payments to third parties for his
4 benefit.
5 72. On or about April 16, 2018, the day before his 2017 taxes
6 were due, D.C. Accountant emailed the Defendant's personal assistant
7 at that time, hereafter "Personal Assistant 2" and advised that the
8 Defendant "owes a lot of money" for the 2017 tax year and inquired if
9 the Defendant had cash available for tax payments as "he really
10 should pay as much as he can." In response, Personal Assistant 2 set
11 up a call between the Defendant and D.C. Accountant for the next day.
12 After that call, D.C. Accountant filed an extension on the
13 Defendant's behalf making his tax filings, although not his tax
14 payments, due on October 15, 2018.
15 73. For the 2017 tax year, D.C. Accountant prepared the
16 Defendant's individual and corporate income tax returns and
17 repeatedly attempted to provide them to the Defendant throughout the
18 fall of 2018.
19 74. On or about October 12, 2018, D.C. Accountant emailed the
20 Defendant advising him that he owed approximately $600,000 in
21 individual income taxes and an additional $204,000 in corporate
22 income taxes on behalf of Owasco, PC. D.C. Accountant further
23 reminded the Defendant that the tax returns were due and encouraged
24 him to file.
25 75. On or about October 13, 2018, instead of responding to D.C.
26 Accountant, the Defendant texted his ex-wife that he could not make
27 his alimony payment because "the wire came back due to insufficient
28 funds--/you know tuitions alimony **taxes** rent. Jesus." (emphasis

added). The Defendant had not paid his 2017 taxes when he sent that text.

76. On or about October 23, 2018, D.C. Accountant emailed the Defendant again advising him that his 2017 Form 1040 and Owasco, PC's 2017 Form 1120 were due on October 15 and were late. D.C. Accountant urged the Defendant "to get them filed as soon as possible since late filing and late payment penalties will continue to accrue."

77. On or about November 8, 2018, D.C. Accountant emailed the Defendant again advising him that his "2017 tax returns are still unfiled" and requesting an address where he could send the prepared returns for the Defendant to sign and file.

78. On or about November 9, 2018, D.C. Accountant emailed the Defendant reminding him again that "You need to get 2017 filed so we can try to work out a payment schedule."

79. On or about December 10, 2018, the Defendant texted his ex-wife, "I have no money [ex-wife]. I'm waiting on a few things. When I can **pay the taxes**, **I will pay the taxes**. I'm (sic) the meantime I'm struggling to pay your alimony and all girls expenses." (emphasis added).

80. On or about November 16, 2018, the Defendant texted Personal Assistant 2 and asked her to send him "all auto pay expenses and payroll breakdown please." In response, on or about November 27, Personal Assistant 2 advised the Defendant that D.C. Accountant was "trying to reach you re: taxes" and she then sent him a breakdown detailing that he had approximately $87,000 in monthly expenses, not including payments for outstanding taxes. The Defendant subsequently directed Personal Assistant 2 to pay some of his personal expenses, including his boat loan payment, but not his taxes.

81. On or about November 26, 2018, Personal Assistant 2 forwarded him an email from his ex-wife. In the forwarded email, the Defendant's ex-wife told the personal assistant, "[the Defendant] needs to send [D.C. Accountant] an email confirmation that he approves sharing his tax returns with me and my accountant—that's what we agreed to in the divorce settlement."

82. On or about December 20, 2018, the Defendant's ex-wife texted him and requested that the Defendant authorize D.C. Accountant to share the Defendant's 2017 tax return with her, as the Defendant was required to provide under the parties' Marital Separation Agreement. In response, the Defendant told her that, "My tax returns aren't completed. [D.C. Accountant] is going off information from [Business Associate 4] that is not accurate at all. I don't understand. I will call him now." He later sent a follow-up text claiming, "I have no prepared tax returns to send you now."

83. On or about February 19, 2019, D.C. Accountant emailed the Defendant and the Defendant's attorney and reminded both that the "2017 tax returns are complete and ready to file. Would you like me to have copies sent to you electronically?"

E. The Defendant owed taxes for 2017, which he did not pay.

84. The Defendant had a duty to pay $581,713 he owed in self-assessed individual income taxes for 2017 on April 17, 2018, which he chose not to do.

85. To avoid being held in contempt of court in two separate civil proceedings, the Defendant late filed his 2017 Form 1040 on February 18, 2020. In his 2017 Form 1040, the Defendant self-assessed owing $581,713 in taxes. His CA Accountants specifically discussed with him the amounts he owed for his taxes. The Defendant

1 nonetheless chose not to make any payments when he filed on February
2 18, 2020.

3 F. The Defendant had the funds available to pay his individual
4 income taxes when they were due.

5 86. In April 2018, the Defendant had over $1 million available
6 in his individual and corporate bank accounts. Notwithstanding these
7 available funds, the Defendant chose not to pay his outstanding 2017
8 individual income tax liability of $581,713 when it was due.

9 G. Rather than pay his taxes, the Defendant spent millions of
10 dollars on an extravagant lifestyle.

11 87. In 2018, the Defendant spent more than $1.8 million on
12 personal expenses rather than pay his individual income taxes for
13 2017 even though they were due in April 2018.

14 88. In 2019, the year prior to the filing of his 2017 Form 1040
15 in February 2020, the Defendant spent more than approximately
16 $600,000 on personal expenses rather than pay any of the $581,713 he
17 owed when he finally filed his 2017 Form 1040.

18 The Charge

19 89. During the calendar year 2017, the Defendant ROBERT HUNTER
20 BIDEN had and received taxable income of $1,956,003, on which taxable
21 income there was owing to the United States of America an income tax
22 of $581,713. He was required by law to pay, on or before April 17,
23 2018, that income tax to the Internal Revenue Service Center, at San
24 Francisco, California, or to another Internal Revenue Service office
25 permitted by the Commissioner of Internal Revenue, including the
26 Internal Revenue Service office in Los Angeles, California. Well
27 knowing all of the foregoing, he did willfully fail on April 17,
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1 2018, and on February 18, 2020, in the Central District of California
2 and elsewhere, to pay the income tax due.
3 In violation of Title 26, United States Code, Section 7203.
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COUNT THREE

[26 U.S.C. § 7203: failure to file 2017 Form 1040]

90. The Grand Jury re-alleges paragraphs 1 through 48 and 67 through 88 of this Indictment here.

91. During the calendar year 2017, the Defendant ROBERT HUNTER BIDEN had received gross income in excess of $2.3 million. By reason of such gross income, he was required by law, following the close of the calendar year 2017 and on or before October 15, 2018, to make an income tax return to the Internal Revenue Service, stating specifically the items of his gross income and any deductions and credits to which he was entitled. Knowing and believing all of the foregoing, he did willfully fail, on or about October 15, 2018, in the Central District of California and elsewhere, to make an income tax return.

In violation of Title 26, United States Code, Section 7203.

COUNT FOUR

[26 U.S.C. § 7203: failure to pay 2018 Form 1040]

92. The Grand Jury re-alleges paragraphs 1 through 48 of this Indictment here.

A. The Defendant earned a substantial income in 2018.

93. Over the course of 2018, the Defendant earned approximately $2,187,286 in gross income from the sources identified above.

B. The Defendant had a legal obligation to file a U.S. Individual Income Tax Return in 2018.

94. For tax year 2018, anyone under 65, filing individually, and who made more than $12,000, had to file a federal tax return by April 15, 2019, unless granted an extension to October 15, 2019.

C. The Defendant did not timely file a U.S. Individual Income Tax Return for 2018.

95. The Defendant did not timely file his 2018 Form 1040 by October 15, 2019, when it was due.

D. The Defendant knew he had to file and pay taxes for 2018.

96. On January 24, 2019, D.C. Accountant emailed the Defendant and the Defendant's attorney advising, "The 2018 tax return for Owasco, PC is due to be filed on April 15, 2019."

97. Between April 13 and April 15, 2019, the Defendant, D.C. Accountant, and the Defendant's attorney corresponded regarding the need for the Defendant to file a U.S. Individual Income Tax Return or tax extension for the 2018 tax year and to pay taxes. Ultimately, an extension was filed making the tax filings, but not the tax payments, due on October 15, 2019.

E. The Defendant owed taxes for 2018, which he did not pay.

98. The Defendant owed $620,901 in individual income taxes for 2018 due by April 15, 2019, which he chose not to pay.

99. To avoid being held in contempt of court in two separate civil proceedings, the Defendant late filed his 2018 Form 1040 on February 18, 2020. In his tax return for 2018, he self-assessed owing $620,901 in taxes. His CA Accountant specifically discussed with him the amount of taxes that he owed, and he chose not to make any payments when he filed.

F. The Defendant had the funds available to pay his individual income taxes when they were due.

100. Roughly contemporaneous with the arrest of P.H., an individual associated with CEFC, on or about November 2, 2017, HWIII received a $1,000,000 deposit. At the Defendant's direction, on or about March 22, 2018, the funds were transferred to Owasco, LLC. The memo line of this transfer indicated it was for "[P.H.] Representation." To justify the transfer, HWIII was provided with a letter stating that the funds were a retainer for the Defendant's representation of P.H., who was under criminal investigation in the United States.

101. Separate and apart from this million-dollar payment, around the time that his 2018 individual income tax was required to be paid, the Defendant received substantial amounts of money which could have satisfied his entire tax liability of $620,901, including:

a. March 6, 2019: $50,000 from Trial Attorney;

b. March 20, 2019: $10,000 from Skaneateles;

c. March 21, 2019: $618,681 from Skaneateles (related to Global);

d. March 21, 2019: $40,150 from Burisma; and

e. April 24, 2019: $39,923 from Burisma.

102. From January through October 15, 2020, the Defendant received the benefit of Personal Friend paying more than $1.2 million of the Defendant's personal expenses but the Defendant did not direct any of those funds towards his outstanding 2018 federal individual income taxes.

G. Rather than pay his taxes, the Defendant spent millions of dollars on an extravagant lifestyle.

103. The Defendant continued to earn handsomely and to spend wildly in 2018. The Defendant's expenditures increased as his income increased. In 2018, the Defendant spent more than $1.8 million, including approximately $772,000 in cash withdrawals, approximately $383,000 in payments to women, approximately $151,000 in clothing and accessories, approximately $78,000 in miscellaneous retail purchases and other payments. The Defendant did not use any of these funds to pay his taxes in 2018.

104. In 2019, the year when his 2018 taxes were due, the Defendant spent approximately $600,000 on personal expenses rather than pay any of the $620,901 he owed when he finally filed his 2018 Form 1040.

The Charge

105. During the calendar year 2018, the Defendant ROBERT HUNTER BIDEN, had and received taxable income in excess of $1.6 million, on which taxable income there was owing to the United States of America an income tax of $620,901. He was required by law to pay, on or before April 15, 2019, that income tax to the Internal Revenue Service Center, at San Francisco, California, or to another Internal

1 Revenue Service office permitted by the Commissioner of Internal
2 Revenue including the Internal Revenue Service office in Los Angeles,
3 California. Well knowing all of the foregoing, he did willfully fail
4 on April 15, 2019, and on February 18, 2020, in the Central District
5 of California and elsewhere, to pay the income tax due.
6 In violation of Title 26, United States Code, Section 7203.
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COUNT FIVE

[26 U.S.C. § 7203: failure to file 2018 Form 1040]

106. The Grand Jury re-alleges paragraphs 1 through 48 and 93 through 104 of this Indictment here.

107. During the calendar year 2018, the Defendant ROBERT HUNTER BIDEN, had and received gross income in excess of $2.1 million. By reason of such gross income, he was required by law, following the close of calendar year 2018, and on or before October 15, 2019, to make an income tax return to the Internal Revenue Service, stating specifically the items of his gross income and any deductions and credits to which he was entitled. Knowing and believing all of the foregoing, he did willfully fail, on or about October 15, 2019, in the Central District of California and elsewhere, to make an income tax return.

In violation of Title 26, United States Code, Section 7203.

1 COUNT SIX

2 [26 U.S.C. § 7201: evasion of assessment for 2018 Form 1040]

3 108. The Grand Jury re-alleges paragraphs 1 through 48 and 93
4 through 104 of this Indictment here.

5 A. The Defendant finally filed his 2018 Form 1040 in 2020 in order
6 to avoid being held in contempt of court in two civil
7 proceedings.

8 109. As described above, in 2019 and 2020, the Defendant finally
9 prepared and filed his income tax returns for 2018 in order to avoid
10 being held in contempt of court in two civil proceedings.

11 B. The Defendant hired accountants in California to complete his
12 2018 returns.

13 110. In or around November 2019, the Defendant hired the CA
14 Accountants to prepare his individual income tax returns and
15 corporate income tax returns for Owasco, PC for 2017 and 2018.

16 111. While D.C. Accountant had already created financial and
17 accounting records in connection with the 2017 tax returns, no
18 similar records existed for 2018. Therefore, the CA Accountants used
19 available bank and credit card statements to create various
20 schedules, including schedules for different categories of expenses,
21 and a general ledger for Owasco, PC. A bookkeeper initially
22 classified each expense. The CA Accountants then requested that the
23 Defendant review and confirm the accuracy of the prepared schedules
24 and ledger.

25 112. The CA Accountants also identified records for the
26 Defendant that they did not have. These included details for wire
27 transfers from Owasco, PC's Wells Fargo account to accounts at JP
28 Morgan Chase that were owned by others and statements for a Wells

1 Fargo business line of credit ending in 7350 (hereafter "business
2 line of credit").

3 113. On or about January 28, 2020, the CA Accountants requested
4 that the Defendant sign a representation letter. The Defendant signed
5 this letter in which he promised that he had made available "all the
6 records and information regarding my income . . . and deductions as
7 necessary for you to prepare the returns." The Defendant further
8 confirmed his understanding that the CA Accountants were "relying on
9 [him] to provide complete and accurate information," and that he was
10 responsible for the final "accuracy and completeness for the tax
11 returns."

12 C. The Defendant claimed extensive business travel in 2018 when he
13 had none.

14 114. In working with the CA Accountants to prepare the returns,
15 the Defendant claimed business expenses, including approximately
16 $388,810 in business-related travel, despite having done little to no
17 business in that year. At the same time the Defendant was making
18 those representations to the CA Accountants, the Defendant was
19 working on his memoir, which was not published until after he filed
20 his 2018 returns and which he did not share with them. Unbeknownst
21 to the CA Accountants, in his memoir, the Defendant described 2018 as
22 being dominated by crack cocaine use "twenty-four hours a day,
23 smoking every fifteen minutes, seven days a week." In fact, the
24 Defendant never told the CA Accountants about his extensive drug and
25 alcohol abuse in 2018 which might have prompted greater scrutiny of
26 his claims of hundreds of thousands of dollars in business expenses.

27 115. Rather than conducting business, and generating business
28 expenses, the Defendant wrote in his memoir that after he arrived in

1 California in April 2018, for the next "four or five months," he
2 surrounded himself with and paid for an entourage of:

3 . . . thieves, junkies, petty dealers, over-the-hill strippers, con artists, and assorted hangers-on, who then invited their friends and associates and most recent hookups. They latched on to me and didn't let go, all with my approval. I never slept. There was no clock. Day bled into night and night into day.

7 116. And the Defendant specifically described his stays in
8 various luxury hotels in California and private rentals, and expenses
9 related to them, in this way:

10 I stayed in one place until I tired of it, or until it tired of me, and then moved on, my merry band of crooks, creeps, and outcasts soon to follow. Availability drove some of the moves; impulsiveness drove others. A sample itinerary: I left the Chateau [Marmont] the first time for an Airbnb in Malibu. When I couldn't reserve it for longer than a week, I returned to West Hollywood and the Jeremy hotel. There were then stays at the Sunset Tower, Sixty Beverly Hills, and the Hollywood Roosevelt. Then another Airbnb in Malibu and an Airbnb in the Hollywood Hills. Then back to the Chateau. Then the NoMad downtown, the Standard on Sunset. A return to the Sixty, a return to Malibu . . .
An ant trail of dealers and their sidekicks rolled in and out, day and night. They pulled up in late-series Mercedes-Benzes, decked out in oversized Raiders or Lakers jerseys and flashing fake Rolexes. Their stripper girlfriends invited their girlfriends, who invited their boyfriends. They'd drink up the entire minibar, call room service for filet mignon and a bottle of Dom Pérignon. One of the women even ordered an additional filet for her purse-sized dog.

26 Notably, the Defendant did not write that he conducted any business
27 in any of these luxury hotels nor did he describe any of the
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1 individuals who visited him there as doing so for any business
2 purpose.
3 D. The Defendant failed to identify all personal expenses paid
4 using corporate funds.
5 117. On January 28, 2020, the Defendant met with the CA
6 Accountants in person at their office for more than three hours.
7 During this meeting the Defendant reviewed the General Ledger and
8 various schedules for Owasco, PC including a purported "Office
9 Expense" schedule and a purported "Professional and Outside Service"
10 schedule to confirm their accuracy.
11 118. The General Ledger that the Defendant reviewed included
12 thousands of dollars of personal expenses at luxury hotels, many of
13 which were specifically identified in the Defendant's memoir, as
14 described above. The Defendant never disclosed to the CA Accountants
15 that his time spent in California in 2018 was not for business
16 purposes. For example, the General Ledger contained:
17 a. $1,716 for a stay at the Borgata in Atlantic City, New
18 Jersey, in February 2018;
19 b. $2,996 for flights on Virgin America to Los Angeles
20 for the Defendant in April 2018;
21 c. $1,727 related to the rental of a Lamborghini that he
22 drove when he first moved to California in April 2018;
23 d. $43,693 for stays at the Chateau Marmont Hotel in
24 Los Angeles, California, in April and May 2018;
25 e. $463 so that his then-girlfriend could ship boxes
26 containing clothing to California in April 2018;
27 f. $7,215 for Airbnb rentals for his then-girlfriend, in
28 Los Angeles, California, in May and June 2018;

g. $2,200 paid to the Nomad Hotel in Los Angeles in July 2018; and

h. $8,996 paid to John Hancock for the Defendant's personal life insurance in October 2018.

119. The General Ledger the Defendant reviewed also contained $11,555 in rent payments for his daughter's apartment in New York City that were characterized as "Travel, Trans. & Other." The Defendant failed to inform the CA Accountants that he had used the Owasco, PC account to make these rent payments.

120. While he reviewed the schedules for "Office Expenses" and "Professional and Outside Services," the Defendant affirmatively identified, with a yellow highlighter, personal expenses that should not be deducted as business expenses.

121. While the Defendant identified personal expenses on the "Office Expense" Schedule, including ones as small as a $15 payment to a tattoo parlor and a $35.56 payment to a bookstore, he did not identify the following personal expenses:

a. A $1,500 Venmo payment on August 14, 2018. That payment was to an exotic dancer, at a strip club. The Defendant described the payment in the Venmo transaction as for "artwork." The exotic dancer had not sold him any artwork.

b. A $975 payment to "Crutch Card" on September 21, 2018; this was for the benefit of the Defendant's then-girlfriend and was unrelated to any business activity of the Defendant's.

c. A $438 payment on May 15, 2018, to "Shinola." Shinola was a clothing store where the Defendant purchased personal items.

1 d. Payments totaling $11,500 for an escort paid by the
2 Defendant to spend two nights with him.
3 e. $2,312.50 paid to P&P Matters, Inc., and an additional
4 check to P&P Matters, Inc., in the amount of $3,450, a test prep
5 service for his daughter.
6 f. $499.61 paid to Sermoneta Gloves for expensive
7 personal items for himself and this then-girlfriend.
8 122. The "Professional and Outside Service" schedule included a
9 $30,000 payment to Columbia University for the Defendant's daughter's
10 law school tuition. While the Defendant identified other personal
11 expenses on the Professional and Outside Services Schedule as
12 personal expenditures, he did not identify this one, which was, in
13 fact, the largest line item on the Professional and Outside Services
14 schedule.
15 E. <u>The Defendant falsely claimed that money paid to women with whom</u>
16 <u>he had personal relationships was wages, reducing his tax</u>
17 <u>burden</u>.
18 123. During that January 28, 2020 meeting, the Defendant was
19 also shown a Profit and Loss statement for Owasco, PC that included
20 $86,000 in wages to purported employees of Owasco, PC. The Defendant
21 knew this was a false deduction but failed to inform the CA
22 Accountants. He knew it was false because despite being engaged in
23 little to no business activity, the Defendant directed Personal
24 Assistant 2 in 2018 to place on payroll and provide health care
25 benefits to three women with whom he had romantic or sexual
26 relationships and a fourth woman who was related to one of those
27 women. These payroll expenses were treated as business expenses on
28 Owasco, PC's Form 1120, reducing the amount of income to the

1 Defendant and, as a result, his individual income tax liability. The
2 women that received wages included:
3 a. Person 1, described above as bringing a paternity suit
4 against the Defendant, who had been engaged in a romantic relationship
5 with the Defendant from 2017 to 2018. The Defendant placed Person 1
6 on payroll shortly after she moved to Arkansas while she was pregnant
7 with his child. Person 1 did not perform any work after being formally
8 placed on payroll in spring 2018 and had no work-related communication
9 with the Defendant after she was placed on payroll. Person 1 received
10 $22,500 in wages which the Defendant falsely claimed as a business
11 deduction reducing the income to him from Owasco, PC and his individual
12 income taxes. Later, in November 2018, the Defendant had the following
13 text exchange with Personal Assistant 2 regarding Person 1:
14
15
16 THE DEFENDANT: [T]ake [Person 1] off payroll I
17 thought you said she decidedly dint (sic) want
to work and didn't need health insurance
anyway. Remember that conversation?
18
19 PERSONAL ASSISTANT 2: No. I do not remember
20 that conversation. I remember a conversation
where I was disappointed that you wanted to pay
her the same rate as me. But I am over that.
Maybe she told you that but I wasn't involved.
21
22 THE DEFENDANT: regardless [] thats (sic) was if
23 she was working a 40 hour week full time for
me. I haven't talked to [Person 1] in 7
months???????
24
25 b. Person 2 is someone with whom the Defendant had a
26 romantic relationship and who did no work, nor was she expected to do
27 any work for Owasco, PC. The Defendant placed Person 2 on payroll in
28 Spring 2018 in order to provide her with health insurance. In addition

to health insurance, Person 2 received $11,000 in wages, which the Defendant falsely claimed as a business deduction reducing the income to him from Owasco, PC and his individual income taxes.

c. The Defendant placed Person 3 on payroll in spring 2018. Person 3 was a family member of Person 2's. Person 3 received $11,000 in wages which the Defendant falsely claimed as a business deduction reducing the income to him from Owasco, PC and his individual income taxes. Prior to being placed on payroll, Person 3 had assisted the Defendant with personal errands and some light clerical work. After being placed on payroll, Person 3 did not perform any work-related services.

d. The Defendant placed Person 4 on payroll in summer 2018. Person 4 had a sexual relationship with the Defendant and acted as a "West Coast" personal assistant, running errands, and performing other personal tasks. Person 4 received $13,000 in wages which the Defendant falsely claimed as a business deduction reducing the income to him from Owasco, PC and his individual income taxes. By November 2018, although the Defendant continued to pay Person 4 through payroll, he had limited to no contact with her. This prompted Person 4 to email Personal Assistant 2 in January 2019 to inquire about her employment status and to state that the Defendant "has not responded to me or reached out to me for some months now."

\

1 F. The Defendant falsely identified personal expenses as business
2 deductions paid out of his individual accounts.

3 124. In the same January 28, 2020 meeting referenced above the
4 CA Accountants also provided the Defendant with copies of bank
5 statements for his individual account at Wells Fargo ending in 4929
6 and an Owasco, LLC account at Wells Fargo ending in 1553 and asked
7 him to identify any corporate expenses to be deducted on Owasco, PC's
8 Form 1120. The Defendant then circled certain expenses by hand.
9 Many of the expenses the Defendant circled were not, as he knew,
10 business expenses. Instead, they were personal expenses generated
11 during what he described in his memoir as a "bacchanal" in 2018. For
12 example,

13 a. The Defendant circled $1,248 in payments for airline
14 tickets as a business expense for an exotic dancer to fly from Los
15 Angeles to New York in September 2018;

16 b. The Defendant circled $3,852 as a business expense for
17 the rental of a Lamborghini that he drove when he first moved to
18 California in April 2018 until his Porsche was shipped from the East
19 Coast;

20 c. Similarly, the Defendant circled hotel stays claiming
21 they were business expenses, including approximately:

22 i. $4,478 paid to the Chateau Marmont in Los
23 Angeles, California, in April and May 2018;

24 ii. $11,133 paid to the Hollywood Roosevelt in Los
25 Angeles, California, in May 2018;

26 iii. $11,169 paid to the Sixty Beverly Hills in June
27 and July 2018;

28

1 iv. $9,494 paid to the Kimpton La Peer Hotel in
2 Beverly Hill, California in July and October 2018;
3 v. $4,004 paid to the London West Hotel, in
4 Beverly Hills, California in July 2018;
5 vi. $4,347 paid to Caesars Palace in Las Vegas in
6 August 2018;
7 vii. $7,761 paid to the Jeremy Hotel in Hollywood in
8 May 2018;
9 viii. $1,023 paid to the District Hotel in
10 Washington, D.C. in May and June 2018;
11 ix. $739 paid to 1 Hotel Park in New York City in
12 January 2018; and
13 x. $2,861 paid to the Roxy Hotel in New York City in
14 June and December 2018.
15 A number of these were the very same hotels that the Defendant
16 identified, by name, in his memoir as the locations of his months-
17 long drug and alcohol binge.
18 125. The Defendant also circled a $275 dinner he had with his
19 then-girlfriend on April 12, 2018, at Nobu.
20 126. In total, the Defendant identified over 100 supposed travel
21 expenditures, worth nearly $134,000 from his Wells Fargo individual
22 account ending in 4929 and the Wells Fargo Owasco, LLC account ending
23 in 1553. Approximately 78 of the "travel" expenditures worth $112,000
24 were made between April and September 2018. The Defendant used these
25 hotels as personal residences since he chose not to have one at the
26 time. Further there was no business purpose to staying at luxury
27 hotels in Atlantic City, New York City and Los Angeles. Rather, as
28

1 he described in his memoir, they were used to meet up with his then-
2 girlfriend and for constant partying.

3 127. The Defendant also circled multiple direct payments to
4 Person 3, totaling $18,400 from his personal Wells Fargo bank account
5 and $10,000 from the Wells Fargo Owasco, LLC account, falsely
6 claiming they were business expenses. These payments were in
7 addition to any money paid to Person 3 for any work she performed and
8 in addition to what she received as wages. Based on the Defendant's
9 false representations, the CA Accountants classified the payments as
10 deductions which reduced the income to him from Owasco, PC and his
11 income tax. Further, during his meeting with the CA Accountants on
12 January 28, 2020, the Defendant falsely told the CA Accountants that
13 all payments to Person 3 in 2018 were "100% business related."

14 G. The Defendant wired money to JP Morgan Chase to pay personal
15 expenses and falsely represented to the CA Accountants that
16 these wire transfers were business expenses.

17 128. During the January 28, 2020 meeting the Defendant falsely
18 told the CA Accountants that $57,000 worth of payments wired from
19 Owasco, PC's bank account to JP Morgan Chase were all business
20 related. On February 6, 2020, the Defendant repeated this
21 misrepresentation and told the CA Accountants that these payments
22 were to a third party for consulting services.

23 129. The CA Accountants did not have access to the details of
24 the wire transfers from Owasco, PC's account to JP Morgan Chase and
25 repeatedly asked the Defendant to provide that detail. He did not.

26 130. In truth, the wire transfers from the Owasco, PC account to
27 JP Morgan Chase were to pay for personal expenses, for example:
28

1 a. The Defendant paid Person 5 approximately $6,000 in
2 July and August 2018. Person 5 "cleaned and [] ran errands, simple
3 things like going to get him some boxers, or get him some food, go
4 grocery shopping, or just grabbing the alcohol. . . that was really
5 just the scope of it."

6 b. In or about July 5, 2018, the Defendant sent a $18,000
7 wire to Person 4, and the wire details, which the CA Accountants were
8 not shown, said $10,000 of it was for a "golf member deposit." In fact,
9 at the Defendant's direction, the $10,000 was used to purchase a
10 membership in a sex club, which he visited with Person 4.

11 c. The Defendant made an additional $26,500 in payments
12 to Person 4 in June and October, in addition to what she received as
13 wages.

14 131. Based on the Defendant's representations, the CA
15 Accountants classified the approximately $57,000 in payments from
16 Owasco, PC's Wells Fargo account to JP Morgan Chase as a business
17 expense for consulting. This had the effect of reducing the income
18 paid to the Defendant from Owasco and reduced his individual income
19 taxes.

20 H. <u>The Defendant used the business line of credit to pay personal
21 expenses and falsely represented to the CA Accountants that it
22 was for business expenses</u>.

23 132. Similarly, the Defendant also told CA Accountants that
24 approximately $119,000 in payments from the Owasco, PC account used
25 to pay off the business line of credit had also been for business
26 expenses, including travel.

27

28

1 133. The CA Accountants did not have access to the statements
2 for the business line of credit and repeatedly asked the Defendant to
3 provide them. He did not.
4 134. In truth, the Defendant had used the business line of
5 credit to pay for luxury hotels, restaurants, high-end clothing, and
6 other personal items in New York and in California during 2018, among
7 others. For example, the Defendant charged the business line of
8 credit:
9 a. $1,713 paid to the 1 Hotel Park in New York City in
10 December 2017 and January 2018;
11 b. $567 paid to "Primp in Home," a mobile spa, for his
12 then-girlfriend, in New York City in January 2018;
13 c. $3,941 paid to Rag & Bone, a high-end clothing store
14 in New York City for items for himself and his then-girlfriend, in
15 January 2018;
16 d. $469 paid to the Watergate Hotel in Washington, D.C.
17 in January 2018;
18 e. $3,947 in payments made to M Street Management, a
19 strip club in Washington, D.C., in January 2018;
20 f. $3,373 paid to Expedia for a hotel stay in New York
21 City in February 2018;
22 g. $5,425 paid to the Soho Grand Hotel in New York City
23 in January and March 2018;
24 h. $2,952 paid to the 6 Columbus Circle hotel in New York
25 City in January 2018;
26 i. $773 via Venmo on April 1, 2018, to an exotic dancer;
27 and
28

j. $1,219 paid to the District Hotel in Washington, D.C., in January 2018;

135. The Defendant also used the business line of credit to make payments for the benefit of his children and his own benefit because it artificially reduced his income tax liability including:

a. $19,535 in rent payments for one of his daughters in New York City; and

b. $1,509 in payments to another daughter.

136. The Defendant also used the business line of credit to make $27,316 in payments to an online pornography website, which in total accounted for one fifth of all of the business line of credit expenditures. The Defendant also used the Owasco, PC Wells Fargo account to make payments to the same site. The latter category of payments were initially captured in the Office Expense schedule and the Defendant identified them as personal expenses and they were removed. Yet he failed to inform the CA Accountants that he had also used the business line of credit to make payments to the same pornography website and failed to provide them with statements from the business line of credit that would have revealed this to them.

137. Based on the Defendant's representation, the CA Accountants categorized the business line of credit payments as travel and meal expenses. Treating payments from Owasco, PC to the business line of credit as business related caused the Owasco, PC Form 1120 to overstate its business expenses, to reduce the Defendant's taxable income and therefore artificially reduced his individual income tax liability.

1 I. The Defendant knowingly signed false tax returns.

2 138. On or about Wednesday, February 5, 2020, the Defendant
3 emailed the CA Accountants the following:

4 > Wanted to know where we stand on filing. I have a deadline
5 > to share 16/17/18 returns with my ex-wife by Friday. Even
> if we have not filed 17/18 I would like to get the 16
6 > completed return (she needs to sign anyway) and drafts of
> 17/18 to her. Please Advise. Thanks.

7

8 139. On or about February 7, 2020, the CA Accountants
9 transmitted draft 2018 Forms 1040 and 1120 to the Defendant's
10 counsel, seeking any "proposed changes, comments, or thoughts." The
11 cover email noted that there was "information still outstanding that
12 [the accountants] would prefer to obtain before filing the returns;
13 however, if you and our client feel it necessary to file these
14 returns on Monday, we will follow your instruction and finalize the
15 returns as is." The CA Accountants then listed the missing
16 information, which included statements supporting the business line
17 of credit for 2017 and 2018. No comments or questions were received,
18 and the CA Accountants did not modify the draft returns.

19 140. On or about February 11, 2020, the Defendant met with the
20 CA Accountants. The Defendant reviewed and discussed his individual
21 and corporate income tax returns for 2017 and 2018 with the CA
22 Accountants. After reviewing them, the Defendant signed the tax
23 returns. The returns were then mailed to the IRS at the Defendant's
24 direction.

25 141. The 2018 Form 1120 contained false information, on line 26
26 and in Statement 3 in the return and elsewhere including but not
27 limited to the following:

28

1 a. Claiming false "Travel, Transportation and Other"
2 deductions including, but not limited to, luxury vehicle rentals,
3 house rentals for his then-girlfriend, hotel expenses, and New York
4 City apartment rent for his daughter;
5 b. Claiming false "Office and Miscellaneous" deductions,
6 including, but not limited to, the purchase of luxury clothing,
7 payments to escorts and dancers, and payments for his daughter's
8 college advising services;
9 c. Claiming false "Legal Professional and Consulting"
10 deductions, including, but not limited to, payment of his daughter's
11 law school tuition and his personal life insurance policy;
12 d. Claiming false deductions for payments from Owasco,
13 PC's account to pay off the business line of credit, specifically by
14 allocating 80 percent to "Travel Transportation and Other" and 20
15 percent to "Meals," when in truth and in fact most of the business
16 line of credit expenses were personal, including to a website
17 providing pornographic content, payments at a strip club, and
18 additional rent payments for his daughter; and
19 e. Claiming false deductions for payments from Owasco,
20 PC's account to JP Morgan Chase, specifically that these were for
21 "consulting," when in truth and in fact, these transfers included
22 payments to various women who were either romantically involved with
23 or otherwise performing personal services for the Defendant,
24 including a $10,000 payment for his membership in a sex club.
25 142. The 2018 Form 1120 also contained false information, on
26 line 13, specifically, claiming false payroll deductions, including
27 deductions for "wages" paid to women with whom he had personal
28 relationships including a woman who was then pregnant with his child.

1 143. The 2018 Form 1040 contained false information, on line 6,
2 as the Defendant underreported his total income. That is, the
3 Defendant failed to include in his total income the use of Owasco,
4 PC's corporate funds to pay for his personal expenses.

5 144. Because these false business deductions were in fact
6 payments of the Defendant's personal expenses, they should have been
7 categorized as income to him from Owasco, PC which he, in turn, would
8 have had to report on his 2018 Form 1040 and pay tax on that income.
9 Because these personal expenses were falsely categorized by the
10 Defendant as business expenses, he falsely underreported his income
11 from Owasco, PC, on line 6 of his 2018 Form 1040 and self-assessed a
12 lower amount of tax due and owing than was accurate.

13 The Charge

14 145. From on or about January 1, 2018, through on or about
15 February 18, 2020, in the Central District of California and
16 elsewhere, the Defendant ROBERT HUNTER BIDEN, willfully attempted to
17 evade and defeat income tax due and owing by him to the United States
18 of America, for the calendar year 2018, by committing the following
19 affirmative acts among others:

20 a. Preparing and causing to be prepared, and signing and
21 causing to be signed, a false and fraudulent U.S. Individual Income
22 Tax Return, Form 1040, which was submitted to the Internal Revenue
23 Service;

24 b. Using, and causing to be used, Owasco, PC funds to pay
25 for personal expenses and later deducting, and causing to be
26 deducted, these same personal expenses as corporate expenses on the
27 Owasco, PC tax return on Form 1120;

28

c. Claiming personal expenses, paid with personal funds, were business expenses of Owasco, PC and deducting and causing to be deducted, these same personal expenses as corporate expenses on the Owasco, PC tax return on Form 1120; and

d. Paying, and causing to be paid, by Owasco, PC certain salary and healthcare benefit expenses of individuals who performed no work on behalf of Owasco, PC while on payroll, and deducting and causing to be deducted, these same expenses as corporate expenses on the Owasco, PC tax return on Form 1120.

In violation of Title 26, United States Code, Section 7201.

COUNT SEVEN

[26 U.S.C. § 7206: filing a false and fraudulent 2018 Form 1040]

146. The Grand Jury re-alleges paragraphs 1 through 48, 93 through 104 and 109 through 144 of this Indictment here.

147. On or about February 18, 2020, in the Central District of California, and elsewhere, the Defendant ROBERT HUNTER BIDEN willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a false 2018 Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. That Form 1040 reported on line 6 total income in the amount of $2,187,286, whereas, as Defendant knew, his income was greater because he had claimed false business deductions on Owasco, PC's Form 1120 that were in fact additional income to him.

In violation of Title 26, United States Code, Section 7206(1).

COUNT EIGHT

[26 U.S.C. § 7206: filing a false and fraudulent 2018 Form 1120]

148. The Grand Jury re-alleges paragraphs 1 through 48, 93 through 104 and 109 through 144 of this Indictment here.

149. On or about February 20, 2020, in the Central District of California, and elsewhere, the Defendant ROBERT HUNTER BIDEN willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a false Form 1120, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. The 2018 Form 1120 contained false information on:

a. line 26 and in Statement 3 in the return and elsewhere including but not limited to the following:

i. Claiming false "Travel, Transportation and Other" deductions including, but not limited to, luxury vehicle rentals, house rentals for his then-girlfriend, hotel expenses, and New York City apartment rent for his daughter;

ii. Claiming false "Office and Miscellaneous" deductions, including, but not limited to, the purchase of luxury clothing, payments to escorts and dancers, and payments for his daughter's college advising services;

iii. Claiming false "Legal Professional and Consulting" deductions, including, but not limited to, payment of his daughter's law school tuition and his personal life insurance policy;

iv. Claiming false deductions for payments from Owasco, PC's account to pay off the business line of credit,

1 specifically by allocating 80 percent to "Travel Transportation and
2 Other" and 20 percent to "Meals," when in truth and in fact most of
3 the business line of credit expenses were personal, including to a
4 website providing pornographic content, payments at a strip club, and
5 additional rent payments for his daughter; and

6 v. Claiming false deductions for payments from
7 Owasco, PC's account to JP Morgan Chase, specifically that these were
8 for "consulting," when in truth and in fact, these transfers included
9 payments to various women who were either romantically involved with
10 or otherwise performing personal services for the Defendant,
11 including a $10,000 payment for the Defendant's membership in a sex
12 club.

13 b. on line 13, specifically, claiming false payroll
14 deductions, including, deductions for "wages" paid to women with whom
15 he had personal relationships including a woman who was then pregnant
16 with his child.

17 150. Because these false business deductions were in fact
18 payments of the Defendant's personal expenses, they should have been
19 categorized as income to him from Owasco, PC which he, in turn, would
20 have had to report on his 2018 Form 1040 and pay tax on that income.
21 Because these personal expenses were falsely categorized by the
22 Defendant as business expenses, he falsely underreported his income
23 from Owasco, PC, on line 6 of his 2018 Form 1040 and self-assessed a
24 lower amount of tax due and owing than was accurate.

25 In violation of Title 26, United States Code, Section 7206(1).

26

27

28

COUNT NINE

[26 U.S.C. § 7203: failure to pay 2019 Form 1040]

151. The Grand Jury re-alleges paragraphs 1 through 48 of this Indictment here.

A. The Defendant earned a substantial income in 2019.

152. Over the course of 2019, the Defendant earned approximately $1,045,850 in gross income from the sources identified above.

B. The Defendant had a legal obligation to file a U.S. Individual Income Tax Return and pay taxes in 2019.

153. For tax year 2019, anyone under 65, filing individually, and who made more than $12,200, had to file a federal tax return.

154. The deadline for filing federal tax returns and paying taxes for 2019 was July 15, 2020, because of an automatic extension provided by the IRS during the COVID-19 pandemic, unless a taxpayer filed for an extension, which made the deadline October 15, 2020.

C. The Defendant knew he had to pay taxes for 2019.

155. From at least January 2019 through September 2019, the Defendant was provided with periodic updates regarding his cashflow and outstanding liabilities, including his various income tax liabilities. The Defendant controlled his finances and directed which bills should be paid, routinely choosing personal expenses over his income tax liabilities.

D. The Defendant owed taxes for 2019, which he chose not to pay.

156. The Defendant filed a 2019 From 1040 on October 15, 2020, and self-reported that he earned total gross income of $1,045,850 and

taxable income of $843,577 and self-assessed that he owed $197,372 for the 2019 tax year.

157. The Defendant did not pay any of his outstanding tax debt when he filed his return.

E. The Defendant had the funds available to pay his taxes.

158. In 2020, prior to when the Defendant filed the 2019 Form 1040, the Defendant's agent received multiple payments from the publisher of his memoir and then transferred the following amounts to the Defendant's wife's account in the amounts and on the dates that follow:

a. $93,750 on January 21, 2020; and

b. $46,875 on May 26, 2020.

F. Rather than pay his taxes, the Defendant spent millions of dollars on an extravagant lifestyle.

159. From January through October 15, 2020, the Defendant spent more than $600,000 on personal expenses rather than pay any of the $197,372 he owed for tax year 2019.

The Charge

160. During the calendar year 2019, the Defendant ROBERT HUNTER BIDEN, had and received taxable income of $843,577, on which taxable income there was owing to the United States of America an income tax of $197,372. He was required by law to pay, on or before July 15, 2020, that income tax to the Internal Revenue Service Center, at San Francisco, California, or to another Internal Revenue Service office permitted by the Commissioner of Internal Revenue, including the Internal Revenue Service office in Los Angeles, California. Well knowing all of the foregoing, he did willfully fail on July 15, 2020,

1 in the Central District of California and elsewhere, to pay the
2 income tax due.
3 In violation of Title 26, United States Code, Section 7203.
4
5 A TRUE BILL
6
/s/
7 Foreperson
8
9 DAVID WEISS
Special Counsel
10
11
LEO J. WISE
12 Principal Senior Assistant Special
Counsel
13
DEREK E. HINES
14 Senior Assistant Special Counsel
15 United States Department of Justice
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Appendix B:
Order on Motions to Dismiss
United States v. Robert Hunter Biden,
2:23-cr-00599-MCS
(C.D. Cal. Apr. 1, 2024)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT HUNTER BIDEN, Defendant.	Case No. 2:23-cr-00599-MCS-1 **ORDER ON MOTIONS TO DISMISS (ECF NOS. 25–32)**

1 The Government accuses Defendant Robert Hunter Biden of: willfully failing to
2 pay at least $1.4 million in federal taxes he owed for tax years 2016–2019 in violation
3 of 26 U.S.C. § 7203, willfully failing to file tax returns for tax years 2017 and 2018 in
4 violation of 26 U.S.C. § 7203, tax evasion for tax year 2018 in violation of 26 U.S.C.
5 § 7201, and filing false and fraudulent tax forms for tax year 2018 in violation of 26
6 U.S.C § 7206. On December 7, 2023, a grand jury in the Central District of California
7 returned an indictment against Defendant containing three felony counts and six
8 misdemeanor counts. (Indictment, ECF No. 1.) In a pending proceeding in the United
9 States District Court for the District of Delaware, the Government charges Defendant
10 with making false and fictious statements on ATF Form 4473 in connection with
11 Defendant's purchase of a firearm in Delaware and illegally possessing a firearm as a
12 user of controlled substances. Indictment, *United States v. Biden*, No. 1:23-cr-00061-
13 MN (D. Del. Sept. 14, 2023), ECF No. 40.
14 Defendant filed eight motions to dismiss the Indictment in this action. They are:
15 (1) Motion to Dismiss the Indictment Based on Immunity Conferred by
16 Defendant's Diversion Agreement (ECF No. 25);
17 (2) Motion to Dismiss the Indictment Because Special Counsel Weiss was
18 Unlawfully Appointed and the Prosecution Violates the Appropriations
19 Clause (ECF No. 26);
20 (3) Motion to Dismiss the Indictment for Selective and Vindictive Prosecution
21 and Breach of Separation of Powers (ECF No. 27);
22 (4) Motion to Dismiss the Indictment for Due Process Violations Based on
23 Outrageous Government Conduct (ECF No. 28);
24 (5) Motion to Dismiss Count 1 as Untimely or, in the Alternative, to Dismiss
25 All Counts for Failure to State a Claim and Lack of Specificity (ECF No.
26 29);
27 (6) Motion to Dismiss Counts 2, 4, and 6 of the Indictment in Part for Duplicity
28 (ECF No. 30);

(7) Motion to Dismiss Count 9 of the Indictment for Selective Prosecution (ECF No. 31); and

(8) Motion to Dismiss Counts 1–4 for Improper Venue (ECF No. 32).[1]

The motions are fully briefed. The Court heard extensive oral argument on March 27, 2024. (*See* Mins., ECF No. 64.)

I. BACKGROUND[2]

At least as early as the summer of 2021, and continuing through the summer of 2023, Defendant, represented by attorney Christopher Clark, was in discussions with attorneys from the United States Attorney's Office for the District of Delaware concerning the Government's tax-related allegations underlying the Indictment in this action. As part of these discussions, Defendant made presentations to the Government regarding the very allegations and evidence contained within the Indictment. (*See* Selective Prosecution Mot. 2–3, ECF No. 27.) To facilitate the ongoing discussions, Defendant entered into tolling agreements with the United States Attorney's Office for the District of Delaware and the United States Department of Justice, Tax Division, tolling the statues of limitations on any potential tax charges from July 1, 2021, through March 1, 2022, and from March 2, 2022, through June 15, 2022. (*See* SOL Opp'n Exs. 1–2, ECF Nos. 38-1 to 38-2.) The discussions between the Government and Defendant during this time included both misdemeanor tax violations (willful failure to file and willful failure to pay in violation of 26 U.S.C. § 7203) and felony tax violations (tax evasion in violation of 26 U.S.C. § 7201, filing a false return in violation of 26 U.S.C.

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[1] Defendant filed a ninth motion, Motion to Strike Surplusage, (ECF No. 33), which the Court resolved in a separate order, (*see* ECF No. 34).

[2] To provide context for the remainder of this Order, the Court sets out a brief background of undisputed events leading up to the Indictment. Where appropriate, a more detailed recitation of facts is included within the discussion of the Court's determination of each motion.

1 § 7206, and assisting in the preparation of a false return in violation of 26 U.S.C.
2 § 7206). (*Id.*) At the same time, Defendant and the Government were also discussing
3 potential charges related to a firearm offense. (*See* Machala Decl. Ex. 4 ("Clark Decl.")
4 ¶ 10, ECF No. 25-5.)
5 By late July 2023, Defendant and the Government reached agreement on a
6 resolution of the tax charges and the firearm charges memorialized in two separate
7 agreements: a memorandum of plea agreement resolving the tax offenses, (Machala
8 Decl. Ex. 3 ("Plea Agreement"), ECF No. 25-4), and a deferred prosecution agreement,
9 or diversion agreement, addressing the firearm offenses, (Machala Decl. Ex. 2
10 ("Diversion Agreement"), ECF No. 25-3).
11 As part of the Plea Agreement, Defendant agreed to waive any venue challenge
12 that could arise from the tax charges being adjudicated in Delaware, (Plea Agreement
13 § 1), and agreed to plead guilty to two counts of willful failure to pay taxes in violation
14 of 26 U.S.C. § 7203, (*id.* § 3). Defendant also agreed to a statement of facts supporting
15 the misdemeanor and felony counts present in the Indictment in the present action. (*Id.*
16 § 3 & Ex. 1.)
17 As part of the Diversion Agreement, the Government agreed to dismiss the
18 firearm related charges after a two year diversion period, (Diversion Agreement § II(4)),
19 during which Defendant agreed to comply with a number of terms and conditions, (*id.*
20 §§ II(9)–(10)). Defendant also agreed to a statement of facts supporting the firearm-
21 related charges. (*Id.* § II(11) & Attach. A.) The Diversion Agreement further included
22 a dispute resolution procedure by which the Government could seek a determination by
23 the United States District Court for the District of Delaware that Defendant had
24 breached his obligations under the Diversion Agreement. (*Id.* § 14.) Upon a finding of
25 breach by the Delaware district court, the Government would have the option of
26 prosecuting Defendant for any federal criminal violation of which the Government had
27 knowledge. (*Id.* § II(14)(b).) Finally, assuming Defendant complied with the terms of
28 the Diversion Agreement, the agreement granted Defendant immunity for any federal

crimes encompassed by the statement of facts in the Plea Agreement, (Plea Agreement Ex. 1), and the statement of facts in the Diversion Agreement, (Diversion Agreement Attach. A).

The parties submitted the Plea Agreement and the Diversion Agreement to United States District Judge Maryellen Noreika in advance of a scheduled July 26, 2023, Initial Appearance and Plea Hearing. (*See* Machala Decl. Ex. 1 ("Del. Hr'g Tr."), ECF No. 25-2.) At the hearing, after questioning Defendant and the parties, the District Court Judge expressed concerns regarding both Defendant's understanding of the scope of the immunity offered by the Diversion Agreement and the appropriateness of the District Court's role in resolving disputes under the Diversion Agreement. (Del. Hr'g Tr. 103–08.) The District Court Judge asked the parties to rework the agreements and provide additional briefing regarding the appropriate role of the District Court in resolving disputes under the Diversion Agreement. (*Id.*) At the hearing, Defendant entered a plea of not guilty to the tax charges then pending in Delaware. (*Id.* at 109.)

After the hearing in Delaware, the parties exchanged communications regarding proposed changes to the Diversion Agreement and the Plea Agreement. (*See, e.g.*, Lowell Decl. Ex. B, ECF No. 48-3 (August 7, 2023 Letter from Christopher J. Clark to Leo J. Wise, ECF 48-3); Def.'s Suppl. Ex. C, ECF No. 58-1 (August 9, 2023 Letter from Leo J. Wise to Christopher J. Clark).) On August 11, 2023, Attorney General Merrick Garland appointed United States Attorney David Weiss as Special Counsel to continue his investigation of Defendant. The same day, the Government moved to dismiss the tax information in Delaware without prejudice. Mot. to Voluntarily Dismiss Criminal Tax Information, *United States v. Biden*, No. 1:23-cr-00061-MN (D. Del. Aug. 11, 2023), ECF No. 31. On August 15, 2023, Mr. Clark moved to withdraw from his representation of Defendant, and Abbe Lowell took primary responsibility for further negotiations with the Government on Defendant's behalf. *See* Mot. for Leave to Withdraw as Counsel, *United States v. Biden*, No. 1:23-cr-00061-MN (D. Del. Aug. 15, 2023), ECF No. 38. At an August 29, 2023, meeting between Mr. Lowell and attorneys

from the Office of Special Counsel, it became apparent to the parties that they had reached an impasse. (Lowell Decl. ¶¶ 3–5, ECF No. 48-1.) The Special Counsel subsequently convened a grand jury in the Central District of California, leading to the Indictment in this action.

II. MOTION TO DISMISS THE INDICTMENT BASED ON IMMUNITY CONFERRED BY DEFENDANT'S DIVERSION AGREEMENT (ECF NO. 25)

Defendant argues that the indictment violates the Diversion Agreement he entered into with the Government that confers immunity from the charged crimes. (*See generally* Immunity Mot., ECF No. 25.) The Government contends that the Diversion Agreement never became effective because a condition precedent to its formation was not met, and the Government thus was free to withdraw its assent to the agreement. (*See generally* Immunity Opp'n, ECF No. 35.)

A. Legal Standard

"[A] criminal defendant has a due process right to enforce the terms of his plea agreement." *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc) (citing *Santobello v. New York*, 404 U.S. 257, 261–62 (1971)). "If the government indicts a defendant on charges that the defendant believes are barred by a preexisting plea agreement, the defendant may move to dismiss those charges." *United States v. Plascencia-Orozco*, 852 F.3d 910, 920 (9th Cir. 2017). A "deferred prosecution agreement is analogous to a plea bargaining agreement" in the context of a motion to dismiss an indictment under these principles. *United States v. Garcia*, 519 F.2d 1343, 1345 & n.2 (9th Cir. 1975); *see also United States v. Shapiro*, 879 F.2d 468, 470–71 (9th Cir. 1989) (extending these principles broadly to "agreements made by prosecutors upon which defendants have justifiably relied to their detriment").

1 **B. Discussion**

2 1. Overview of the Diversion Agreement

3 As relevant to the motion, the Diversion Agreement identifies its parties as the
4 United States of America and Robert Hunter Biden. (Machala Decl. Ex. 2 ("Diversion
5 Agreement") § I, ECF No. 25-3.) Section II of the agreement contains its "TERMS
6 AND CONDITIONS," which include definitions of its term and diversion period:

7 1. The term of this Agreement shall be twenty-four (24)
8 months, beginning on the date of approval of this Agreement,
9 unless there is a breach as set forth in paragraphs 13 and 14.
10 Obligations hereunder survive the term of this Agreement
11 only where this Agreement expressly so provides.
12 2. The twenty-four (24) month period following the
13 execution and approval of this Agreement shall be known as
14 the "Diversion Period."

15 (*Id.* §§ II(1)–(2).) In the agreement, Defendant agreed to waive indictment, (*id.* § II(3));
16 subject himself to the jurisdiction of the federal trial court in Delaware, (*id.* § II(8));
17 subject himself to pretrial diversion supervision, (*id.* § II(10)); and acknowledge the
18 truthfulness and accuracy of, and decline to repudiate or contradict, an attached
19 statement of facts setting forth information relating to the firearm charges, (*id.* § II(12)).

20 In turn, the United States agreed not to criminally prosecute Defendant for any
21 federal crimes encompassed by the statement of facts attached to the Diversion
22 Agreement and the statement of facts attached to the Plea Agreement. (*Id.* § II(15).) The
23 latter statement encompasses the facts relevant to the tax charges in this matter. (*See*
24 Machala Decl. Ex. 3, at Ex. 1, ECF No. 25-4.) Notably, the Diversion Agreement
25 incorporates the statement of facts attached to the Plea Agreement without regard to
26 whether the Delaware District Court accepted a plea pursuant to the Plea Agreement.

27 The Diversion Agreement sets forth a process by which the Delaware District
28 Court would determine whether Defendant committed a knowing, material breach of

1 the agreement upon request of the United States. (Diversion Agreement § II(14).) The
2 agreement also provides for execution in counterparts, (*id.* § II(18)); contains an
3 integration clause, (*id.* § 19); and authorizes modifications "set forth in writing and
4 signed by the United States, Biden, and Biden's counsel," (*id.*).
5 The signature page contains signature blocks for "the Parties"; the block for the
6 United States bears a signature of a Special Assistant United States Attorney and date
7 of July 26, 2023, and the block for Defendant bears the signature of Defendant and his
8 counsel. (Diversion Agreement 9.)[3] A third signature block, introduced by the text
9 "APPROVED BY" and providing a line for the signature of Margaret M. Bray, Chief
10 United States Probation Officer of the District of Delaware, is blank. (*Id.*)
11 The Government and Defendant both claim the agreement is unambiguous, but
12 each party's interpretation of the instrument stands in stark contrast to the other's. The
13 Government asserts that the Probation Officer's approval of the Diversion Agreement
14 was a condition precedent to its formation. (Immunity Opp'n 12–17.) Per this argument,
15 because the Probation Officer never affixed her signature to the "APPROVED BY"
16 block, the Diversion Agreement never existed as a binding contract. (*Id.* at 6–12.) On
17 the other hand, Defendant asserts that the Probation Officer's assent to the agreement
18 was not a condition of its formation, and that only the parties, and not the Probation
19 Officer, needed to approve the Diversion Agreement for its terms to take effect.
20 (Immunity Mot. 8–9, 13–16.) Defendant further asserts that the Probation Officer
21 approved the Diversion Agreement by issuing a recommendation of pretrial diversion
22 consistent with the agreement. (*Id.* at 16–18; *see* Machala Decl. Ex. 5, ECF No. 25-6.)
23 From the parties' positions, the Court perceives three issues ripe for
24 interpretation: first, whether the word *approval* as used in the agreement refers to
25 approval by the Probation Officer or by the parties; second, whether *approval* could be
26
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[3] The signature under Defendant's block does not bear a date, but the Court understands Defendant and his counsel affixed their marks on July 26, 2023. (Clark Decl. ¶ 43.)

obtained only by signature or by other means; and third, whether *approval* was a condition precedent to formation of the agreement or to performance of its terms.

2. Legal Standard Governing Interpretation

The parties agree that the Diversion Agreement is subject to standard contract interpretation rules. Which contract interpretation rules the parties contend apply here, however, is unclear. The parties cite authorities applying federal law, (*e.g.*, Immunity Mot. 10; Immunity Opp'n 7); Delaware law, (*e.g.*, Immunity Mot. 9; Immunity Opp'n 7); and California law, (*e.g.*, Immunity Opp'n 12–13).

The Ninth Circuit has its own "settled" "methodology for interpreting a plea agreement." *Doe v. U.S. Dist. Ct. (In re Doe)*, 57 F.4th 667, 674 (9th Cir. 2023). "[P]lea agreements are contractual in nature and are measured by contract law standards," including "traditional contract principles" pertaining to construction of terms and obligations. *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000) (internal quotation marks omitted). But "[t]he analogy to contract law is . . . in certain circumstances imperfect, and [federal courts] do not always follow it." *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006). Given concerns about the defendant's constitutional rights at play, "the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government," courts "hold[] the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements" than they would a drafting party to a commercial contract. *Clark*, 218 F.3d at 1095 (internal quotation marks omitted). "As a defendant's liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made, so that the government gets what it bargains for but nothing more." *Transfiguracion*, 442 F.3d at 1228 (citations and internal quotation marks omitted).

"[S]everal well-established rules of interpretation" govern interpretation of a plea agreement:

> If the terms of the plea agreement on their face have a clear and unambiguous meaning, then this court will not look to extrinsic evidence to determine their meaning. If, however, a term of a plea agreement is not clear on its face, we look to the facts of the case to determine what the parties reasonably understood to be the terms of the agreement. If, after we have examined the extrinsic evidence, we still find ambiguity regarding what the parties reasonably understood to be the terms of the agreement, then the government ordinarily must bear responsibility for any lack of clarity. Construing ambiguities in favor of the defendant makes sense in light of the parties['] respective bargaining power and expertise.

Clark, 218 F.3d at 1095 (citations and internal quotation marks omitted).

The parties have not identified, and the Court has not uncovered, binding circuit authority extending these interpretation principles to pretrial diversion agreements. But several other circuit courts have found diversion agreements analogous to plea agreements and construed them according to similar contract principles. *E.g.*, *United States v. Harris*, 376 F.3d 1282, 1287 (11th Cir. 2004) ("[T]his court interprets a pretrial diversion agreement applying the same standards we would use to interpret a plea agreement."); *Aschan v. Auger*, 861 F.2d 520, 522 (8th Cir. 1988) (applying contract principles, reasoning that "[t]he pre-trial diversion agreement is analogous to a plea agreement"); *cf. Garcia*, 519 F.2d at 1345 & n.2 (similarly analogizing a deferred prosecution agreement to a plea bargaining agreement). The Court perceives no meaningful distinction between plea and diversion agreements relevant to the

application of these interpretation principles. Accordingly, the Court applies the framework set forth in *Clark* to its interpretation of the Diversion Agreement.[4]

3. Application of Interpretation Rules

The Court need not consult extrinsic evidence because the Diversion Agreement is unambiguous with respect to the issues for interpretation outlined above.[5] But both parties miss the mark with their proffered interpretations in some respects. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) ("The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous . . . .").

a. *Meaning of Approval*

Defendant argues that the *approval* to which the Diversion Agreement refers in sections II(1)–(2) is the approval by the parties as memorialized by the signatures affixed to the contract. (Immunity Mot. 14–16.) The Government asserts that *approval* refers to the approval by the Probation Officer, which could be memorialized only by

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[4] *Clark* and its progeny constitute a relatively small universe of binding cases interpreting plea agreements, and the parties relied extensively on authorities interpreting state law in their briefs. Principles of circuit law governing interpretation of plea agreements appear generally consistent with civil contract principles under federal and state law. *See Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983) ("In fashioning federal rules, guidance is gained from general principles for interpreting contracts."); *but see Yi v. Circle K Stores, Inc.*, 258 F. Supp. 3d 1075, 1083 (C.D. Cal. 2017) (noting extrinsic evidence may be used to determine ambiguity under California law). Thus, the Court cites some authorities interpreting nonbinding state law in aid of its decision but will note which law those authorities apply.

[5] Accordingly, the Court does not reach Defendant's argument that the Government should be estopped from denying the validity of the agreement or the Probation Officer's approval. (Immunity Mot. 18–19.) The Diversion Agreement is unambiguous, and the Government's position on its interpretation cannot change its meaning.

1 her signature on the "APPROVED BY" block on the signature page. (Immunity Opp'n
2 9–12.)

3 The text of the agreement is susceptible only to the interpretation of *approval*
4 urged by the Government. Defendant's proffered interpretation, that only the parties
5 needed to approve the Diversion Agreement for the term and diversion period to
6 commence, would result in surplusage or redundancy, as a close reading of the terms
7 *approval* and *execution* demonstrates. *United States v. Medina-Carrasco*, 815 F.3d 457,
8 462 (9th Cir. 2016) (rejecting interpretation that "would render meaningless" a
9 provision in a plea agreement); *see also Iron Branch Assocs., LP v. Hartford Fire Ins.*
10 *Co.*, 559 F. Supp. 3d 368, 378 (D. Del. 2021) (Under Delaware law, "[a] court must not
11 render any part of the contract mere surplusage or render any provision or term
12 'meaningless or illusory.'" (quoting *Est. of Osborn ex rel. Osborn v. Kemp*, 991 A.2d
13 1153, 1159 (Del. 2010))).

14 The Court construes the words *execution* and *approval* consistent with their
15 common meanings, which comfortably fit into the framework of the Diversion
16 Agreement. *See Clark*, 218 F.3d at 1096 ("Following traditional rules of contract
17 interpretation, we must examine the plain language of the term in the context of the
18 document as a whole."); *In re Doe*, 57 F.4th at 675 ("We begin with the most natural
19 reading . . . ."). To execute means "[t]o make (a legal document) valid by signing; to
20 bring (a legal document) into its final, legally enforceable form." *Execute*, *Black's Law*
21 *Dictionary* (11th ed. 2019). To approve means "[t]o give formal sanction to; to confirm
22 authoritatively." *Approve*, *Black's Law Dictionary* (11th ed. 2019). Consistent with
23 these meanings, the Diversion Agreement uses *execution* to refer to manifestations of
24 assent by the parties to the agreement, the United States and Defendant, and the
25 agreement uses *approval* to refer to the formal sanction by the Probation Officer.

26 *Approval* and *approved* together appear in three places in the agreement: the
27 provision defining the agreement's term, (Diversion Agreement § II(1)); the provision
28 defining the diversion period, (*id.* § II(2)); and the signature block designated for the

Probation Officer, (*id.* at 9). Outside of definition provisions, the only place the agreement uses the *approve* word stem is in the signature block inviting a formal sanction by the Probation Officer. And obtaining the approval of the Probation Officer makes sense in the context of the agreement, as the parties contemplated as a term of Defendant's performance his subjection to her supervision. (*Id.* § II(10)(a).) In other words, the supervision provision would be nugatory if the Probation Officer refused to supervise Defendant.[6] The definition provisions require an *approval*, and the only place in the agreement to which the Court can look to divine the meaning of *approval* is the signature block for the Probation Officer, compelling an interpretation that ties *approval* to an act by the Probation Officer.

In contrast, the term *execution* appears twice in the Diversion Agreement: in the provision defining the diversion period, (*id.* § II(2)), and in a provision authorizing execution of the agreement in counterparts, (*id.* § II(18)). Consistent with the definition of *execute*, the counterparts provision circumscribes the acts of signing the agreement that might validate it; in other words, the parties agreed that signing the same copy of the agreement would have the same effect as signing different copies. Notably, the provision defining the diversion period uses both *execution* and *approval* together, indicating each has its own meaning: "The twenty-four (24) month period following the *execution* and *approval* of this Agreement shall be known as the 'Diversion Period.'" (*Id.* § II(2) (emphases added).) As Defendant's counsel admitted at the hearing,

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[6] This observation begs a question regarding another provision, the parties' agreement that the United States District Court for the District of Delaware would play an adjudicative role in any alleged material breach of the agreement by Defendant. (Diversion Agreement § II(14).) The judge overseeing the action in Delaware questioned whether it was appropriate for her to play this role. (Del. Hr'g Tr. 92–104.) The Court is uncertain as to whether the parties understood the Probation Officer also to have a role in approving the breach-adjudication plan in her capacity as an agent of the court. *See* 18 U.S.C. § 3602. But these issues need not be resolved to adjudicate the motion.

Defendant's proffered interpretation would render the phrase "execution and approval" redundant in part. The contrast between sections II(1) and II(2) supports an interpretation that gives each word its own meaning; while "approval" triggers the agreement's term, the diversion period begins only "following the execution and approval" of the agreement.[7]

The only reasonable interpretation of *execution* and *approval* inferable from the text of the agreement that would give the terms unique meanings is that they refer to the actions of different actors: *approval*, to the action by the Probation Officer, and *execution*, to the action by the parties.[8] Defendant's proffered interpretation—that *approval* refers to the assent of the parties—would conflate *execution* and *approval*, erasing the distinction the parties drew between these words.

b. *Means of Approval*

Even if the Diversion Agreement required approval by the Probation Officer, Defendant argues in the alternative that the Probation Officer's approval of the agreement might be inferred from her publication of a pretrial diversion report that recommends a 24-month term of pretrial diversion. (Immunity Mot. 16–18; *see* Machala Decl. Ex. 5, ECF No. 25-6.) Defendant's theory of approval of the Diversion Agreement finds no purchase in the text of the agreement. The means by which the Probation Officer might approve the Diversion Agreement are not expressly stated, but

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[7] *But see infra* note 10.

[8] For the reasons discussed in the following subsection, *execution* cannot reasonably be interpreted to refer to affixing signatures by the parties and the Probation Officer collectively. Since *approval* unambiguously must be obtained by means of signature, an interpretation of *execution* that encompasses signature by the Probation Officer would make the phrase "execution and approval" in section II(2) redundant in part. *See Allen v. Honeywell Ret. Earnings Plan*, 382 F. Supp. 2d 1139, 1165 (D. Ariz. 2005) (acknowledging "the rule of contract interpretation that disfavors constructions that nullify a contract term or render a term superfluous or redundant").

the agreement provides but one reasonable, obvious method of approval: affixation of the Probation Officer's signature on the "APPROVED BY" signature block set aside for her. (Diversion Agreement 9.) The agreement is not reasonably susceptible to an interpretation that the Probation Officer could manifest her approval by issuing a pretrial diversion recommendation consistent with the Diversion Agreement, let alone by any means other than signature on the line reserved for her.[9]

Defendant's theory is also at odds with uncontroverted facts before the Court. In response to Defendant's motion, the Government submitted a declaration from Assistant United States Attorney Benjamin J. Wallace, who testified that on the morning of July 26, 2023, the Probation Officer declined to sign the Diversion Agreement. (*See* Wallace Decl., ECF No. 35-1.) Defendant did not dispute this representation in his reply memorandum, and while Defendant's counsel tried to minimize this testimony at the hearing, his arguments were unpersuasive.

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[9] Defendant's argument would fail on its merits even if the Probation Officer could have manifested her approval by issuing a pretrial diversion report. Defendant submits that the Probation Officer provided a "letter to counsel . . . enclosing her recommendation in favor of the Diversion Agreement and copy of the Agreement." (Immunity Mot. 18.) The report filed with this Court does not reference or attach a copy of the agreement at all. (*See generally* Machala Decl. Ex. 5.) That said, the report filed with the motion is incomplete and apparently redacted. Although some of the recommended conditions of pretrial diversion align with the conditions discussed in the Diversion Agreement, they do not mirror each other perfectly. (*See, e.g.*, Machala Decl. Ex. 5 § 38(5) (requiring as a condition of pretrial diversion Defendant's consent to entry into a criminal background check system, a condition not discussed in the Diversion Agreement).) Further, another document in the motion record indicates that the parties modified the Diversion Agreement after the Probation Officer issued her report in an effort to "more closely match" the report. (Clark Decl. Ex. T (providing July 20, 2023 revisions to Diversion Agreement); *cf.* Machala Decl. Ex. 5 (dated July 19, 2023).) The Court resists Defendant's ouroboric theory that the Probation Officer manifested approval of an agreement the parties changed in response to the purported approval. Further, the Court doubts the Probation Officer manifested approval of the revised version of the Diversion Agreement passively by being party to an email circulating the updated draft. (*See* Clark Decl. Ex. T.)

c. *Condition of Approval*

The Government argues that the Probation Officer's signing of the Diversion Agreement was a condition precedent to its formation. (Immunity Opp'n 12–18.) The Diversion Agreement is not reasonably susceptible to the Government's interpretation; the text of the agreement unambiguously makes *approval* a condition precedent to performance, not to formation.

As discussed, *approval* helps define the temporal scope of two terms: the agreement's term and the diversion period. (Diversion Agreement §§ II(1)–(2).) Approval is a predicate to the commencement of both periods. The parties expressly tied performance of several obligations under the Diversion Agreement to the diversion period. (*E.g.*, *id.* § II(10) (setting forth Defendant's obligations "during the Diversion Period").) Although the parties did not expressly tie their obligations to the agreement's term, the survival clause indicates that the parties contemplated performance only during the contract term except where expressly provided. (*Id.* § II(1).)[10] In other words, the parties made performance of contractual obligations conditional upon *approval*.

The provisions pertaining to formation of the agreement stand in contrast to the terms requiring *approval*. The agreement clearly identifies the United States and Defendant—not the Probation Officer—as parties to the agreement. (*Id.* §§ I, II(19).) The agreement contemplates *execution* of the agreement in counterparts—and, as discussed, *execution* requires the parties' signature, not the Probation Officer's. (*Id.*

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[10] The Diversion Agreement contains no express provisions invoking the survival clause as it relates to the agreement's term, but the parties provided that certain provisions would survive the diversion period. (Diversion Agreement § II(4) (requiring performance "within thirty (30) days after the expiration of the Diversion Period"); *id.* § II(9)(a) (requiring performance "during the Diversion Period or at any time thereafter").) This might support a reading that the agreement's term is synonymous with the diversion period, though that reading would sanction a redundancy. But the Court need not conclusively interpret these provisions to render an interpretation of *approval* as a condition precedent to performance.

1 § II(18).) The Probation Officer's sanction is not required for the parties to modify the
2 agreement. (*Id.* § II(19).) *Approval* has no bearing on any of these provisions pertinent
3 to formation and modification of the agreement.

4 The Government offers no persuasive argument that procuring the Probation
5 Officer's signature was a condition precedent to the agreement's formation as opposed
6 to its performance. Indeed, the authority that opens the Government's argument to this
7 end teaches that "formation-contingent language" should "jump[] out at you." *Int'l Bhd.*
8 *of Teamsters, Local 396 v. NASA Servs.*, 957 F.3d 1038, 1046 (9th Cir. 2020) (internal
9 quotation marks omitted) (construing California law); (*see* Immunity Opp'n 12–13
10 (quoting *Int'l Bhd. of Teamsters*, 957 F.3d at 1043)); *see also United States v. Murray*,
11 897 F.3d 298, 306 (D.C. Cir. 2018) (Garland, C.J.) ("While specific, talismanic words
12 are not required, the law nevertheless demands that conditions precedent be expressed
13 in unmistakable language." (internal quotation marks omitted)).

14 At the hearing, the Government offered *United States v. Gonzalez*, 918 F.2d 1129
15 (3d Cir. 1990), in support of its argument that the Probation Officer's approval was a
16 condition precedent to formation. There, the government offered a package plea
17 agreement to three criminal codefendants, one of whom refused, resulting in the
18 government's withdrawal of the deal. *Id.* at 1131–32. One of the defendants who
19 accepted the plea claimed the agreement should be enforced as it applied to him. *Id.* at
20 1131–33. Observing that the parties did not dispute that unanimous acceptance by all
21 three men was a condition precedent to the agreement's formation, the district court and
22 the circuit panel refused to enforce the deal. *Id.* at 1133. This authority does not discuss
23 the distinction between conditions precedent to formation versus conditions precedent
24 to performance, and the existence of a condition precedent to formation was undisputed.
25 Thus, *Gonzalez* has little persuasive value here.

26 Nothing in the text of the Diversion Agreement tethers the very existence of the
27 agreement, or any party's acceptance of the agreement, to the Probation Officer's
28 approval. *See* Restatement (Second) of Contracts § 36(2) ("[A]n offeree's power of

1 acceptance is terminated by the non-occurrence of any condition of acceptance under
2 the terms of the offer."); *cf. id.* § 224 cmt. c ("In order for an event to be a condition, it
3 must qualify a duty under an existing contract. Events which are part of the process of
4 formation of a contract, such as offer and acceptance, are therefore excluded under the
5 definition [of condition] in this section."). For example, there is no clear indication that
6 the United States' acceptance of the Diversion Agreement was contingent on the
7 Probation Officer's approval, *cf. McKenzie v. Risley*, 801 F.2d 1519, 1527 (9th Cir.
8 1986) (applying federal law to habeas petition by Montana inmate, and reasoning that
9 the petitioner and the prosecution did not form a plea agreement where "the prosecutors
10 made it clear that they wished to discuss any plea agreement with the victim's family
11 before finally approving it"), *vacated upon grant of reh'g en banc*, 815 F.2d 1323 (9th
12 Cir. 1987), and there is no provision deeming the agreement "not . . . valid unless and
13 until all signatures appear where indicated below," *United States v. Ha*, No. CR07-
14 4068-MWB, 2008 U.S. Dist. LEXIS 29187, at *16–17 (N.D. Iowa Apr. 9, 2008).

15 Instead, *approval* qualifies the temporal scope of the agreement and, thus,
16 unambiguously presents a condition to performance thereunder. (Diversion Agreement
17 §§ II(1)–(2).) "Generally in contracts, when reference is made to conditions, what is
18 meant are conditions to performance—that is, conditions which become operative after
19 formation of the contract and qualify the duty of immediate performance of a promise
20 or promises in that contract—not conditions to the creation or formation of a contract
21 or promise." 13 Richard A. Lord, *Williston on Contracts* § 38:4 (4th ed. 2023); *see also*
22 Restatement (Second) of Contracts § 224 cmt. c ("In order for an event to be a condition,
23 it must qualify a duty under an existing contract."). On the topic of approval by a third
24 party as a condition, a leading treatise explains:

> 25 In making a contract the parties may use language indicating
> 26 that the "contract" itself is conditional on some collateral
> 27 event, such as the approval of a third person, court or
> 28 commission, or the award of some collateral construction

> contract. In such cases, technically, it is quite incorrect to say that until the event occurs there is no contract; neither party has the privilege of revocation and no further expression of assent by the two parties is necessary.

8 Catherine M.A. McCauliff, *Corbin on Contracts* § 31.10 (Joseph M. Perillo ed., 1999) (footnote omitted). Analogously, the Probation Officer did not need to approve the Diversion Agreement for its formation to be perfected, though the parties made their performance of their obligations contingent upon the event of her signing.

4. Whether Defendant Has Immunity

Having found that the Diversion Agreement is a contract that binds the parties but that the parties made the Probation Officer's signature a condition precedent to its performance, the Court turns to Defendant's theory of immunity: that the United States' obligation to refrain from prosecuting Defendant under section II(15) of the Diversion Agreement is currently in force. (Immunity Mot. 19–20.) It is not. The immunity provision is not one exempted from the term of the contract under the survival clause. (*See* Diversion Agreement §§ II(1), (15).) Thus, performance of the Government's agreement not to prosecute Defendant is not yet due.[11]

The Court understands that its decision rests on an interpretation of the agreement neither party advocated—that the Diversion Agreement is a binding contract but performance of its terms is not yet required. The Court, therefore, invites the parties to stipulate to further pretrial motion practice to the extent there are additional disputes

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[11] Similarly, Defendant is not yet obliged to avoid contradicting the statement of facts, (Diversion Agreement § II(12)), which he did in his motions to dismiss, (*compare id.* Attach. A ("Biden moved to California in the spring of 2018 . . . ."), *with* Venue Mot. 2, ECF No. 32 ("Mr. Biden moved to California in the summer of 2019 . . . .")).

that arise from the Court's Schrödinger's cat-esque construction of Defendant's immunity under the Diversion Agreement.[12]

C. Conclusion

The motion is denied.

III. MOTION TO DISMISS THE INDICTMENT BECAUSE SPECIAL COUNSEL WEISS WAS UNLAWFULLY APPOINTED AND THE PROSECUTION VIOLATES THE APPROPRIATIONS CLAUSE (ECF NO. 26)

Defendant argues that the Court should dismiss the indictment because the Government unlawfully appointed Special Counsel David Weiss and, alternatively, because the Department of Justice's ("DOJ") funding of Mr. Weiss in his role as Special Counsel violates the Appropriations Clause. (*See generally* Appointment Mot., ECF No. 26.) The Government contends that both Mr. Weiss's appointment as Special Counsel and funding as Special Counsel are lawful. (*See generally* Appointment Opp'n, ECF No. 36.)

A. Background

Mr. Weiss began investigating this matter in 2019 while acting as the United States Attorney for the District of Delaware. *See* Att'y Gen. Order No. 5730-2023 (Aug. 11, 2023), https://www.justice.gov/d9/2023-08/order.appointment_of_david_c._weiss_as_special_counsel.pdf [https://perma.cc/LY96-QUZJ]. On August 11, 2023, Attorney General Merrick Garland appointed Mr. Weiss Special Counsel to continue

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[12] The Court expressly closes the door to further pretrial motion practice on any other issues. (*See* Mins., ECF No. 17.) Further, the Court will not allow any such motion to delay the pretrial status conference set for May 29, 2024.

the investigation pursuant to 28 U.S.C. §§ 509, 510, 515, and 533, and decided to make Mr. Weiss's appointment subject to 28 C.F.R. §§ 600.4–.10. *See Attorney General Merrick B. Garland Delivers a Statement*, Office of Public Affairs, U.S. Dep't of Justice (Aug. 11, 2023), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-statement [https://perma.cc/MX8D-SYL5].[13] Mr. Weiss continues to serve as United States Attorney for the District of Delaware. *Id.* The DOJ is funding Mr. Weiss's work under a permanent, indefinite appropriation for expenses by independent counsels. (Appointment Mot. 6.)[14]

B. Appointment of Special Counsel

1. Legal Standard

Federal statutes govern who may litigate cases on behalf of the United States. "All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General," save some exceptions irrelevant here. 28 U.S.C. § 509. The Attorney General may delegate those functions to "any other officer, employee, or agency of the Department of Justice" as the Attorney General "considers appropriate." *Id.* § 510. And "any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . which United States attorneys are authorized by law to conduct." *Id.* § 515(a); *see also id.* § 533 ("The Attorney

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[13] The Court, on its own motion, takes judicial notice of these materials from the website of the DOJ.

[14] Defendant offers no support for this proposition, but his proffer appears consistent with statements made in a publication by the DOJ. U.S. Dep't of Justice, *Special Counsel's Office – Weiss Statement of Expenditures August 11, 2023 through September 30, 2023*, at 4, https://www.justice.gov/d9/2024-01/SCO%20David%20C.%20Weiss%20-%20SOE%20-%20Aug%2011%202023%20to%20Sept%2030%202023_final%201.5.2024.pdf [https://perma.cc/D9PT-CMU4].

1 General may appoint officials . . . to detect and prosecute crimes against the United
2 States . . . [and] to conduct such other investigations regarding official matters under
3 the control of the Department of Justice . . . .").

4 The DOJ has promulgated a set of regulations regarding the appointment and
5 supervision of "Special Counsel." General Powers of Special Counsel, 28 C.F.R. Part
6 600.[15] The regulations provide that the Attorney General may appoint a Special Counsel
7 if the Attorney General "determines that criminal investigation of a person or matter is
8 warranted" and assigning a United States Attorney or other DOJ lawyer "would present
9 a conflict of interest for the Department or other extraordinary circumstances." 28
10 C.F.R. § 600.1. A Special Counsel named pursuant to the regulations "shall be selected
11 from outside the United States Government." *Id.* § 600.3(a). The regulations also
12 provide that the Attorney General sets the scope of a Special Counsel's jurisdiction. 28
13 C.F.R. § 600.4. Once the Attorney General sets a Special Counsel's jurisdiction, the
14 Special Counsel has the authority to "exercise all investigative and prosecutorial
15 functions of any United States Attorney." *Id.* § 600.6. A Special Counsel must "comply
16 with the rules, regulations, procedures, practices and policies of the Department of
17 Justice" and "consult with appropriate offices within the Department for guidance with
18 respect to established practices, policies and procedures," or with the Attorney General
19 if the Special Counsel concludes that "extraordinary circumstances of any particular
20 decision" would make such consultation "inappropriate." *Id.* § 600.7(a).

21 The Attorney General's responsibility over a Special Counsel includes the power
22 to discipline or remove the Special Counsel. *Id.* § 600.7(d). That said, a Special Counsel
23 is not "subject to the day-to-day supervision of any official of the Department," though
24 the Attorney General may request that the Special Counsel explain any investigative or
25
26
27 [15] For an in-depth history of the Special Counsel regulations and related law, see *United States v. Manafort*, 312 F. Supp. 3d 60, 69–70 (D.D.C. 2018), and *United States v.*
28 *Stone*, 394 F. Supp. 3d 1, 17–19 (D.D.C. 2019).

1 prosecutorial step and may conclude that the step "is so inappropriate or unwarranted
2 under established Departmental practices that it should not be pursued." *Id.* § 600.7(b).
3 "If the Attorney General concludes that a proposed action . . . should not be pursued,
4 the Attorney General" must notify the Chairs and Ranking Minority Members of the
5 Judiciary Committees of the House of Representatives and Senate. *Id.* §§ 600.7(b),
6 600.9(a). The Attorney General must also notify the Chairs and Ranking Minority
7 Members upon removing a Special Counsel. *Id.* § 600.9(a)(2).
8
9 2. Discussion
10 Defendant argues that the DOJ regulations require that a Special Counsel be
11 appointed from outside of the government and, thus, Mr. Weiss is not eligible to serve
12 as a Special Counsel because he served and continues to serve as United States Attorney
13 for the District of Delaware. (Appointment Mot. 2–6; Appointment Reply 1–3.) In
14 response, the Government argues that appointment of a Special Counsel pursuant to 28
15 C.F.R. §§ 600.1–.10 is only one mechanism in place for the Attorney General to appoint
16 an independent counsel, and that the Attorney General's statutory authority under 28
17 U.S.C. §§ 509, 510, 515, and 533 provide the Attorney General with sufficient authority
18 to appoint an independent counsel without all of the requirements of 28 C.F.R.
19 §§ 600.1–.10. For the reasons discussed below, the Court agrees with the Government's
20 positions.
21 Title 28 clearly vests the Attorney General with the functions of the DOJ, 28
22 U.S.C § 509, and permits the Attorney General to delegate those functions to any other
23 officer of the DOJ, 28 U.S.C. § 510; *see also id.* §§ 515, 533; *United States v. Nixon*,
24 418 U.S. 683, 694 (1974).
25 Defendant offers no convincing reason why the Special Counsel regulations
26 displace the Attorney General's statutory authority as opposed to merely existing in
27 parallel with that authority. Defendant argues that the Part 600 regulations retained a
28 requirement from the now-lapsed Ethics in Government Act the regulations replaced,

1 which required a special prosecutor to not "hold[] or recently [hold] any office of profit
2 or trust under the United States." Pub. L. No. 95-521, 92 Stat. 1824 (1978); (*see*
3 Appointment Mot. 2–4). But Defendant ignores that the Attorney General's statutory
4 authority under §§ 509, 510, and 515, and the lapsed law always coexisted in parallel.
5 *See In re Sealed Case*, 829 F.2d 50, 52–53, 55–58 (D.C. Cir. 1987); *United States v.*
6 *Libby*, 429 F. Supp. 2d 27, 34 (D.D.C. 2006).

7 At the hearing on his motion, Defendant argued that, as implementing
8 regulations, the Attorney General could not sidestep the Part 600 regulations when
9 appointing independent counsel. Again, the Court disagrees.

10 "Agency regulations fall into two distinct categories: 'substantive rules on the
11 one hand and interpretative rules, general statements of policy, or rules of agency
12 organization, procedure, or practice on the other.'" *United States v. Manafort*, 312 F.
13 Supp. 3d 60, 75 (D.D.C. 2018) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 &
14 n.30 (1979)). A substantive, or "legislative-type," rule "affect[s] individual rights and
15 obligations" and "may be 'binding' or have the 'force of law.'" *Chrysler Corp.*, 441
16 U.S. at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 235–36 (1974)). Such rules are
17 promulgated "in compliance with procedures imposed by Congress, such as
18 requirements for notice and comment set forth in the Administrative Procedure Act."
19 *Manafort*, 312 F. Supp. 3d at 75 (citing *Chrysler Corp.*, 441 U.S. at 303).

20 The DOJ was unambiguously clear that it was not creating a substantive rule in
21 promulgating the Part 600 regulations. The regulations concern "matters of agency
22 management or personnel" and "agency organization, procedure, or practice." Final
23 Rule, 64 Fed. Reg. 37038, 37041 (July 9, 1999) (citing 5 U.S.C. §§ 552–53). Further,
24 the DOJ did not subject the regulations to the rulemaking procedures required by the
25 Administrative Procedure Act, such as notice and comment. *Id.* And the DOJ
26 promulgated the regulations pursuant to 5 U.S.C. § 301, which allows the head of an
27 executive department to "prescribe regulations for the government of his department,
28 the conduct of its employees, the distribution and performance of its business, and the

custody, use, and preservation of its records, papers, and property."[16] Finally, § 600.10 explicitly states that the regulations are "not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity." 28 C.F.R. § 600.10. "Courts have held that the type of language used in section 600.10 is effective to disclaim the creation of any enforceable rights." *Manafort*, 312 F. Supp. 3d at 76 (collecting cases).[17]

Nor is Defendant's citation of *Nixon*, 418 U.S. 683, convincing. There, the Supreme Court held that the regulation appointing the Watergate Special Prosecutor, including giving the Special Prosecutor "explicit power" to challenge any assertion of executive privilege, had the "force of law." *Id.* at 694–95. The facts and law here are distinguishable. For one, *Nixon* dealt with an internal executive branch struggle, not a criminal defendant's attempt to enforce DOJ compliance with a regulation. *See id.* at 697. Further, in holding that the Watergate regulations had the force of law, the Supreme Court noted that "the delegation of authority to the Special Prosecutor . . . is not an ordinary delegation by the Attorney General to a subordinate officer" because the removal of the Special Prosecutor required the consensus of eight designated members of Congress. *Id.* at 696. Those circumstances are not present in this case.

Defendant concedes in his reply that §§ 509, 510, 515, and 533 "may authorize the AG to appoint a prosecutor" but argues that a "Special Counsel" is a "term of art created by DOJ regulations." (Appointment Reply 2.) This argument clearly places

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[16] The Supreme Court has called U.S.C. § 301 a "housekeeping statute." *Chrysler Corp.*, 441 U.S. at 309.

[17] The Court also notes that the regulations do not purport to be the exclusive avenue for the Attorney General to appoint a Special Counsel, and they appear to support the contrary position given that the regulations are cabined to the need for an "*outside* Special Counsel." 28 C.F.R. § 600.1(b). To determine, then, that all Special Counsel must be appointed from without the government would render the word "outside" surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (Courts "are . . . reluctant to treat statutory terms as surplusage in any setting." (cleaned up)).

form over substance. Following Defendant's logic, the Attorney General could have appointed Mr. Weiss "Designated Counsel" pursuant to the Attorney General's statutory authority and 28 C.F.R. §§ 600.4–.10, and the issue Defendant complains of would disappear. That the Attorney General used the term "Special Counsel" instead of some other term similarly indicative of an independent counsel is a distinction without a difference.

C. Appropriations Clause

1. Legal Standard

A defendant may seek to enjoin a prosecution funded in violation of the Appropriations Clause. *See United States v. Pisarski*, 965 F.3d 738, 741 (9th Cir. 2020); *United States v. Evans*, 929 F.3d 1073, 1076 (9th Cir. 2019); *United States v. McIntosh*, 833 F.3d 1163, 1173–74 (9th Cir. 2016). Under the Appropriations Clause of the Constitution, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (internal quotation marks omitted); *see* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). "[I]n other words, the payment of money from the Treasury must be authorized by a statute." *Richmond*, 496 U.S. at 424.

2. Discussion

Defendant argues that the DOJ's funding of this prosecution violates the Appropriations Clause and, thus, the Court should dismiss the indictment. (Appointment Mot. 6–8.) Defendant asserts, and the Government does not dispute, that the DOJ is funding this prosecution through an appropriation for independent counsel. *See* 28 U.S.C. § 591 note ("[A] permanent indefinite appropriation is established within the Department of Justice to pay all necessary expenses of investigations and

1 prosecutions by independent counsel appointed pursuant to the provisions of [the now-
2 lapsed Ethics in Government Act] or other law.").

3 Defendant contended at the hearing that the indefinite appropriation incorporated
4 the now-lapsed Ethics in Government Act's definition of "independent," and thus is
5 unavailable to fund Mr. Weiss. The Court rejects this argument for several reasons.
6 First, the Ethics in Government Act at no point explicitly defined the term
7 "independent" or "independent counsel." *See* 28 U.S.C. §§ 591–99. Further, while
8 Congress passed the appropriation with the Ethics in Government Act in mind, the plain
9 language of the appropriation unambiguously refers to independent counsel appointed
10 pursuant to other statutory authority. *See* Pub. L. No. 100-202, tit. II, 101 Stat. 1329
11 (1987) ("A permanent indefinite appropriation is established within the Department of
12 Justice to pay all necessary expenses of investigations and prosecutions by independent
13 counsel appointed pursuant to the provisions of [the now-lapsed Ethics in Government
14 Act] *or other law*." (emphasis added)). In fact, in the text of the provision, Congress
15 specifically differentiated between "Independent Counsel" appointed pursuant to the
16 Ethics in Government Act and other "independent counsel":

17 > *Provided further*, That of the funds appropriated to the
18 > Department of Justice in this Act, not to exceed $1,000,000
19 > may be transferred to this appropriation to pay expenses
20 > related to the activities of any *Independent Counsel* appointed
21 > pursuant to 28 U.S.C. 591, et seq. . . . . *Provided further*, That
22 > a permanent indefinite appropriation is established within the
23 > Department of Justice to pay all necessary expenses of
24 > investigations and prosecution by *independent counsel* . . . .

25 *Id.* (emphasis added). "The separate references to 'Independent Counsel' (capitalized)
26 and 'independent counsel' (lower case) within the same provision show that Congress
27 recognized a distinction between the specific 'Independent Counsel appointed pursuant
28 to 28 U.S.C. 591' and a general category of independent counsel to be appointed under

1 section 591 or other law." *United States v. Stone*, 394 F. Supp. 3d 1, 20 (D.D.C. 2019)
2 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).
3 Defendant argues that Special Counsel Weiss's appointment pursuant to 28
4 U.S.C. §§ 509, 510, 515, and 533 and 28 C.F.R. §§ 600.4–.10, but not 28 C.F.R.
5 § 600.3, is ineligible for the appropriation because a Special Counsel appointed from
6 within the DOJ could never have an adequate quantum of independence to qualify as
7 an independent counsel within the meaning of the appropriation. (Appointment Mot. 6–
8 8.) The Government disagrees. (Appointment Opp'n 10–14.) To determine whether
9 Special Counsel Weiss, as appointed, is an "independent counsel," the Court must
10 interpret the text of the statute.
11 "The interpretation of a statutory provision must begin with the plain meaning of
12 its language." *United States v. Flores*, 729 F.3d 910, 914 (9th Cir. 2013) (internal
13 quotation marks omitted). "To determine plain meaning, '[courts] examine not only the
14 specific provision at issue, but also the structure of the statute as a whole, including its
15 object and policy.'" *United States v. Lillard*, 935 F.3d 827, 833 (9th Cir. 2019) (quoting
16 *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999)). "If the
17 language has a plain meaning or is unambiguous, the statutory interpretation inquiry
18 ends there." *Id.* at 833–34 (quoting *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703,
19 706 (9th Cir. 2017)). "[U]nless defined, words in a statute 'will be interpreted as taking
20 their ordinary, contemporary, common meaning.'" *Flores*, 729 F.3d at 914 (quoting
21 *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012)). "In determining the 'plain
22 meaning' of a word, [courts] may consult dictionary definitions, which [courts] trust to
23 capture the common contemporary understandings of the word." *Id.* "If the statutory
24 language lacks a plain meaning, courts may 'employ other tools, such as legislative
25 history, to construe the meaning of ambiguous terms.'" *Lillard*, 935 F.3d at 834 (quoting
26 *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015)).
27 The appropriation does not define the term "independent counsel," providing no
28 guidance to the Court as to what level of independence Congress intended. Nor do

dictionary definitions of the term "independent counsel" clarify the issue. *See, e.g.*, *Counsel*, *Black's Law Dictionary* (11th ed. 2019) (defining "independent counsel" as "[a]n attorney hired to provide an unbiased opinion about a case or to conduct an impartial investigation; esp., an attorney appointed by a governmental branch or agency to investigate alleged misconduct within that branch or agency").

As such, the Court looks to other tools to construe the meaning of the ambiguous term "independent counsel." *Lillard*, 935 F.3d at 834. The parties do not direct the Court to any legislative history documents predating the passage of the appropriation, and the Court is not aware of any. But the General Accounting Office ("GAO")[18] previously audited the appropriation and reported to Congress that other independent counsels appointed after the Ethics in Government Act expired have been paid with funds from the permanent appropriation. *See, e.g.*, U.S. Gen. Acct. Off., GAO/AIMD-00-310, Financial Audit: Independent and Special Counsel Expenditures for the Six Months Ended March 31, 2000, at 5–6 (2000) (reporting to Congress after the lapse of the Ethics in Government Act that "the Department of Justice determined that the appropriation established by Public Law 100-202 to fund expenditures by independent counsels appointed pursuant to 28 U.S.C. 591–599, or other law, is available to fund the expenditures of John C. Danforth, who was appointed as a Special Counsel within the Department of Justice by the Attorney General"), https://www.gao.gov/assets/aimd-00-310.pdf [https://perma.cc/3W9P-UVG7]; U.S. Gov't Accountability Off., GAO-04-1014, Financial Audit: Independent and Special Counsel Expenditures for the Six Months Ended March 31, 2004, at 3–4 (2004) (reporting the same for Special Counsel Patrick J. Fitzgerald, who served contemporaneously as United States Attorney for the

[18] The General Accounting Office has been renamed the Government Accountability Office. *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 287 n.6 (2010).

1 Northern District of Illinois), https://www.gao.gov/assets/gao-04-1014.pdf
2 [https://perma.cc/U89J-HAGB].
3 In fact, after its September 2004 audit, the GAO agreed with the DOJ "that the
4 same statutory authorities that authorize the Attorney General . . . to delegate authority
5 to a U.S. Attorney to investigate and prosecute high ranking government officials are
6 'other law' for the purposes of authorizing the Department to finance the investigation
7 and prosecution from the permanent indefinite appropriation." U.S. Gov't
8 Accountability Off., B-302582, Special Counsel and Permanent Indefinite
9 Appropriation 7 (2004), https://www.gao.gov/assets/b-302582.pdf [https://perma.cc/
10 6VAD-UBJ8] ("GAO Analysis"). After this report, the only change Congress made to
11 the appropriation was to remove the GAO's audit duty. *See* Pub. L. No. 111-68,
12 § 1501(d), 123 Stat. 2023, 2041 (2009). This suggests that the DOJ's use of the
13 appropriation to fund independent counsels appointed from within the DOJ is consistent
14 with Congress's intent. *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979)
15 ("[O]nce an agency's statutory construction has been fully brought to the attention of
16 the public and the Congress, and the latter has not sought to alter that interpretation
17 although it has amended the statute in other respects, then presumably the legislative
18 intent has been correctly discerned." (internal quotation marks omitted)).
19 Defendant argues in his reply that the GAO Analysis and *Stone* cut against the
20 Government's opinion because the GAO Analysis examined Special Counsel
21 Fitzgerald, who was not subject to the Part 600 regulations, and *Stone* concerned Special
22 Counsel Robert Mueller, who was appointed from outside the government.
23 (Appointment Reply 7–9.) The Court is not convinced.
24 As noted above, Special Counsel Weiss was lawfully appointed from within the
25 Government pursuant to 28 U.S.C. §§ 509, 510, 515, and 533. And while the GAO
26 Analysis, which is not binding on the Court, does note that the "indicia of independence
27 of Special Counsel Fitzgerald" included his "express exclusion . . . from the application
28 of 28 C.F.R. Part 600," and the Attorney General's delegation of all his authority with

respect to the Special Counsel Fitzgerald's investigation, GAO Analysis 6, this does not mean that Mr. Weiss lacks sufficient independence.

Though Mr. Weiss is subject to some supervision by the Attorney General, *see* 28 C.F.R. § 600.7(b), he operates largely outside of the regular Department of Justice structure and hierarchy. Mr. Weiss is not subject to day-to-day supervision by Department officials. *Id.* He has "the full power and independent authority" of a United States Attorney and determines "whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of [his] duties and responsibilities," save for some exceptions in the Special Counsel regulations. *Id.* § 600.6. While "the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step," the Attorney General must give the Special Counsel's views "great weight." *Id.* § 600.7(b). And if the Attorney General determines that a step should be undone or the Special Counsel removed, the Attorney General must notify Congress. *Id.* And as the DOJ recognized, the Part 600 regulations attempt to "strike a balance between independence and accountability." 64 Fed. Reg. at 37038. Thus, the Part 600 regulations do not indicate that a prosecutor acting subject to the regulations is so restricted that the prosecutor cannot fall within the broad category of "independent counsel" Congress intended to fund. *See Stone*, 394 F. Supp. 3d at 22.[19]

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[19] Nor is Defendant's reference to a 2002 Congressional Research Service report on the difference between Special Counsel, Independent Counsel, and Special Prosecutors persuasive. (*See* Appointment Reply 9 n.5); Jack Maskell, Cong. Rsch. Serv., RL31246, Independent Counsel Law Expiration and the Appointment of "Special Counsels" (2002). While it is true that the report states the designation "Special Counsel" "seems appropriate . . . since their designation as 'independent' counsels might be considered somewhat of a misnomer," the report, which does not analyze the appropriation, recognized that Special Counsels retained some "limited independence from the Attorney General and the Department of Justice." Maskell, *supra*, at 4.

For these reasons, the Court concludes that Special Counsel Weiss is lawfully funded through the indefinite appropriation, and the Appropriations Clause has not been violated.

D. Conclusion

The motion is denied.

IV. MOTION TO DISMISS THE INDICTMENT FOR SELECTIVE AND VINDICTIVE PROSECUTION AND BREACH OF SEPARATION OF POWERS (ECF NO. 27)

Defendant argues that the Court should dismiss the indictment because the prosecution is motivated by discriminatory intent and animus concerning Defendant's political and familial affiliations—particularly his relation to his father, the sitting President of the United States. (Selective Prosecution Mot. 11–15, ECF No. 27.) Defendant contends that the Court should presume vindictiveness because the prosecution made decisions to bring or increase the gravity of charges without intervening events or new evidence. (*Id.* at 15–17.) And Defendant submits that similarly situated individuals are not similarly prosecuted for the crimes for which he is charged. (*Id.* at 17–19.) Defendant requests discovery and a hearing to seek further support for his claims. (*Id.* at 20.) Finally, Defendant contends that the prosecution violates principles of separation of powers. (*Id.* at 19.)

The Government argues that Defendant has not identified a similarly situated person who was not prosecuted, a necessary element of a selective prosecution challenge. (Selective Prosecution Opp'n 8–9, ECF No. 37.) The Government submits there is no evidence of discriminatory animus by prosecutors. (*Id.* at 10–16.) It contends that a presumption of vindictiveness does not apply, and, therefore, the Government need not proffer reasons for its prosecutorial decision-making. (*Id.* at 16–19.) The

Government calls Defendant's separation of powers argument frivolous, and his request for discovery and a hearing unfounded. (*Id.* at 19–20.)[20]

A. Background

As the Court stated at the hearing, Defendant filed his motion without any evidence. The motion is remarkable in that it fails to include a single declaration, exhibit, or request for judicial notice. Instead, Defendant cites portions of various Internet news sources, social media posts, and legal blogs. These citations, however, are not evidence. To that end, the Court may deny the motion without further discussion. *See* Fed. R. Crim. P. 47(b) (allowing evidentiary support for motions by accompanying affidavit); *see also* C.D. Cal. R. 7-5(b) (requiring "[t]he evidence upon which the moving party will rely in support of the motion" to be filed with the moving papers); C.D. Cal. Crim. R. 57-1 (applying local civil rules by analogy); *cf.* C.D. Cal. Crim. R. 12-1.1 (requiring a declaration to accompany a motion to suppress).

In light of the gravity of the issues raised by Defendant's motion, however, the Court has taken on the task of reviewing all the cited Internet materials so that the Court can decide the motion without unduly prejudicing Defendant due to his procedural error.[21] The facts set out below come from Defendant's sources. While the materials, even if authenticated, contain multiple levels of hearsay, the Court includes them to provide a complete picture of Defendant's argument.

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[20] The parties freely refer to briefs they filed in connection with a motion to dismiss filed in the criminal case against Defendant pending in Delaware, in which the parties advanced similar arguments, but more voluminously. Although the Court has read the Delaware briefing, (*see* Tr. 13, ECF No. 18), its resolution of the motion rests only on the arguments and evidence presented in the filings in this case. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

[21] However, Defendant mischaracterizes the content of several cited sources. The Court notes discrepancies where appropriate.

1 Defendant claims that federal prosecutors began investigating his tax affairs in 2 2018. Kathryn Watson et al., *Investigation into Hunter Biden's "tax affairs" began in* 3 *2018*, CBS News (Dec. 10, 2020, 7:01 a.m.), https://www.cbsnews.com/news/hunter- 4 biden-tax-investigation-began-2018/ [https://perma.cc/K4EW-S8F4].[22] According to 5 Defendant, the Department of Justice obtained warrants in 2019 to search his electronic 6 devices for evidence related to his taxes. (Selective Prosecution Mot. 4.)[23] During a 7 presidential debate in 2020, then-President Donald Trump referred to Defendant's drug 8 abuse. Michael Collins, *Hunter Biden's drug use back in public eye as criminal charges* 9 *could be around the corner*, USA Today (June 12, 2023, 5:02 a.m.), 10 https://www.usatoday.com/story/news/politics/2023/06/12/hunter-biden-addiction- 11 american-families-opioid/70222851007/ [https://perma.cc/VYE3-KBJ4].[24] In late 12 2020, Mr. Trump reportedly "urged the nation's top law enforcement official to
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14

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15 [22] Defendant did not provide a direct link to this source (and numerous others). 16 (Selective Prosecution Mot. 4 n.7.) The Court assumes the article cited in this Order is the one to which Defendant refers even though the date does not match the one 17 presented in Defendant's brief. This article provides no support for Defendant's allegation that then-President Donald Trump called on then-Attorney General William 18 Barr to investigate Defendant in 2018, or that Mr. Barr "secretly assigned U.S. Attorney 19 David Weiss to investigate [him]." (*Id.* at 4.)

[23] Defendant offers no support for this proffered fact. Defendant also asserts that the 20 Department of Justice "determined no felony charges were warranted" upon initial 21 review of the devices seized pursuant to these warrants, but the record is devoid of any evidence indicating that the Department of Justice made any prosecutorial decision at 22 that time. (Selective Prosecution Mot. 4.)

23 [24] In the Court's reading, nothing in this article stands for the proposition for which Defendant cites it: "While DOJ continued to weather increasing political pressure, Mr. 24 Trump and his supporters used Mr. Biden's personal history as both a means of 25 demeaning the Bidens and leveraging DOJ." (Selective Prosecution Mot. 4.) The article mentions that "Republicans have repeatedly sought to use the federal investigation into 26 Hunter Biden's private affairs . . . as part of their campaign to portray the Biden family 27 as corrupt." Collins, *supra*. Nothing in the article suggests these acts were directed to the Department of Justice as opposed to the electorate at large in the 2020 federal 28 election season.

1 aggressively investigate [Defendant], . . . saying: 'You figure out what to do w/ H.
2 Biden—people will criticize the DOJ if he's not investigated for real.'" Devlin Barrett
3 & Josh Dawsey, *Trump to acting AG, according to aide's notes: 'Just say the election*
4 *was corrupt + leave the rest to me,'* Wash. Post (July 31, 2021, 8:09 p.m.),
5 https://www.washingtonpost.com/national-security/trump-rosen-phone-call-notes/
6 2021/07/30/2e9430d6-f14d-11eb-81d2-ffae0f931b8f_story.html [https://perma.cc/
7 8E2E-2TT7]. Defendant publicly announced that he learned about the investigation in
8 December 2020. Watson et al., *supra*.

9 Defendant's father was elected President of the United States in 2020 and was
10 inaugurated in early 2021. Fed. R. Evid. 201(b)(1). In July 2021, and again in March
11 2022, Defendant assented to agreements tolling the statute of limitations for violations
12 of various tax laws, including those the Government ultimately charged Defendant of
13 violating in this action. (Selective Prosecution Opp'n Exs. 1–2, ECF Nos. 37-1 to -2.)[25]
14 According to Defendant, "[b]etween January 2022 and May 2023, Mr. Biden discussed
15 the alleged tax violations with DOJ . . . ." (Selective Prosecution Mot. 5.) On May 15,
16 2023, prosecutors proposed "a non-charge disposition to resolve any and all
17 investigations by the DOJ of Mr. Biden." (Clark Decl. ¶ 6.)[26] After further discussions
18 over the following month, Defendant and the Government coalesced around a deal
19 involving a deferred prosecution agreement and a plea to misdemeanor tax charges. (*See*
20 *generally id.* ¶¶ 7–39.)

21 Meanwhile, in late May, Internal Revenue Service agents spoke to news media
22 and testified before the Ways and Means Committee of the United States House of
23 Representatives about their involvement in the tax investigation of Defendant. *E.g.*, Jim
24 Axelrod et al., *IRS whistleblower speaks: DOJ "slow walked" tax probe said to involve*
25

26 [25] No declaration establishes the authenticity of these documents, but the Court assumes
27 they are true and correct copies of the tolling agreements.
[26] Nothing in this declaration stands for the proposition that "DOJ had already
28 determined that charges should not be brought." (Selective Prosecution Mot. 5.)

Hunter Biden, CBS News (May 24, 2023, 8:31 p.m.), https://www.cbsnews.com/news/irs-whistleblower-tax-probe-hunter-biden/ [https://perma.cc/7GQF-2HJA]; Michael S. Schmidt et al., *Inside the Collapse of Hunter Biden's Plea Deal*, N.Y. Times (Aug. 19, 2023), https://www.nytimes.com/2023/08/19/us/politics/inside-hunter-biden-plea-deal.html [https://perma.cc/6CVJ-KYDK].[27]

The putative plea deal became public in June 2023. Several members of the United States Congress publicly expressed their disapproval on social media. The Republican National Committee stated, "It is clear that Joe Biden's Department of Justice is offering Hunter Biden a sweetheart deal." Mr. Trump wrote on his social media platform, "The corrupt Biden DOJ just cleared up hundreds of years of criminal liability by giving Hunter Biden a mere 'traffic ticket.'" Phillip M. Bailey, *'Slap on the wrist': Donald Trump, congressional Republicans call out Hunter Biden plea deal*, USA Today (June 20, 2023, 11:17 a.m.), https://www.usatoday.com/story/news/politics/2023/06/20/donald-trump-republicans-react-hunter-biden-plea-deal/70337635007/ [https://perma.cc/TSN9-UHLH].[28] On June 23, 2023, the Ways and

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[27] Defendant asserts that the IRS agents' actions prompted then-United States Attorney David Weiss to change his position away from a non-charge disposition to the plea the parties ultimately contemplated, (Selective Prosecution Mot. 5 & nn.11–12), but the support for this assertion apparently is his own attorneys' and the IRS agents' speculation as reported by the *New York Times*, *see* Schmidt et al., *supra* ("Mr. Biden's legal team agrees that the I.R.S. agents affected the deal . . . ."). For the same story, Mr. Weiss declined to comment, and an unnamed law enforcement official disputed the assertion. *Id.*

[28] This source does not stand for the proposition that "extremist Republicans were . . . using the excuse to interfere with the investigation." (Selective Prosecution Mot. 5–6.) Of Mr. Weiss, Mr. Trump also wrote: "He gave out a traffic ticket instead of a death sentence. . . . Maybe the judge presiding will have the courage and intellect to break up this cesspool of crime. The collusion and corruption is beyond description. TWO TIERS OF JUSTICE!" Ryan Bort, *Trump Blasts Prosecutor He Appointed for Not Giving Hunter Biden 'Death Sentence,'* Rolling Stone (July 11, 2023), https://www.rollingstone.com/politics/politics-news/trump-suggests-hunter-biden-death-penalty-1234786435/ [https://perma.cc/UH6N-838R].

Means Committee of the United States House of Representatives voted to publicly disclose congressional testimony from the IRS agents who worked on the tax investigation. Jason Smith, chair of the Ways and Means Committee, told reporters that the agents were "[w]histleblowers [who] describe how the Biden Justice Department intervened and overstepped in a campaign to protect the son of Joe Biden by delaying, divulging and denying an ongoing investigation into Hunter Biden's alleged tax crimes." Farnoush Amiri, *GOP releases testimony alleging DOJ interference in Hunter Biden tax case*, PBS NewsHour (June 23, 2023, 3:58 p.m.), https://www.pbs.org/newshour/politics/gop-releases-testimony-alleging-doj-interference-in-hunter-biden-tax-case.[29] One day before the plea hearing in the United States District Court for the District of Delaware, Mr. Smith moved to file an amicus curiae brief imploring the court to consider the IRS agents' testimony and related materials in accepting or rejecting the plea agreement. Mem. of Law in Support of Mot. for Leave to File Amicus Curiae Br., *United States v. Biden*, No. 1:23-mj-00274-MN (D. Del. July 25, 2023), ECF No. 7-2; Amicus Curiae Br., *United States v. Biden*, No. 1:23-mj-00274-MN (D. Del. July 25, 2023), ECF No. 7-3.[30]

On July 26, 2023, the district judge in Delaware deferred accepting Defendant's plea so the parties could resolve concerns raised at the plea hearing. (*See generally* Del. Hr'g Tr. 108–09.) That afternoon, Defendant's counsel presented Government counsel a menu of options to address the concerns. (Def.'s Suppl. Ex. C, ECF No. 58-1.)[31] On July 31, Defendant's counsel and members of the prosecution team held a telephone conference in which they discussed revising the Diversion Agreement and Plea

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[29] This source does not stand for the proposition that several leaders of house committees "opened a joint investigation." (Selective Prosecution Mot. 6.)

[30] The docket does not show that the Delaware district court resolved the motion, and the Court is uncertain whether the court considered Mr. Smith's brief.

[31] No declaration establishes the authenticity of this document, but the Court assumes it is a true and correct copy of counsel's correspondence.

Agreement. The Government proposed amendments and deletions. (*See* Lowell Decl. Ex. B, ECF No. 48-3.) On August 7, counsel for Defendant responded in writing to these proposals, signaling agreement to certain modifications but resisting the Government's proposal to modify the provision of the Diversion Agreement contemplating court adjudication of any alleged breaches and to delete the provision conferring immunity to Defendant. Defense counsel took the position that the parties were bound to the Diversion Agreement. (*Id.*) On August 9, the Government responded in writing, taking the position that the Diversion Agreement was not in effect, withdrawing its proposed modifications offered on July 31 in addition to the versions of the agreements at play on July 26, and signaling that it would pursue charges. (Def.'s Suppl. Ex. C.) On August 11, United States Attorney General Merrick Garland appointed United States Attorney David Weiss to serve as Special Counsel, Att'y Gen. Order No. 5730-2023 (Aug. 11, 2023), https://www.justice.gov/d9/2023-08/order.appointment_of_david_c._weiss_as_special_counsel.pdf [https://perma.cc/LY96-QUZJ], and the Government represented to the Delaware district court that "the parties are at an impasse and are not in agreement on either a plea agreement or a diversion agreement," Mot. to Vacate Ct.'s Briefing Order, *United States v. Biden*, No. 1:23-cr-00061-MN (D. Del. Aug. 11, 2023), ECF No. 25.

Members of Congress commented on these developments. James Comer, chair of the House Committee on Oversight and Accountability, commented on the Delaware district judge's decision not to accept the plea at the July 26 hearing, "I think that you're seeing our investigation that's shined a light on the many wrongdoings of the Biden family has picked up a lot of credibility today, because now we see that there are a lot of crimes that this family's committed and that played out in court today." Kyle Morris et al., *Comer says House investigations into Hunter Biden given a 'lot of credibility' after plea deal crumbles*, Fox News (July 26, 2023, 4:34 p.m.), https://www.foxnews.com/politics/comer-says-house-investigations-hunter-biden-given-lot-

credibility-plea-deal-crumbles [https://perma.cc/TY2T-C794].[32] After the plea hearing, Mr. Smith told Fox News, "I think that justice is being served," *Jason Smith on Hunter Biden plea deal collapse: Justice is being served*, Fox News (July 26, 2023, 7:01 p.m.), https://www.foxnews.com/video/6331889313112 [https://perma.cc/YL3P-JNW5].[33]

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[32] Again, it is unclear whether congressional investigations played any role in the Delaware district judge's treatment of the case, as Mr. Smith's motion for leave to file an amicus curiae brief presenting information derived from those congressional investigations remains unresolved. *See supra* note 30.

[33] Defendant also quotes an X post in which Mr. Smith asserts that the Special Counsel would not have been appointed but for congressional Republicans' efforts. (Selective Prosecution Mot. 7.) But Defendant quotes the first of a four-post thread *criticizing* the appointment:

> Announcement of a special counsel only happened because congressional GOP exposed the two-tiered judicial system by shining light onto the investigation into Hunter Biden's alleged financial crimes & the political interference that shielded both him & POTUS from scrutiny. Unfortunately, A.G. Garland selected the very same Biden-aligned U.S. Attorney of Delaware, David Weiss, who oversaw the clearly bungled investigation into Hunter Biden and who was the architect of his sweetheart plea deal. This move raises clear concerns that the Administration is once again running cover for the political interference into the Hunter Biden investigation that led to the unprecedented plea deal that fell apart before a federal Judge in Delaware. The reality is this appointment is meant to distract from, and slow down, our investigations. But Congress will not be deterred from continuing its work to hold the Biden Administration accountable and will use every tool available to uncover the facts the American people deserve[.]

Jason Smith (@RepJasonSmith), X (Aug. 11, 2023, 11:19 a.m.) (posts combined), https://x.com/repjasonsmith/status/1690065476838105088 [https://perma.cc/S3YK-ZWYL], https://x.com/repjasonsmith/status/1690065478230691840 [https://perma.cc/8S6L-DSDD], https://x.com/repjasonsmith/status/1690065479593795585 [https://perma.cc/AYV5-75HX], https://x.com/repjasonsmith/status/1690065480940134400 [https://perma.cc/Z5R2-RBHV]. Mr. Comer echoed Mr. Smith's sentiments in a press release issued the same day. *Comer: Justice Department Attempting a Biden Family Coverup*, Comm. on Oversight & Accountability (Aug. 11, 2023),

1 In October 2023, Martin Estrada, United States Attorney for the Central District
2 of California, and Matthew Graves, United States Attorney for the District of the
3 District of Columbia, told the House Judiciary Committee that they declined to partner
4 with Mr. Weiss to work on charges against Defendant; Mr. Estrada indicated "his office
5 was simply too 'resource-strapped' to assign anyone to the case," whereas Mr. Graves
6 said "it would have been too difficult for his office to 'get up to speed on everything.'"
7 Steven Nelson, *Biden-picked LA US attorney claimed he was too 'resource-strapped'*
8 *to charge Hunter*, N.Y. Post (Oct. 26, 2023, 6:18 p.m.), https://nypost.com/2023/10/26/
9 news/us-attorney-martin-estrada-says-he-had-no-resources-to-charge-hunter-biden/
10 [https://perma.cc/UHQ5-82DU]. In a closed-door interview with Judicial Committee
11 investigators in November 2023, Mr. Weiss reportedly acknowledged that "people
12 working on the case have faced significant threats and harassment, and that family
13 members of people in his office have been doxed." Betsy Woodruff Swan, *What Hunter*
14 *Biden's prosecutor told Congress: Takeaways from closed-door testimony of David*
15
16

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17 https://oversight.house.gov/release/comer-justice-department-attempting-a-biden-family-coverup/ [https://perma.cc/N3MX-6CBT]. In any event, nowhere do Messrs.
18 Comer and Smith "publicly admit[] they forced DOJ to" renege on the proposed plea
19 deal and pursue felony charges, as Defendant argues. (Selective Prosecution Mot. 6.)
Moreover, Defendant appears to suggest that, after the deal in Delaware fell apart but
20 before the filing of the indictment in this case, Mr. Trump "joined the fray, vowing that
21 if DOJ does not prosecute Mr. Biden for more, he will 'appoint a real special prosecutor
to go after' the 'Biden crime family,' 'defund DOJ,' and revive an executive order
22 allowing him to fire Executive Branch employees at will." (*Id.* at 7.) The comments he
23 cites all predate the unraveling of the Delaware plea—if not even earlier, before the
announcement of a plea. *See* Kristen Holmes, *Trump's radical second-term agenda*
24 *would wield executive power in unprecedented ways*, CNN Politics (Nov. 16, 2023,
25 8:41 p.m.) (recounting comments from June 2023), https://www.cnn.com/2023/11/16/
politics/trump-agenda-second-term/index.html [https://perma.cc/TK5B-YTDY];
26 Alexander Bolton, *Trump's call to defund DOJ, FBI puts Senate, House GOP at odds*,
27 The Hill (Apr. 6, 2023, 6:00 a.m.), https://thehill.com/homenews/senate/3936557-
trumps-call-to-defund-doj-fbi-puts-senate-house-gop-at-odds/ [https://perma.cc/
28 C4XT-G2YU].

Weiss, Politico (Nov. 10, 2023, 2:05 p.m.), https://www.politico.com/news/2023/11/10/hunter-biden-special-counsel-takeaways-00126639.[34]

The Government called witnesses to present testimony to a grand jury in November and December 2023. (Selective Prosecution Opp'n 7.) The grand jury returned an indictment on December 7, 2023. (Indictment.) In response, Mr. Comer issued a statement:

> Two brave IRS whistleblowers, Gary Shapley and Joseph Ziegler, placed their careers on the line to blow the whistle on misconduct and politicization in the Hunter Biden criminal investigation. The Department of Justice got caught in its attempt to give Hunter Biden an unprecedented sweetheart plea deal and today's charges filed against Hunter Biden are the result of Mr. Shapley and Mr. Ziegler's efforts to ensure all Americans are treated equally under the law.

Comer Statement on Hunter Biden Indictment, U.S. House Comm. on Oversight & Accountability (Dec. 7, 2023), https://oversight.house.gov/release/comer-statement-on-hunter-biden-indictment/ [https://perma.cc/8Z7X-TJCH]. Eric Holder, a former United States Attorney General, stated on cable television in December 2023 that former United States Attorney colleagues uniformly told him they would not have brought the charges against Defendant. He added:

> I think that he is, you know, being not targeted but treated perhaps a little differently because of who he is. There's a political component to this case, *which is not to say that the special prosecutor, Mr. Weiss, is doing anything*

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[34] Although Mr. Weiss reportedly admitted "he is . . . concerned for his family's safety," Woodruff Swan, *supra*, this outlet did not report that Mr. Weiss "and others in his office faced death threats." (Selective Prosecution Mot. 7.)

inappropriate, but I think there is certainly political pressure that exists in this case that you would not see with regard to other matters.

Eric Holder: Hunter Biden charges wouldn't have been brought in normal scenario, CNN Politics (Dec. 7, 2023) (emphasis added), https://www.cnn.com/videos/politics/2023/12/08/hunter-biden-eric-holder-reaction-sot-lcl-vpx.cnn [https://perma.cc/SRR3-VZC5].[35]

B. Selective Prosecution

1. Legal Standard

Prosecutors have "'broad discretion' to decide whom to prosecute." *United States v. Culliton*, 328 F.3d 1074, 1081 (9th Cir. 2003) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

"Of course, a prosecutor's discretion is subject to constitutional restraints. One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary

[35] Mr. Holder, in relaying the position of unnamed colleagues, did not expressly state that he would not have brought charges in the same situation, as Defendant implies. (*See* Selective Prosecution Mot. 17–18 ("Experienced legal experts agree, *including* former Attorney General Eric Holder . . . ." (emphasis added)).) Further, as the Government points out, (Selective Prosecution Opp'n 9 n.5), the video clip Defendant cited is a short excerpt of a longer interview with Mr. Holder. He went on to opine: "This isn't some kind of ordinary run-of-the-mill tax case, that this was an abuse of the tax system . . . ." *Transcripts*, CNN (transcript of program aired Dec. 7, 2023), https://transcripts.cnn.com/show/lcl/date/2023-12-07/segment/01 [https://perma.cc/B6YJ-6QDE].

classification." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citations and internal quotation marks omitted). "[A]n indictment that results from selective prosecution will be dismissed." *United States v. Mayer*, 503 F.3d 740, 747 (9th Cir. 2007).

To demonstrate selective prosecution, a defendant must show both discriminatory effect and discriminatory purpose. *Armstrong*, 517 U.S. at 465. In other words, a defendant "must demonstrate that (1) other similarly situated individuals have not been prosecuted and (2) his prosecution was based on an impermissible motive." *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007).

Proving selective prosecution "is particularly demanding." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). Because "[a] selective-prosecution claim asks a court to exercise judicial power over a special province of the Executive," "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Armstrong*, 517 U.S. at 464 (internal quotation marks omitted).

2. <u>Discussion</u>

Defendant fails to present a reasonable inference, let alone clear evidence, of discriminatory effect and discriminatory purpose. Accordingly, the selective prosecution claim fails.

a. *Discriminatory Effect*

Toward his burden to show similarly situated individuals have not been prosecuted, Defendant offers two sets of comparators who resolved tax disputes civilly: Robert and Susan Shaughnessy, and Roger and Nydia Stone. (Selective Prosecution

1 Mot. 18 n.56; Selective Prosecution Reply 5–6, ECF No. 48.)[36] Drawing the analogy
2 more broadly, Defendant argues that "it is no secret that DOJ does not prosecute
3 everyone who fails to file or pay taxes on time," and that "[t]he government does not
4 generally bring criminal charges for failing to file or pay taxes." (Selective Prosecution
5 Mot. 18 & n.56.)

6 In *Shaughnessy* and *Stone*, delinquent taxpayers agreed to civil consent
7 judgments requiring them to pay unpaid income taxes and interest thereon. Consent J.,
8 *United States v. Stone*, 0:21-cv-60825-RAR (S.D. Fla. July 18, 2022), ECF No. 64;
9 Consent J., *United States v. Shaughnessy*, No. 1:22-cv-02811-CRC (D.D.C. Apr. 18,
10 2023), ECF No. 10. Nothing in the record of the civil cases, let alone in the
11 circumstances of the "countless others" the Government declines to prosecute,
12 (Selective Prosecution Mot. 19), provides an inference that these individuals are
13 similarly situated to Defendant with regard to indicia of criminal intent. Obviously,
14 *Stone* and *Shaughnessy* were civil cases; intent was not a material element of the
15 nonpayment counts at issue. *See generally* Compl., *United States v. Stone*, 0:21-cv-
16 60825-RAR (S.D. Fla. April 16, 2021), ECF No. 1;[37] Compl., *United States v.*
17 *Shaughnessy*, No. 1:22-cv-02811-CRC (D.D.C. Sept. 15, 2022), ECF No. 1. Although
18 Defendant submits that only two of the factors indicative of willfulness set forth in the
19 Department of Justice's *Criminal Tax Manual* apply to him, history of payment and
20
21 [36] At the hearing, Defendant's counsel offered as another comparator Milton Grimes,
22 the subject of recently filed criminal tax charges in this district. Indictment, *United*
23 *States v. Grimes*, No. 2:24-cr-00190-SB-1 (C.D. Cal. Mar. 21, 2024), ECF No. 1.
Counsel argued that the alleged nonpayment of tax by Mr. Grimes was, if anything,
24 more egregious than that alleged by Defendant. The prosecution of Mr. Grimes does
25 nothing but undermine Defendant's proffer of "*similarly situated* individuals [who]
have *not* been prosecuted." *Sutcliffe*, 505 F.3d at 954 (emphases added).
26 [37] Intent was an element to a claim for fraudulent transfer the United States brought
27 against the Stones, which the United States eventually dismissed voluntarily. Joint Mot.
for Entry of Consent J. 1, *United States v. Stone*, 0:21-cv-60825-RAR (S.D. Fla. July
28 15, 2022), ECF No. 63.

1 repeated violations, (Selective Prosecution Mot. 18), the Government's allegations in
2 the indictment suggest otherwise. *Compare, e.g.*, U.S. Department of Justice, Tax
3 Division, *Criminal Tax Manual* § 8.08[3][2] (2022) (identifying "[p]roviding
4 accountant or return preparer with inaccurate and incomplete information" as a factor),
5 https://www.justice.gov/tax/media/1338211/dl?inline [https://perma.cc/JZ2K-YQTP],
6 *with* (Indictment ¶ 114 ("In working with the CA Accountants to prepare the returns,
7 the Defendant claimed business expenses, including approximately $388,810 in
8 business-related travel, despite having done little to no business in that year.")). In
9 essence, Defendant argues that because most people do not suffer criminal charges for
10 failing to pay taxes on time, he should not either. But adopting Defendant's position
11 would ignore the numerous meaningful allegations about Defendant's criminal intent
12 that are not necessarily shared by other taxpayers who do not timely pay income tax,
13 including the Shaughnessys and Stones. (*See* Selective Prosecution Opp'n 2–4
14 (reviewing allegations).) Without a clear showing that the evidence going to criminal
15 intent "was as strong or stronger than that against the defendant" in the cases of the
16 Shaughnessys, the Stones, and other comparators, the Court declines to infer
17 discriminatory effect. *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000).[38]

18 Aside from comparators, Defendant offers mere rhetorical points toward
19 discriminatory effect. Defendant supposes that the prosecution would not have brought
20 charges against a similarly situated defendant based on the decisions of United States
21 Attorneys to decline to partner on the case, and based on the beliefs of "[e]xperienced
22 legal experts" as memorialized in a statement by Mr. Holder on cable television.
23 (Selective Prosecution Mot. 17–18.) But the United States Attorneys reportedly offered
24 explanations to Congress for their nonparticipation unrelated to their evaluation of the
25

26 [38] In his reply, Defendant proffers that Mr. Stone "wrote a memoir about his criminal
27 actions," as Defendant is alleged to have done. (Selective Prosecution Reply 6
(emphasis removed).) That memoir is not before the Court, and its value as evidence in
28 a putative criminal tax evasion case against Mr. Stone is unestablished.

1 strength of the case. Nelson, *supra*. Defendant and the Court can only guess what they
2 think about the propriety of bringing the charges here. And the Court doubts hearsay
3 statements about the opinions of unidentified prosecutors with unspecified knowledge
4 about the charges and the evidence supporting them provide clear evidence of
5 discriminatory effect. *See Eric Holder: Hunter Biden charges wouldn't have been*
6 *brought in normal scenario*, *supra*. If anything, Mr. Holder's statements suggest he
7 holds an opinion in tension with Defendant's: Mr. Holder expressly declined to state
8 that Mr. Weiss was "doing anything inappropriate," *id.*, and he noted that Defendant's
9 actions went beyond "some kind of ordinary run-of-the-mill tax case," *Transcripts*,
10 *supra*. None of this amounts to the kind of clear evidence necessary to support
11 Defendant's claim of selective prosecution. *Cf. United States v. Adams*, 870 F.2d 1140,
12 1146 (6th Cir. 1989) (reversing denial of discovery to support claim of vindicative
13 prosecution upon review of supporting affidavits); *United States v. Falk*, 479 F.2d 616,
14 623 (7th Cir. 1973) (reversing denial of discovery to support claim of selective
15 prosecution in light of "the admission of the Assistant United States Attorney and the
16 two published [policy] statements by the Selective Service officials which contradict
17 the propriety of the action taken in this case").
18
19 b. *Discriminatory Purpose*
20 Defendant offers only conjecture about animus motivating the prosecutorial
21 decisions in this case. The circumstantial allegations of animus he offers are thin. "The
22 kind of intent to be proved is that the government undertook a particular course of action
23 'at least in part "because of," not merely "in spite of" its adverse effects upon an
24 identifiable group.'" *United States v. Turner*, 104 F.3d 1180, 1184 (9th Cir. 1997)
25 (quoting *Wayte*, 470 U.S. at 610). As the Court's close reading of Defendant's literature
26 review of reporting about his case demonstrates, Defendant provides no facts indicating
27 that the Government undertook charging decisions in any respect because of public
28 statements by politicians, let alone based on Defendant's familial and political

affiliations.[39] Defendant asserts that the Government made numerous prosecuting decisions between 2019 and 2023 without offering any substantiating proffer that such decisions were made before the Special Counsel decided to present the charges to the grand jury, let alone any proffer that anyone outside the Department of Justice affected those decisions, let alone any proffer that any of those decisions were made based on unjustifiable standards. For example, Defendant makes much ado about Messrs. Comer and Smith's public statements about the case, inferring that their actions in Congress influenced the course of the prosecution. Mr. Comer even claimed the charges would not have been brought if not for "whistleblower" testimony before the House Oversight Committee. *Comer Statement on Hunter Biden Indictment*, *supra*. But politicians take credit for many things over which they have no power and have made no impact. As counsel conceded at the hearing, just because someone says they influenced a prosecutorial decision does not mean that they did. Public statements by politicians hardly serve as evidence disturbing the "presumption of regularity" that attaches to prosecutorial decisions. *Armstrong*, 517 U.S. at 464 (internal quotation marks omitted).

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[39] The Government argues that the motion should be denied because Defendant does not "identify facts that support any actual legal right that *he* exercised." (Selective Prosecution Opp'n 10.) The Government offers no authority to support its argument. In any event, courts recognize that "membership in a political party is protected by the First Amendment, and the mere exercise of that right cannot be punished by means of selective prosecution." *United States v. Torquato*, 602 F.2d 564, 569 n.9 (3d Cir. 1979); *see Wayte*, 470 U.S. at 608 ("T]he decision to prosecute may not be deliberately based upon an unjustifiable standard . . . including the exercise of protected statutory and constitutional rights."); *Falk*, 479 F.2d at 619–20 (recognizing draft resister's selective prosecution argument, reasoning that "just as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities"); *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) ("Steele is entitled to an acquittal if his evidence proved that the authorities purposefully discriminated against those who chose to exercise their First Amendment rights."). Defendant is the son of the President of the United States. His parentage confers a nigh immutable political affiliation. Prosecuting Defendant based on political animus surely would be an unjustifiable standard.

1 And the fact that the parties contemplated by 2021 at the latest the charges ultimately
2 brought against Defendant supports the presumption. (Selective Prosecution Opp'n Exs.
3 1–2.) The circumstantial evidence of animus is simply not strong enough to support a
4 claim of selective prosecution.

5 As to direct evidence of animus, Defendant submits that the Court should take as
6 truth reporting by the *New York Times* that "Mr. Weiss told an associate that he
7 preferred not to bring any charges, even misdemeanors, against Mr. Biden because the
8 average American would not be prosecuted for similar offenses." Schmidt et al., *supra*;
9 (*see* Selective Prosecution Mot. 13, 17). First, as Defendant concedes, the reporting
10 acknowledges that account is disputed. The identities of the person who conveyed the
11 statement to the reporters and the person who disputed the statement are unknown. No
12 one has presented testimony under penalty of perjury corroborating that Mr. Weiss
13 made this statement. *Cf. Adams*, 870 F.2d at 1146 ("Unless these men are perjuring
14 themselves, their testimony raises a significant question as to why this particular
15 prosecution was undertaken."). Second, the article suggests Mr. Weiss made that
16 statement (if at all) in "late 2022," when he reportedly "determined that he did not have
17 sufficient grounds to indict Mr. Biden for major felonies." Schmidt et al., *supra*. The
18 state of the evidence prosecutors had at that time, relative to when the parties struck the
19 putative plea deal half a year later and when the prosecutors presented the tax case to
20 the grand jury a year later, is uncertain on this record. Third, as the Government
21 persuasively notes, what Mr. Weiss might have meant by "the average American" in
22 relation to Defendant is unclear. (Selective Prosecution Opp'n 3–4, 11.) There are
23 several axes upon which Defendant is not an average American; for example, the
24 average American does not earn millions of dollars of income in a four-year period and
25 has not written a memoir allegedly memorializing criminal activity. A selective
26 prosecution of Defendant based on other of his atypical characteristics to which Mr.
27 Weiss's purported statement might have referred could be justifiable and permissible.
28 *See United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) ("Mere selectivity in

1 prosecution creates no constitutional problem."). In short, the record leaves uncertain
2 whether Mr. Weiss made this comment or, even if he did, that the comment reflected
3 his state of mind when he made the ultimate charging decision or, even if it did, what
4 exactly he meant by the statement. There is no clear direct evidence of discriminatory
5 purpose.
6
7 **C. Vindictive Prosecution**
8 1. <u>Legal Standard</u>
9 "A prosecutor violates due process when he seeks additional charges solely to
10 punish a defendant for exercising a constitutional or statutory right." *United States v.*
11 *Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000) (citing *Bordenkircher*, 434 U.S. at
12 363). "A defendant may establish vindictive prosecution (1) by producing direct
13 evidence of the prosecutor's punitive motivation, or (2) by showing that the
14 circumstances establish a reasonable likelihood of vindictiveness, thus giving rise to a
15 presumption that the Government must in turn rebut." *United States v. Kent*, 649 F.3d
16 906, 912–13 (9th Cir. 2011) (cleaned up). "[T]he mere *appearance* of vindictiveness is
17 enough to place the burden on the prosecution," *United States v. Ruesga-Martinez*, 534
18 F.2d 1367, 1369 (9th Cir. 1976), but "the appearance of vindictiveness results only
19 where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial
20 conduct that would not have occurred but for hostility or a punitive animus towards the
21 defendant because he has exercised his specific legal rights," *United States v. Gallegos-*
22 *Curiel*, 681 F.2d 1164, 1169 (9th Cir. 1982) (citing *United States v. Goodwin*, 457 U.S.
23 368, 384 (1982)).
24 "[A] prima facie case for vindictive prosecution requires that a defendant prove
25 an improper prosecutorial motive through objective evidence before any presumption
26 of vindictiveness attaches." *United States v. Alexander*, 287 F.3d 811, 818 (9th Cir.
27 2002); *United States v. Garza-Juarez*, 992 F.2d 896, 906 (9th Cir. 1993) (requiring
28 "[e]vidence indicating a realistic or reasonable likelihood of vindictiveness").

2. Discussion

The parties do not cleanly delineate their discussion of Defendant's theory of selective prosecution from their discussion of his theory of vindictive prosecution. As the Ninth Circuit has recognized, there is "[l]ittle substantive difference . . . between selective prosecution and vindictive prosecution." *United States v. Wilson*, 639 F.2d 500, 502 (9th Cir. 1981). For many of the same reasons discussed in connection with the claim of selective prosecution, the vindictive prosecution claim fails for lack of objective direct or circumstantial evidence of vindictiveness.

Defendant asserts that a presumption of vindictiveness arises because the Government repeatedly "upp[ed] the ante right after being pressured to do so or Mr. Biden trying to enforce his rights." (Selective Prosecution Mot. 16.) Defendant alleges a series of charging decisions by the prosecution, (*id.* at 4–7), but the record does not support an inference that the prosecutors made them when Defendant says they did. In any event, a presumption does not arise here. "Particularly when a vindictiveness claim pertains to pretrial charging decisions, the Supreme Court urges deference to the prosecutor. Deference is appropriate for pretrial charging decisions because, 'in the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution.'" *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017) (citation omitted) (quoting *Goodwin*, 457 U.S. at 381). "[J]ust as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." *Goodwin*, 457 U.S. at 380. Thus, "in the context of pretrial plea negotiations vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right." *Gamez-Orduno*, 235 F.3d at 462 (citation and internal quotation marks omitted).

Deference to the prosecutorial decision to bring charges, notwithstanding significant pretrial negotiations between the parties to avoid them, is warranted.

Defendant attempts to distinguish *Goodwin* and its progeny on the basis that "an agreement *had* been reached" to resolve the case. (Selective Prosecution Reply 7–8.) But the fact of the matter is that the Delaware federal court did not accept the plea, the parties discussed amendments to the deal they struck toward satisfying the court's concerns, and the deal subsequently fell through. That a plea was only one step away from the finish line does not diminish the deference the Court must give to the prosecution's decision to break off negotiations and pursue an indictment.

At best, Defendant draws inferences from the sequence of events memorialized in reporting, public statements, and congressional proceedings pertaining to him to support his claim that there is a reasonable likelihood he would not have been indicted but for hostility or punitive animus. As counsel put it at the hearing, "It's a timeline, but it's a juicy timeline." But "[t]he timing of the indictment alone . . . is insufficient" to support a vindictiveness theory. *Brown*, 875 F.3d at 1240; *see also United States v. Robison*, 644 F.2d 1270, 1273 (9th Cir. 1981) (rejecting appearance-of-vindictiveness claim resting on "nothing more than the post hoc ergo propter hoc fallacy").

D. Discovery

"[T]he standard for discovery for a selective prosecution claim should be nearly as rigorous as that for proving the claim itself." *United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018); *see Armstrong*, 517 U.S. at 468 ("The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim."). Thus, the defendant must provide "some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent." *Armstrong*, 517 U.S. at 468 (internal quotation marks omitted). The threshold to obtain discovery in aid of a vindictive prosecution claim similarly requires "some evidence." *United States v. Sanders*, 211 F.3d 711, 717 (2d Cir. 2000); *see United States v. One 1985 Mercedes*, 917 F.2d 415, 421 (9th Cir. 1990) ("[A] criminal defendant may be entitled

1 to discovery if he or she establishes a prima facie showing of a likelihood of
2 vindictiveness by some evidence tending to show the essential elements of the
3 defense."). The "some evidence" standard "is a rigorous one, itself a significant barrier
4 to the litigation of insubstantial claims." *Sanders*, 211 F.3d at 717 (cleaned up).
5 "Whether a defendant claims selective prosecution or vindictive prosecution,
6 'examining the basis of a prosecution delays the criminal proceeding, threatens to chill
7 law enforcement by subjecting the prosecutor's motives and decision-making to outside
8 inquiry, and may undermine prosecutorial effectiveness by revealing the Government's
9 enforcement policy.'" *Id.* (quoting *Armstrong*, 517 U.S. at 465).
10 Defendant cannot meet this standard. In the technical sense, Defendant provided
11 virtually no evidence in support of his motion. And even if the Court credited the
12 sources Defendant cites in support of his claims, his proffer does not rise to the rigorous
13 standard required to justify discovery for the reasons discussed in the preceding
14 sections.
15
16 **E. Separation of Powers**
17 "The doctrine of separation of powers is fundamental in our system. It arises,
18 however, not from Art. III nor any other single provision of the Constitution, but
19 because behind the words of the constitutional provisions are postulates which limit and
20 control." *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590–91 (1949)
21 (internal quotation marks omitted). The Constitution does not require "a complete
22 division of authority between the three branches," *Nixon v. Adm'r of Gen. Servs.*, 433
23 U.S. 425, 443 (1977), instead "enjoin[ing] upon its branches separateness but
24 interdependence, autonomy but reciprocity," *Youngstown Sheet & Tube Co v. Sawyer*,
25 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Still, "[t]he hydraulic pressure
26 inherent within each of the separate Branches to exceed the outer limits of its power,
27 even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S.
28 919, 951 (1983).

1 To this Court's knowledge, no federal court has dismissed an indictment for
2 violation of the separation of powers. Only one published decision from a district court
3 outside this circuit has even discussed such a challenge—and that court rejected it. *See*
4 *generally United States v. Mardis*, 670 F. Supp. 2d 696 (W.D. Tenn. 2009). At the initial
5 status conference in this matter, the Court noted the paucity of guiding authority on the
6 separation-of-powers issue and invited counsel to provide "other case law out there that
7 would be of interest to the Court," or, "if [*Mardis*] is the only case, [to] make sure that
8 that's clear in the briefing." (Tr. 29–30, ECF No. 18.) Defendant has not cited any case
9 other than *Mardis* for this issue in the briefing,[40] so the Court assumes the case stands
10 alone, which is consistent with the Court's independent research.

11 The Court will not take the unprecedented step of dismissing an indictment for
12 violation of separation-of-powers principles based on the public statements of current
13 and former members of the political branches of the federal government. As in *Mardis*,
14 the conduct of which Defendant complains is political commentary on the investigation
15 and prosecution of alleged criminal conduct. There, a congressperson "actively sought
16 a federal indictment" of the defendant. 670 F. Supp. 2d at 698. The *Mardis* court's
17 reasoning is persuasive:

> 18 [T]he Court is dubious that an individual legislator's
> 19 interaction with executive branch officials could ever
> 20 interfere with the authority of the executive in a way that
> 21 would violate the separation of powers. To conclude
> 22 otherwise would risk stifling the kind of interaction with the
> 23 executive by legislators that the courts have countenanced as
> 24 among the sundry activities frequently undertaken by
> 25 congressmen and senators. . . . Legislators routinely express

26

27 [40] Defendant offers a passing citation of *Falk*, which dealt with a selective prosecution
28 challenge. (Selective Prosecution Mot. 19 (citing *Falk*, 479 F.2d at 624).)

> their opinions to executive branch officials about matters for which their departments or agencies are responsible. Defendant's position presumes that executive officials must disregard these views and remain entirely free of their influence in order to maintain the separation of powers, but this is impracticable, unnecessary, and bears no relation to the actual workings of the modern administrative state. Furthermore, the adoption of Defendant's conception of the separation of powers would surely hinder legitimate congressional oversight of executive agencies. This interaction among the branches is simply part of the vigorous engagement that gives rise to the system of checks and balances in our government. As the Supreme Court has said, "Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes."

Id. at 701–03 (citations and footnote omitted) (quoting *Loving v. United States*, 517 U.S. 748, 773 (1996)). This reasoning holds as extended to other individuals affiliated with the political branches of the federal government. Hardly can the Court say that a congressional committee or its chair, a president, or a prosecutor, former, present, or future, should refrain from opining on the acts or inaction of federal prosecutors or else risk subjecting criminal indictments to the threat of dismissal. Doing so would effectively impose a gag order restricting the proper functioning of the system of checks and balances implicit in the structure of the federal government.

In challenging the indictment for violation of the separation of powers, Defendant essentially asks the Court to step beyond the bounds of its own constitutionally enumerated ken. The executive branch has "absolute discretion to decide whether to

prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). With limited exceptions (such as the ones discussed in preceding sections of this Order), the exercise of prosecutorial discretion is "not subject to judicial review." *United States v. Molina*, 530 F.3d 326, 332 (5th Cir. 2008); *see also Wayte*, 470 U.S. at 607 ("This broad [prosecutorial] discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."). Accordingly, the Court will not recognize a novel challenge to prosecutorial discretion.

The Court does not opine on the merit of statements by individuals associated with the political branches designed to exert pressure over prosecutorial functions reserved to the executive. Instead, the Court acknowledges that the American system of federal government endorses the utterance of those statements, resists Defendant's invitation "to exceed the outer limits of its power" by sanctioning a heretofore unrecognized ground for usurping the exercise of prosecutorial discretion, *Chadha*, 462 U.S. at 951, and rejects the challenge.

F. Conclusion

The motion is denied.

V. MOTION TO DISMISS THE INDICTMENT FOR DUE PROCESS VIOLATIONS BASED ON OUTRAGEOUS GOVERNMENT CONDUCT (ECF NO. 28)

Defendant argues that the indictment must be dismissed due to outrageous government conduct by Supervisory Special Agent Gary Shapley and Special Agent Joseph Ziegler, Internal Revenue Service case agents involved in the investigation of Defendant who allegedly disclosed to Congress and the media confidential grand jury information in breach of Rule 6(e) of the Federal Rules of Criminal Procedure and confidential tax return information in violation of 26 U.S.C. § 6103. (Outrageous Conduct Mot. 14–17, ECF No. 28.) In the alternative, Defendant asks the Court to

1 exercise its supervisory powers to dismiss the indictment due to Shapley and Ziegler's
2 conduct. (*Id.* at 17–20.) The Government submits that dismissal is not a remedy for
3 violation of § 6103. (Outrageous Conduct Opp'n 2–3, ECF No. 42.)[41] The Government
4 further argues that Defendant has not met his burden to show the charges in this case
5 resulted from Shapley and Ziegler's public statements. (*Id.* at 4–12.) Finally, the
6 Government contends exercise of the Court's supervisory powers is unwarranted. (*Id.*
7 at 12–15.)
8
9 **A. Background**
10 The Internal Revenue Service Criminal Investigation organization ("IRS-CI") is
11 the federal law enforcement agency responsible for investigating potential criminal
12 violations of the Internal Revenue Code. (Batdorf Decl. ¶ 1, ECF No. 42-1.) In
13 December 2022, Shapley and Ziegler were members of an IRS-CI team assigned to the
14 investigation of Defendant. (*Id.* ¶ 2.) The overseer of IRS-CI operations decided to
15 remove Shapley and Ziegler from the investigative team in December 2022, though they
16 ultimately were not removed until May 2023. (*Id.* ¶¶ 3–5.)
17 Starting in April 2023, Shapley and Ziegler and their counsel made public
18 appearances in news media and sent correspondence to and testified before Congress
19 about their participation in the IRS investigation against Defendant. (*See generally*
20 Outrageous Conduct Mot. 3–13 (collecting links to media sources and congressional
21 webpages).)[42] The Court assumes for the purpose of this motion that Shapley and
22
23

24 [41] The Court cites the publicly filed, redacted versions of the parties' briefs.
25 [42] As with his Motion to Dismiss for Selective and Vindictive Prosecution and Breach
of Separation of Powers, Defendant largely supports this motion to dismiss with
26 information sourced from the Internet, which is not evidence appropriate for
27 consideration on a motion to dismiss. The motion may be denied on this basis.
Nevertheless, to resolve the motion, the Court accepts for the sake of argument
28 Defendant's proffer regarding Shapley and Ziegler's conduct. In the interest of judicial

Ziegler, themselves or through counsel, improperly disclosed confidential grand jury information in violation of Federal Rule of Criminal Procedure 6(e) and confidential tax return information in violation of 26 U.S.C. § 6103 on one or more of these occasions.[43]

A grand jury returned an indictment in this case on December 7, 2023. In response, Shapley and Ziegler issued a joint statement stating that "the indictment 'is a complete vindication of our thorough investigation, and underscores the wide agreement by investigators and prosecutors that the evidence supported charges against Hunter Biden.'" Brooke Singman, *IRS whistleblowers: Hunter Biden indictment is a 'complete vindication' of investigation, allegations*, Fox News (Dec. 8, 2023, 1:56 p.m.), https://www.foxnews.com/politics/irs-whistleblowers-hunter-biden-indictment-complete-vindication-investigation-allegations [https://perma.cc/FL5X-NE62].

B. 26 U.S.C. § 6103

As a threshold issue, the Government contends that Defendant's challenge is incognizable insofar as it rests on Shapley and Ziegler's alleged violations of 26 U.S.C. § 6103. (Outrageous Conduct Opp'n 2–3.) Defendant does not meaningfully resist this argument, clarifying that "[h]e is not claiming that a Section 6103 violation alone warrants dismissal, but rather constitutes one more data point in the larger panoply of

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economy, and for the reasons discussed in note 43, the Court does not recount their purported conduct in detail.

[43] The particulars of when and how Defendant asserts Shapley and Ziegler made these disclosures, and what their contents were, are immaterial to this Order. The Court declines to make any affirmative findings that Shapley and Ziegler violated these rules given the pending civil case Defendant brought against the IRS related to the alleged disclosures, *see generally* Complaint, *Biden v. U.S. IRS*, No. 1:23-cv-02711-TJK (D.D.C. Sept. 18, 2023), ECF No. 1, and the potential for criminal prosecution of such violations. But the Court need not resolve whether their public statements ran afoul of these nondisclosure rules to decide the motion.

government misconduct that, when taken together, demonstrates an obvious and gross violation of his constitutional rights." (Outrageous Conduct Reply 4, ECF No. 49.)

The Court assumes the motion is incognizable to the extent it rests on § 6103 violations, as the Ninth Circuit has counseled against dismissal of criminal charges as a remedy for such violations. *See United States v. Michaelian*, 803 F.2d 1042, 1043 (9th Cir. 1986) ("This Court has previously demonstrated its reluctance to imply a judicial remedy for violations of § 6103 given Congress' explicit provision of a remedy. . . . Indeed, no court has held that a § 6103 violation warrants dismissal or suppression."); *cf.* 26 U.S.C. § 7431 (providing civil remedy for unauthorized disclosures under § 6103).[44]

C. Outrageous Government Conduct

1. Legal Standard

Due process principles allow a federal court to dismiss a prosecution based on outrageous government conduct. *United States v. Pedrin*, 797 F.3d 792, 795 (9th Cir. 2015). "A prosecution results from outrageous government conduct when the actions of law enforcement officers or informants are 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" *Id.* (quoting *United States v. Russell*, 411 U.S. 423, 431–32 (1973)); *see also Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) ("Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction."). "Dismissing an indictment for outrageous government conduct, however, is limited to extreme cases in which the

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[44] That said, remedies other than dismissal may address improper disclosure of grand jury information, but the Supreme Court has suggested that a court could exercise supervisory powers to dismiss an indictment for Rule 6(e) violations. *See Bank of N.S. v. United States*, 487 U.S. 250, 259–63 (1988). The Court's decision on this motion would not materially change if its assumption is improper.

defendant can demonstrate that the government's conduct violates fundamental fairness and is so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013) (internal quotation mark omitted).

"There is no bright line dictating when law enforcement conduct crosses the line between acceptable and outrageous, so every case must be resolved on its own particular facts." *Id.* (internal quotation marks omitted). "Constitutionally unacceptable conduct includes, but is not limited to, situations where law enforcement agents employed unwarranted physical or mental coercion, where government agents engineer and direct the criminal enterprise from start to finish, and where the government essentially manufactures new crimes in order to obtain the defendant's conviction." *United States v. Stenberg*, 803 F.2d 422, 429 (9th Cir. 1986) (citations and internal quotation marks omitted), *abrogated by statute on other grounds as stated in United States v. Atkinson*, 966 F.2d 1270, 1273 n.4 (9th Cir. 1992). But "the outrageous conduct defense is generally unavailable where the criminal enterprise was already in progress before the government became involved or where the defendant was involved in a continuing series of similar crimes during the government conduct at issue." *Id.*

"The standard for dismissal on this ground is extremely high." *Pedrin*, 797 F.3d at 795 (internal quotation marks omitted); *see also United States v. Ryan*, 548 F.2d 782, 789 (9th Cir. 1976) ("[T]he due process channel which *Russell* kept open is a most narrow one . . . ."); *Black*, 733 F.3d at 302 ("[T]here are only two reported decisions in which federal appellate courts have reversed convictions under this doctrine."); *United States v. Sapper*, No. 2:12-cr-00435-GMN-CWH, 2013 U.S. Dist. LEXIS 128939, at *7–8 (D. Nev. Apr. 15, 2013) ("To be sure, the only successful assertion of outrageous government conduct in the Ninth Circuit was in *Greene v. United States*, 454 F.2d 783

(9th Cir. 1971), which predates *Russell* and *Hampton*."), *R. & R. adopted*, 2013 U.S. Dist. LEXIS 128941 (D. Nev. Sept. 10, 2013).[45]

2. Discussion

The parties do not cite, and the Court has not found, any authority invoking the outrageous government conduct doctrine to dismiss a prosecution in any situation remotely analogous to the one presented here. Shapley and Ziegler's conduct does not fall into any of the recognized grounds for application of the defense. *See Stenberg*, 803 F.2d at 429.

The two cases the parties cite in which Ninth Circuit courts ratified an outrageous government conduct defense offer poor analogs. In *Greene*, an undercover government agent involved himself "directly and continuously over . . . a long period of time in the creation and maintenance of criminal operations," "enmesh[ing the government] in criminal activity, from beginning to end." 454 F.2d at 787. Defendant offers no facts to suggest Shapley and Ziegler catalyzed the underlying crimes of which he is accused.[46]

In *United States v. Marshank*, the prosecution "actively collaborated" with the defendant's attorney, Ron Minkin, "to build a case against the defendant" and "colluded with Minkin to obtain an indictment against the defendant, to arrest the defendant, to ensure that Minkin would represent the defendant despite his obvious conflict of interest, and to guarantee the defendant's cooperation with the government." 777 F.

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[45] Contrary to Defendant's representation, the circuit panel in *Stenberg* did not "dismiss[an] indictment for outrageous government conduct." (Outrageous Conduct Mot. 15); *see Stenberg*, 803 F.2d at 430 ("[W]e conclude that the outrageous government conduct defense is unavailable.").

[46] And there is cause to question whether *Greene* was an outrageous government conduct case at all. *See United States v. Rogers*, No. 2:22-cr-00064-APG-EJY, 2023 U.S. Dist. LEXIS 104207, at *5 n.2 (D. Nev. May 22, 2023) (citing *United States v. Haas*, 141 F.3d 1181, 1998 WL 88550, at *1 (9th Cir. May 3, 1998) (unpublished table decision), to question whether *Greene* even arose under the doctrine), *R. & R. adopted*, 2023 U.S. Dist. LEXIS 103250 (D. Nev. June 12, 2023).

1 Supp. 1507, 1524 (N.D. Cal. 1991). Defendant does not accuse Shapley and Ziegler of
2 misconduct in the process of building the case against him or any active collaboration
3 between them and the prosecution; instead, he posits that their public disclosures of
4 information about the investigation might have impacted the Special Counsel's decision
5 to pursue the tax charges. (Outrageous Conduct Reply 10 ("There is no doubt that the
6 agents' actions in spring and summer 2023 substantially influenced then-U.S. Attorney
7 Weiss's decision to renege on the plea deal last summer, and resulted in the now-Special
8 Counsel's decision to indict Biden in this District.").) His theory rests on a speculative
9 inference of causation supported only by the sequence of events. For example,
10 Defendant supposes that Shapley and Ziegler's joint statement regarding the indictment,
11 in which they claimed "complete vindication of [their] thorough investigation," shows
12 that the indictment "was a *direct result* of Ziegler and Shapley's public conduct." (*Id.*
13 at 3–4 (internal quotation marks omitted).) Hardly so. As discussed in the context of the
14 previous motion, publicly taking credit for a prosecution hardly proves the boaster's
15 conduct had any effect on the presumedly independent prosecutor. This is a far cry from
16 *Marshank*, where the court made robust findings of fact about the prosecution's active
17 encouragement of the misconduct after an evidentiary hearing, which Defendant has
18 not requested to ventilate his postulation.

19 Reaching outside this circuit, the Court finds the Second Circuit's opinion in
20 *United States v. Walters*, 910 F.3d 11 (2d Cir. 2018), a compelling analog. There, the
21 FBI investigated the defendant for suspicious securities trading. *Id.* at 16. The
22 supervisor of the primary case agent for the investigation, David Chaves, provided
23 information about the investigation to several reporters. *Id.* at 16–18. Chaves continued
24 to communicate with reporters about the investigation even after he was instructed to
25 cease contact with the media. *Id.* at 18. The district court, assuming that Chaves
26 improperly disclosed grand jury information in violation of Federal Rule of Criminal
27 Procedure 6(e), denied the defendant's motion to dismiss based on the outrageous
28 government conduct doctrine. *Id.* at 20–21. The circuit panel affirmed:

> Although the misconduct at issue is deeply disturbing and perhaps even criminal, it simply is not commensurate with the conduct in those cases where indictments were dismissed for coercion or violations of bodily integrity. The Court certainly does not condone the conduct, but we are hard-pressed to conclude that the leaking by a government official of confidential information to the press shocks the conscience. While there may be circumstances where strategic leaks of grand jury evidence by law enforcement rises to the level of outrageous conduct sufficient to warrant dismissal, those circumstances are not present here.

Id. at 28 (internal quotation marks and citation omitted).

The Court agrees with the reasoning of the *Walters* panel. Shapley and Ziegler's alleged public disclosures of confidential information, even if assumed to be "deeply troubling," *id.* at 26, simply do not shock the conscience to the level other recognized bases for dismissal do. The Court perceives no meaningful basis upon which to distinguish *Walters* from this case.[47] Given the "extremely high" standard for dismissal on this ground, *Pedrin*, 797 F.3d at 795 (internal quotation marks omitted), the Court declines to dismiss the indictment based on Shapley and Ziegler's conduct.[48]

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[47] At the hearing, Defendant's counsel asserted that Shapley and Ziegler's conduct was more outrageous given the methods by and frequency with which they made their public disclosures over admonitions not to do so. This is not a persuasive ground for distinguishing *Walters*, where Chaves provided as many as four reporters information about an investigation he oversaw over the course of 16 months. 910 F.3d at 17–18. And it bears noting that *Walters* was decided on an evidentiary record.

[48] The Government advances a rule that "the defendant must show that the charges *resulted from*" the outrageous government conduct to show a due process violation. (Outrageous Conduct Opp'n 4–9.) Though the Government's presentation is persuasive, the Court stops short of adopting that rule. It is true that courts often consider the doctrine in contexts where the defendant asserts the offending government conduct

1 **D. Supervisory Powers**

2 1. Legal Standard

3 "A district court may dismiss an indictment under its inherent supervisory powers
4 (1) to implement a remedy for the violation of a recognized statutory or constitutional
5 right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate
6 considerations validly before a jury; and (3) to deter future illegal conduct." *United*
7 *States v. Bundy*, 968 F.3d 1019, 1030 (9th Cir. 2020) (internal quotation marks omitted).
8 This power "is premised on the inherent ability of the federal courts to formulate
9 procedural rules not specifically required by the Constitution or the Congress to
10 supervise the administration of justice." *United States v. De Rosa*, 783 F.2d 1401, 1406
11 (9th Cir. 1986). Exercise of supervisory powers is appropriate even without a due
12 process violation, as such exercise aims to "protect[] the integrity of the federal courts
13 and prevent[] the courts from 'making . . . themselves accomplices in willful
14 disobedience of law.'" *Bundy*, 968 F.3d at 1030 (quoting *McNabb v. United States*, 318
15 U.S. 332, 345 (1943)).

16

17 ---

18 played a causal role in the commission, charge, or conviction of a crime. (*Id.* at 7–8
19 (summarizing *Russell*, 411 U.S. 423; *Pedrin*, 797 F.3d 792; *United States v. Combs*, 827 F.3d 790 (8th Cir. 2016); *Stenberg*, 803 F.2d 422; *United States v. Garza-Juarez*,
20 992 F.2d 896 (9th Cir. 1993); and *Marshank*, 777 F. Supp. 1507).) And the
21 Government's proposed rule aligns with the proposition that "the outrageous conduct defense is generally unavailable" where the crime is in progress or completed before
22 the government gets involved. *Stenberg*, 803 F.2d at 429. But the Ninth Circuit teaches
23 that there is no one-size-fits-all rule for application for the doctrine, *see Black*, 733 F.3d at 302 ("There is no bright line dictating when law enforcement conduct crosses the line
24 between acceptable and outrageous, so every case must be resolved on its own particular
25 facts." (internal quotation marks omitted)), and nothing in the Supreme Court's acknowledgment of the doctrine mandates that the offending misconduct play some
26 causal role in the commission of the crime or the levying of charges, *see Russell*, 411
27 U.S. at 431–32. The Court takes the Second Circuit's cue and leaves the door open to challenges based on "strategic leaks of grand jury evidence by law enforcement."
28 *Walters*, 910 F.3d at 28.

2. Discussion

The Court assumes dismissal might be warranted for Shapley and Ziegler's purported violation of Rule 6(e). *See Bank of N.S. v. United States*, 487 U.S. at 259–63 (1988); *Bundy*, 968 F.3d at 1030 (recognizing supervisory powers may be used "to implement a remedy for the violation of a recognized statutory or constitutional right"). But the Court declines to exercise its supervisory powers to provide a remedy to address Shapley and Ziegler's conduct. Exercise of supervisory authority to dismiss an indictment for wrongful disclosure of grand jury information is not appropriate unless the defendant can show prejudice. *Walters*, 910 F.3d at 22–23 (citing *Bank of N.S.*, 487 U.S. at 254–55). In other words, "dismissal of the indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of N.S.*, 487 U.S. at 256 (internal quotation marks omitted).

Defendant focuses his argument on Shapley and Ziegler's influence on the prosecutor's decision to pursue tax charges. (Outrageous Conduct Mot. 19 (insisting the agents "pressured the prosecution's hand").) Aside from failing to substantiate his allegations that the agents influenced the prosecutorial decision with anything but speculation, Defendant offers no case in which a court exercised supervisory powers to dismiss an indictment due to conduct that impacts the fundamental decision to prosecute.[49]

Instead, relevant precedents focus on the effect of any wrongful disclosure on the fairness of the grand jury process. *E.g.*, *Bank of N.S.*, 487 U.S. at 259 (focusing on the question of "whether, despite the grand jury's independence, there was any misconduct

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[49] Just as the Court doubts the wisdom of reviewing a challenge to the legislature's exertion of pressure on the prosecutorial decisions of the executive, the Court similarly doubts whether it should decide that one hand of the executive wrongfully influenced the other. *See supra* section IV(E).

by the prosecution that otherwise may have influenced substantially the grand jury's decision to indict, or whether there is grave doubt as to whether the decision to indict was so influenced"); *Walters*, 910 F.3d at 18–19, 23–24 (following *Bank of N.S.* and rejecting as speculative the defendant's claim that a witness whose anticipated trial testimony was presented to the grand jury chose to cooperate due to Rule 6(e) leaks); *United States v. Samango*, 607 F.2d 877, 884–85 (9th Cir. 1979) (affirming exercise of supervisory power where "the prosecutor's behavior" in his presentation to the grand jury "has exceeded the limits of acceptability"). Defendant offers no facts to suggest that the information Shapley and Ziegler shared publicly had any prejudicial effect on the grand jury's decision to return an indictment. That Shapley and Ziegler's public statements brought notoriety to Defendant's case is not enough to show prejudice.[50] *See United States v. Woodberry*, 546 F. Supp. 3d 180, 188 (E.D.N.Y. 2021) ("[A]dverse pretrial publicity is not a sufficient ground to dismiss an indictment."). Absent some indication that their public disclosures rendered the grand jury process unfair, *Bank of N.S.*, 487 U.S. at 256, the Court finds exercise of its supervisory powers unwarranted.[51]

E. Conclusion

The motion is denied.

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[50] As noted previously, Defendant himself brought notoriety to his conduct though the publication of a memoir.

[51] Defendant also encourages the Court to exercise its supervisory powers to remedy other defects he perceives in his treatment by the federal government, including the prosecution's decision to renege on the Diversion Agreement and bring tax charges, and the prejudice generated by the publicity of his case. (Outrageous Conduct Mot. 18–19.) He also suggests the Court could exercise its supervisory powers to remedy outside influence on the prosecution. (Selective Prosecution Mot. 11 n.31.) Whether these issues are considered separately or together with Shapley and Ziegler's conduct, the Court does not find exercise of its supervisory powers appropriate here.

VI. MOTION TO DISMISS COUNT 1 AS UNTIMELY OR, IN THE ALTERNATIVE, TO DISMISS ALL COUNTS FOR FAILURE TO STATE A CLAIM AND LACK OF SPECIFICITY (ECF NO. 29)

Count 1 charges Defendant with a willful failure to pay his 2016 taxes in violation of 28 U.S.C. § 7203. Defendant argues that this count is untimely, as the willful conduct giving rise to the charge occurred on April 18, 2017. Given that violations of 28 U.S.C. § 7203 are subject to a six-year statute of limitations, Defendant argues that the statute of limitations for his willful failure to pay his 2016 taxes ran out on April 18, 2023. (*See generally* SOL Mot., ECF No. 29.) The Government responds that the indictment identifies the date willfulness for the offense arose as June 12, 2020, (Indictment ¶ 65), well within the six-year statute of limitations. (*See generally* SOL Opp'n, ECF No. 38.)

Anticipating this position, Defendant argues, in the alternative, that if Count 1 is timely, then all of the remaining counts fail under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) because they allege willfulness on the date taxes were due. In other words, if the due date for payment did not establish willfulness for Count 1, the Government cannot use the due date to establish willfulness for the remaining counts. Defendant asks the Government to clarify its position and argues a failure to do so violates the specificity requirements of Rules 7(c) and 12(b)(3)(B)(iii). (SOL Mot. 9–11.)

A. Legal Standards

1. Statute of Limitations

A defendant may raise a statute of limitations defense in a motion under Federal Rule of Criminal Procedure 12(b). *United States v. Smith*, 866 F.2d 1092, 1095 n.3 (9th Cir. 1989). The statute of limitations for a willful failure to pay income tax in violation of 26 U.S.C. § 7203, the offense charged in Count 1, is six years. 26 U.S.C. § 6531(4). The statute of limitations on an offense begins to run when all of the elements are present and the crime is complete. *United States v. Musacchio*, 968 F.2d 782, 790 (9th

1 Cir. 1991). When considering a motion to dismiss a criminal offense as untimely
2 prosecuted, "the trial court [is] limited to the face of the indictment and [is] obliged to
3 accept the facts therein alleged as true." *Winslow v. United States*, 216 F.2d 912, 913
4 (9th Cir. 1954).
5
6 2. Failure to State an Offense and Lack of Specificity
7 Rule 12(b)(3) permits a criminal defendant to move to dismiss an indictment
8 based on "a defect" therein, including "lack of specificity" and "failure to state an
9 offense." Fed. R. Crim. P. 12(b)(3)(B). Rule 7(c)(1) requires an indictment to describe
10 in "plain, concise, and definite" terms the "essential facts" supporting each element. To
11 pass constitutional muster, an indictment must "contain[] the elements of the offense
12 charged and fairly inform[] a defendant of the charge against which he must defend"
13 and "enable[] him to plead an acquittal or conviction in bar of future prosecutions for
14 the same offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (internal
15 quotation marks omitted).
16
17 **B. Discussion**
18 1. Count 1: Statute of Limitations
19 Defendant argues the statute of limitations for Count 1 ran on April 18, 2023, and
20 because the charge was not filed until December 2023, it must be dismissed. (SOL Mot.
21 1.) Defendant accuses the Government of engaging in artful pleading to avoid a statute
22 of limitations problem on Count 1 by alleging Defendant's willful failure to pay
23 individual income taxes for 2016 arose on June 12, 2020, rather than on April 18, 2017.
24 (*Id.* at 1, 6–9.) In support of his argument, Defendant contrasts the Government's
25 allegations as to Count 1 with other counts in which the Government argues Defendant's
26 purported willful failure to pay taxes in other years arose either on the date taxes were
27
28

due but not paid or on the date Defendant filed his Form 1040s but did not pay taxes due. (*Id.* at 6–9.)[52]

The Government argues the statute of limitations did not begin to run on Count 1 until June 12, 2020, when Defendant submitted his delinquent return without payment, and that willfulness allegations must be assessed uniquely as to each count. (SOL Opp'n 3, 8–9.) The Government explains that it charged Defendant with willful failure to pay his 2016 individual income taxes on June 12, 2020, because it believes it can prove Defendant's conduct was willful and all elements of 26 U.S.C. § 7203 were completed on that date. (*Id.* at 7–9.)[53] For instance, unlike in counts pertaining to other years, the Government alleges Defendant's conduct was not willful at the time taxes were due but not paid because Defendant made some effort to timely file his 2016 Form 1040 and pay taxes due, (Indictment ¶¶ 53, 56–57), and he in fact believed that he timely filed his 2016 Form 1040 and paid his taxes timely, (*id.* ¶ 58).

Willfulness is a fact-specific inquiry that is to be determined by the trier of fact on each charge. *See United States v. Marabelles*, 724 F.2d 1374, 1379 (9th Cir. 1984) ("[W]illfulness may be inferred by the trier of fact from all the facts and circumstances of the attempted understatement of tax."); *see also Wilson v. United States*, 250 F.2d 312, 325 (9th Cir. 1957) ("Whether particular conduct is 'willful' is, of course, a question of fact."). The Court must accept the allegations in the indictment as true, *Winslow*, 216 F.2d at 913, including allegations tending to show willfulness did not arise until June 12, 2020. When willfulness arose as to Count 1, if at all, is factual question that should be left to the jury.

Therefore, Defendant's motion to dismiss Count 1 as untimely is denied.[54]

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[52] As discussed in section VII(B)(1) *infra*, the Government may maintain alternate theories as to when willfulness arose.

[53] Also as discussed in section VII(B)(1) *infra*, the Government's theory is cognizable because willfulness can arise well after the date tax is due.

[54] In its opposition, the Government pointed to two tolling agreements Defendant

2. Counts 1–9: Failure to State an Offense and Lack of Specificity

a. *Rule 12(b)(3)(B)(v)*

Defendant asserts that if his purported willfulness as to Count 1 arose for the first time in June 2020, as the Government proffers, then all counts must be dismissed for failure to state an offense pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). (SOL Mot. 2.) Said differently, Defendant argues that if the Government does not allege that he willfully failed to pay his 2016 taxes at the time they were due in 2017, then the Government cannot allege Defendant willfully failed to pay his taxes for other tax years on the date those taxes were due. (*Id.*)

Defendant's challenge is peculiar. Defendant does not assert that the Government failed to state the offenses against him. (*See generally* SOL Mot.) Rather, he takes issue with *how* the Government charged the offenses—by proffering different theories of willfulness for separate charges. Essentially, Defendant asks the Court to make a factual determination as to when willfulness arose on all counts. This is not the proper subject of a Rule 12(b)(3)(B)(v) motion, which is brought to determine if "[t]he indictment . . . states an offense or it doesn't." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). Even though Defendant makes no cogent failure-to-state-an-offense challenge, the Court has reviewed the indictment and finds that it adequately states all nine offenses under Rule 12(b)(3)(B)(v). (Indictment ¶¶ 49–160.)

Therefore, Defendant's motion to dismiss all counts for failure to state an offense fails.

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entered into with the United States Attorney's Office for the District of Delaware and the United States Department of Justice, Tax Division, tolling the statues of limitations on any potential tax charges from July 1, 2021, through March 1, 2022, and from March 2, 2022, through June 15, 2022. (*See* SOL Opp'n Exs. 1–2, ECF Nos. 38-1 to 38-2.) Application of these tolling agreements would have made a crime completed on April 18, 2017, and subject to a six-year statute of limitations, timely in a December 2023 indictment. However, neither the Government nor Defendant presently argues that the tolling provisions in these agreements apply to the present action.

b. *Rules 7(c) and 12(b)(3)(B)(iii)*

In ruling on a motion to dismiss an indictment for lack of specificity, the Court must review an indictment "in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007) (internal quotation marks omitted). "[A] legally sufficient indictment must state the elements of the offense charged with sufficient clarity tco apprise a defendant of the charge against which he must defend and to enable him to plead double jeopardy." *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000).

Here, Defendant seems to argue that if the Government proceeds with its theory that he willfully failed to pay his 2016 individual income taxes in June 2020 and not when taxes were due in April 2017, then the Government has failed to specify its willfulness allegations for all other counts. (SOL Mot. 10.) This argument suggests that Defendant cannot assess from the indictment the grounds for the charges if the Government pursues a late-arising willfulness theory on Count 1.

Defendant's argument is untenable. The Government has provided a fulsome "statement of the facts and circumstances that . . . inform[s] the [Defendant] of the specific offense[s] with which he is charged." *United States v. Blinder*, 10 F.3d 1468, 1476 (9th Cir. 1993). The indictment lists all offenses charged and all facts on which the Government bases its charges. (*See* Indictment ¶¶ 49–160); *cf. United States v. Ogbazion*, No. 3:15-cr-104, 2016 WL 6070365, at *16 (S.D. Ohio Oct. 17, 2016) ("[A]n indictment is legally deficient where it fails to set forth facts which constitute an offense or to identify the essential elements of the offense."). The Government's unique willfulness theory on Count 1 does not render indecipherable its willfulness theory on the other counts. It is hard to imagine what further details Defendant could require to understand the charges against him and to prepare his defense.

Because the Court finds the indictment is legally sufficient, Defendant's motion to dismiss all counts is denied.

C. Conclusion

Defendant's motion is denied.

VII. MOTION TO DISMISS COUNTS 2, 4, AND 6 OF THE INDICTMENT IN PART FOR DUPLICITY (ECF NO. 30)

Defendant asks the Court dismiss Counts 2, 4, and 6 of the indictment in part because he claims they contain duplicative charges. (*See generally* Duplicity Mot., ECF No. 30.) The Government explains in opposition that while Counts 2, 4 and 6 each contains alternate contentions by which Defendant is alleged to have committed elements of the charged offense, each count contains a single charge. (*See generally* Duplicity Opp'n, ECF No. 39.)

A. Legal Standard

"An indictment is considered duplicitous if a single count combines two or more offenses." *United States v. Renteria*, 557 F.3d 1003, 1007 (9th Cir. 2009). An indictment is not duplicitous when it "merely state[s] multiple ways of committing the same offense." *United States v. Arreola*, 467 F.3d 1153, 1161 (9th Cir. 2006). This is because "[s]ome crimes can be committed by several alternative means," and "[i]t is proper for the government to charge different means of a crime connected by conjunctions in the indictment when the means are listed disjunctively in the statute." *Renteria*, 557 F.3d at 1008.

B. Discussion

1. Counts 2 and 4

Count 2 charges Defendant with willfully failing to pay his 2017 taxes, (Indictment 21), and Count 4 charges Defendant with willfully failing to pay his 2018 taxes, (*id.* at 28), both in violation of 26 U.S.C. § 7203. Counts 2 and 4 allege Defendant's willfulness arose on two dates, the date the taxes were due but not paid and

the date Defendant filed his delinquent returns but did not pay a tax due. (*See id.* ¶¶ 89, 105.) Defendant argues that Counts 2 and 4 each contain two separate alleged violations of 26 U.S.C. § 7203 because they "require analysis of different time periods . . . and different alleged actions or inactions by Mr. Biden." (Duplicity Mot. 3.)

There are two elements of willful failure to pay taxes pursuant to 26 U.S.C. § 7203: willfulness and failure to pay tax. *United States v. DeTar*, 832 F.2d 1110, 1113 (9th Cir. 1987). On a failure-to-pay charge, willfulness can arise either when payment is due or at a later time. *See United States v. Andros*, 484 F.2d 531, 532–33 (9th Cir. 1973) (finding Defendant's willfulness arose after payment was due), *effectively overruled on other grounds by United States v. Easterday*, 564 F.3d 1004, 1005 (9th Cir. 2009);[55] *see also United States v. Pelose*, 538 F.2d 41, 44–45 (2d Cir. 1976) (finding the jury was correctly instructed it could find defendant's willfulness arose after the date payment was due); *United States v. Sams*, 865 F.2d 713, 716 (6th Cir. 1988) (agreeing with *Andros* that willfulness can arise at a date later than when payment is due).

"Willfulness" is an essential element of 26 U.S.C. § 7203. Because "willfulness" can be found either on the date taxes are due or at a later date, the Government's inclusion of multiple dates on which Defendant allegedly committed the crime is merely the Government "stat[ing] multiple ways of committing the same offense," *Arreola*, 467 F.3d at 1161.

Arreola offers a persuasive analogy. There, the defendant challenged his conviction under 18 U.S.C. § 924(c)(1)(A), a statute providing minimum sentences for

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[55] In *Easterday*, the Ninth Circuit overruled *Andros*'s holding that willfulness arose when the defendant had sufficient funds to pay his delinquent taxes but failed to do so. However, *Easterday* did not disturb *Andros*'s finding that willfulness can arise at a later date. *See generally Easterday*, 564 F.3d 1004. This part of the *Andros* reasoning merely applies the rule that "[a] crime is complete as soon as every element of the crime occurs." *United States v. Musacchio*, 968 F.2d 782, 790 (9th Cir. 1991).

a person who, "in relation to any . . . drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm," on the basis that the indictment was duplicitous insofar as it charged him with both carrying and possessing a firearm. *Id.* at 1155–56, 1161. The circuit court confirmed that the statute "creates only one offense." *Id.* at 1157. Thus, the panel determined, the indictment was not duplicitous because it "merely state[d] multiple ways of committing the same offense." *Id.* at 1161.[56] Similarly, here the Government alleges that the willfulness element supporting Counts 2 and 4 arose on two dates, the date Defendant's taxes were due but not paid and the date he filed delinquent returns. The Government does not submit that two separate offenses occurred in each of Counts 2 and 4 on both dates; instead, it proffers two alternative theories of the date willfulness arose to support the violation in each count.[57] The Government can plead two theories of one offense without creating a duplicity issue. *Arreola*, 467 F.3d at 1161; *see also* Fed. R. Crim. P. 7(c)(1) ("A count may allege . . . that the defendant committed it by one or more specified means."). Defendant has not met his burden to show Counts 2 and 4 are duplicitous.

2. Count 6

Count 6 charges Defendant with tax evasion for tax year 2018 in violation of 26 U.S.C. § 7201. (Indictment 33.) Count 6 alleges Defendant evaded an assessment of his 2018 individual income taxes by submitting a fraudulent Form 1040 and by claiming personal expenses as business expenses on a Form 1120. (*Id.* ¶ 145.) Defendant argues

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[56] The panel thus rejected the defendant's claim that jury instructions mirroring the language of the indictment violated his Sixth Amendment rights. *Arreola*, 467 F.3d at 1161.

[57] Although 26 U.S.C. § 7203 does not disjunctively state willfulness may arise on the date taxes are due or at a later date, *Renteria*, 557 F.3d at 1008, the Court follows other courts' interpretations that the statute permits a jury to find willfulness either on the date payment was due or at a later date.

that "Count 6 is defective because a jury will have to analyze different requirements based on each of the tax forms that are included in the count." (Duplicity Mot. 3.)

To prove a violation of 26 U.S.C. § 7201, the Government must show an affirmative act constituting an attempt to evade or defeat tax, an additional tax due and owing, and willfulness. *Sansone v. United States*, 380 U.S. 343, 351 (1965). Contrary to Defendant's argument, the jury may consider multiple tax returns in assessing whether a defendant violated 26 U.S.C. § 7201. A circuit panel confirmed this principle in a recent published decision, *United States v. Orrock*, 23 F.4th 1203 (9th Cir. 2022). The defendant in *Orrock* argued that the statute of limitations barred his conviction under § 7201; he claimed that the statute of limitations ran from the date he filed a personal tax return, not the later date he filed a partnership return. *Id.* at 1205–06. The panel affirmed the conviction, concluding that the statute of limitations "runs from the last act necessary to complete the offense, either a tax deficiency or the last affirmative act of evasion, whichever is later." *Id.* at 1105. Although the panel did not expressly consider a duplicity challenge, its reasoning implicitly rests on the principle that a prosecutor may charge a violation of § 7201 based on the preparation of different tax forms, which constitute different acts of evasion that may support the count.[58] This comports with the statutory context of § 7201, which shows "Congress desired to impart a significant degree of flexibility into the Government's charging decision." *United States v. Yagman*, CR 06-227(A) SVW, 2007 WL 9724388, at *9 (C.D. Cal. May 3,

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[58] Defendant distinguishes *Orrock* on the basis that the prosecution there "chose *one* instance to charge." (Duplicity Reply 4, ECF No. 51.) Presumably, the *Orrock* prosecution elected to rest its charge on the later affirmative act of evasion because the earlier act did not occur within the statute of limitations. *See Orrock*, 23 F.3d at 1208. The panel noted that the crime was "theoretically completed" with the earlier act, *id.*, and throughout its decision wrestled with a question of timeliness as applied to circumstances where multiple affirmative acts of evasion are at issue, *see generally id.* at 1206–09. All of this supports the notion that a single charge of § 7201 may be supported by multiple or alternative affirmative acts of evasion.

1 2007); *see id.* (condoning the pleading of a single § 7201 count based on a "continuous
2 scheme designed to defeat the payment of multiple tax debts through numerous
3 affirmative acts" (footnotes omitted)). As in *Arreola*, 467 F.3d at 1161, and as with
4 Counts 2 and 4, Count 6 charges Defendant with one crime that the prosecution may
5 prove one of two ways. Defendant fails to meet his burden to show that the count
6 charged is duplicitous because it contains allegations of evasion involving two different
7 tax forms.
8
9 3. Possible Unanimity Instruction
10 Although the Court sustains the counts, Defendant's concerns regarding the
11 possibility of a jury unanimity issue are reasonable. (*See* Duplicity Mot. 1 (expressing
12 concern that Counts 2 and 4 as drafted "pose[] a risk of conviction despite a lack of
13 unanimity, where the jury convicts on these counts but does not come to an agreement
14 on what year the violation took place," and that Count 6 "risks a lack of unanimity as
15 the jury could convict on this single count, with a jury unanimous that some crime has
16 been committed but not be unanimous as to which one").) Defendant's fear that a jury
17 verdict may lack unanimity as to the conduct underlying a conviction can be quelled by
18 the administration of an appropriate jury instruction. *See United States v. Gonzalez*, 786
19 F.3d 714, 717 (9th Cir. 2015) (discussing use of general and specific unanimity
20 instructions). The Court reserves decision on this issue until the pretrial conference.
21
22 **C. Conclusion**
23 Defendant's motion is denied.
24
25 **VIII. MOTION TO DISMISS COUNT 9 OF THE INDICTMENT FOR**
26 **SPECIFIC SELECTIVE PROSECUTION (ECF NO. 31)**
27 Following the motion to dismiss the indictment in its entirety for selective and
28 vindictive prosecution, the instant motion brings special attention to Defendant's

1 arguments for dismissal of Count 9, which charges him with failure to timely pay
2 income tax due for tax year 2019 in violation of 26 U.S.C. § 7203. Defendant asserts
3 that he paid all his past-due taxes in October 2021, and that the Government does not
4 criminally charge taxpayers like him who timely filed their returns, did not timely pay
5 tax obligations, but ultimately paid past-due tax obligations with interest and penalties.
6 (*See generally* Count 9 Selective Prosecution Mot., ECF No. 31.)
7 The Government responds that Count 9 is substantially similar to the other
8 failure-to-pay charges in Counts 1, 2, and 4. It contends that the Court cannot consider
9 Count 9 in a vacuum in the analysis of discriminatory effect. (*See generally* Count 9
10 Selective Prosecution Opp'n, ECF No. 40.)
11
12 **A. Legal Standards**
13 The Court applies the legal standards for selective and vindictive prosecution set
14 forth *supra* in sections IV(B)(1) and (C)(1).
15
16 **B. Discussion**
17 Defendant fails to substantiate with evidence a fact fundamental to this motion:
18 that he paid his past-due taxes, including those due for tax year 2019, in October 2021.
19 Calling this fact "uncontested," (Count 9 Selective Prosecution Mot. 4), does not mean
20 the Court has enough information to accept it in connection with a motion to dismiss,
21 *see* Fed. R. Crim. P. 47(b); C.D. Cal. R. 7-5(b); C.D. Cal. Crim. R. 57-1. The motion
22 may be denied on this basis.
23 Even assuming the truth of Defendant's proffer, however, Defendant's motion to
24 dismiss Count 9 fails. Defendant's arguments in this motion pertain to discriminatory
25 effect, but they have little bearing on discriminatory purpose or improper motive. The
26 selective and vindictive prosecution claims accordingly lack merit because Defendant
27 fails to present evidence showing the Government elected to prosecute Count 9 based
28 on Defendant's political and familial affiliations. *See United States v. Kent*, 649 F.3d

906, 912–13 (9th Cir. 2011); *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007).

The Court declines Defendant's invitation to adjudge his theory of discriminatory effect in relation to Count 9 without looking more broadly to the criminal conduct of which he is accused. Defendant highlights the principle that "[e]ach charge in an indictment must stand *on its own*, and the basis for each charge must withstand scrutiny independent of the other counts." (Count 9 Selective Prosecution Reply 3, ECF No. 52 (citing *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1158 (9th Cir. 2004), and *Walker v. United States*, 176 F.2d 796, 798 (9th Cir. 1949)).) That holds true when evaluating whether there are deficiencies in the pleading of the charging document, the context in which the cases he cites for this proposition arose. *See Rodriguez-Gonzales*, 358 F.3d at 1158 ("The information was inadequate *as a matter of pleading* to charge Count Two as a felony." (emphasis added)); *Walker*, 176 F.2d at 798 ("The counts under which appellant was convicted should have charged all of the essential facts or elements necessary to constitute a crime . . . .").

But the selective prosecution inquiry requires Defendant to show that "similarly situated individuals have not been prosecuted." *Sutcliffe*, 505 F.3d at 954. "[D]efendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996); *see also United States v. Lewis*, 517 F.3d 20, 27 (1st Cir. 2008) ("A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced."); *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000) ("[W]e define a 'similarly situated' person for selective prosecution purposes as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant—so that any prosecution of that individual would have the same deterrence value and would be related in the same way

to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant."). A legitimate prosecutorial factor relevant here that goes unaddressed in Defendant's narrow focus in his motion is the "nature and numerosity of the offenses." *Lewis*, 517 U.S. at 28; *cf. United States v. Barry*, No. 18-00111 (RMM), 2019 U.S. Dist. LEXIS 95042, at *11 (D.D.C. June 5, 2019) ("The United States has identified legitimate prosecutorial factors that may justify prosecuting Mr. Barry differently than other allegedly similarly situated individuals. . . . [T]he United States asserted that Mr. Barry has an extensive history of similar conduct, then identified a history of infractions ranging from 2007 to 2018 for similar conduct."). Count 9 cannot be divorced from the other counts in the evaluation of whether other similarly situated individuals were not prosecuted.

The level of generality the Government draws for the inquiry might be too narrow. (*See* Count 9 Selective Prosecution Opp'n 3 ("The defendant has not identified any similarly situated individuals who committed tax crimes for 2016, 2017, and 2018 in substantially the same manner, but who got a pass for their 2019 tax crime based on the IRS's response to the COVID-19 pandemic.").) However, it is enough for the Court to determine that Defendant has not met his burden to show similarly situated individuals have not been prosecuted for untimely payment of income tax. Defendant asserts he is situated similarly to individuals who did not timely pay income tax for tax year 2019 but received leniency due to COVID-19 relief programs. (Count 9 Selective Prosecution Mot. 7–11.) The Government alleges Defendant's nonpayment extended well before the emergence of COVID-19 and leniency programs thereunder, (Indictment ¶¶ 65, 89, 105), providing a legitimate prosecutorial reason to pursue the charge in Count 9 against him and not other individuals who failed to timely pay their 2019 taxes.

C. Conclusion

The motion is denied.

IX. MOTION TO DISMISS COUNTS 1–4 FOR IMPROPER VENUE (ECF NO. 32)

Defendant moves to dismiss Counts 1–4 for improper venue, arguing that the charges should not have been brought in this district because Defendant did not become a resident of California until the summer of 2019. (*See generally* Venue Mot., ECF No. 32.) The Government opposes, arguing that the Court is bound by the four corners of the indictment, and that the indictment alleges that Defendant became a California resident in April 2018. (*See generally* Venue Opp'n, ECF No. 41.) Defendant replies that the Court should judicially notice the fact that Defendant did not move to California until 2019 or estop the Government from arguing that he moved earlier. (*See generally* Venue Reply, ECF No. 53.) The Court invited, and the Government filed, a surreply addressing the judicial notice and estoppel arguments. (Surreply, ECF No. 62.)

A. Legal Standard

Federal Rule of Criminal Procedure 12(b)(1) permits a pretrial motion to dismiss an offense "that the court can determine without trial on the merits." This includes a motion to dismiss for "improper venue." Fed. R. Crim. P. 12(b)(3)(A)(i). In ruling on a Rule 12(b) motion, the Court is "bound by the four corners of the indictment, must accept the truth of the allegations in the indictment, and cannot consider evidence that does not appear on the face of the indictment." *United States v. Kelly*, 874 F.3d 1037, 1047 (9th Cir. 2017). A Rule 12(b) motion "cannot be used as a device for a summary trial of the evidence." *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996). "The Court should not consider evidence not appearing on the face of the indictment." *Id.*

B. Discussion

Defendant argues that the Court should dismiss Counts 1–4 because Defendant did not live in California at the time of the alleged conduct, and thus venue does not lie in this district. (Venue Mot. 1–2.) In his reply, Defendant provides the Court two

pathways to dismissal: judicial notice of a Delaware information filed by Mr. Weiss as United States Attorney for the District of Delaware, which alleges that Defendant lived in Washington, D.C., in 2017 and 2018, and judicial estoppel based on the information.[59] (*See* Venue Reply 4–6; Request for Judicial Notice, ECF No. 53-1; *id.* Ex 1, ECF No. 53-2.) The Court considers each argument in turn.

1. Judicial Notice

A court may take judicial notice of facts not subject to reasonable dispute because they are either generally known or capable of accurate and ready determination. Fed. R. Evid. 201(b). This may include filings in other courts. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings and other matters of public record."). But judicial notice is limited to the existence of a public record and not facts therein that may be subject to reasonable dispute. *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (2001); *GemCap Lending, LLC v. Quarles & Brady, LLP*, 269 F. Supp. 3d 1007, 1019 (C.D. Cal. 2017), *aff'd*, 787 F. App'x 369 (9th Cir. 2019). Accordingly, while the Court can take judicial notice of the Delaware Information,[60] the Court cannot take judicial notice of facts contained therein. In any event, the allegations in an information are not facts, they are simply contentions. Furthermore, the contentions in the Delaware Information do not preclude or directly contradict the venue contentions in this action. As the Government notes in the surreply, Defendant could have been a resident of both California and Washington, D.C., at different points in 2018. (Surreply 3.) Thus, the Court denies Defendant's motion to the extent he relies judicial notice of the Delaware Information.

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[59] Defendant raised these two issues in his reply. While a "district court need not consider arguments raised for the first time in a reply brief," *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007), the Court addresses them in the interest of judicial economy.

[60] Defendant's request (ECF No. 53-1) is granted.

2. Judicial Estoppel

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). The application of judicial estoppel is "appropriate to bar litigants from making incompatible statements in two different cases." *Id.* at 783. The Supreme Court has identified "three factors that courts should consider in determining whether the doctrine is applicable in a given case." *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993–94 (9th Cir. 2012).

> First, a party's later position must be clearly inconsistent with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001) (internal quotation marks omitted). Courts in the Ninth Circuit also consider whether "a party's position is tantamount to a knowing misrepresentation to or even fraud on the court." *Marilyn Monroe LLC*, 692 F.3d at 994 (internal quotation marks omitted). And the Ninth Circuit restricts "the application of judicial estoppel to cases where the court relied on, or 'accepted,' the party's previous inconsistent position." *Hamilton*, 270 F.3d at 783.

Neither party engages with these factors. It is not the role of the Court to make parties' arguments for them. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003); *see also Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 873 n.34 (9th Cir. 2001) (declining to address an "argument . . . too undeveloped to be capable of assessment"). That said, the Court does not see how it can find that the Delaware court "accepted" the Government's previous allegation that Defendant was a resident

of Washington, D.C., especially where the information was withdrawn and the Delaware court rejected the parties' plea agreement thereon. Nor is the allegation that Defendant resided in California necessarily inconsistent with the allegation that he was a resident of Washington, D.C. Thus, the Court denies Defendant's motion to the extent it relies on the doctrine of judicial estoppel.[61]

C. Conclusion

The motion is denied.

X. CONCLUSION

For the foregoing reasons, Defendant's motions are denied.

IT IS SO ORDERED.

Dated: April 1, 2024

MARK C. SCARSI
UNITED STATES DISTRICT JUDGE

[61] As the Court noted at oral argument, and as discussed earlier in this Order, Defendant himself has admitted that he moved to California in the spring of 2018. (Diversion Agreement Attach. A.)

Appendix C:
Order Re: Notice of Pardon
United States v. Robert Hunter Biden,
2:23-cr-00599-MCS
(C.D. Cal. Dec. 3, 2024)

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,
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12 Plaintiff,
13 v.
14 ROBERT HUNTER BIDEN,
15
16 Defendant.

Case No. 2:23-cr-00599-MCS-1

ORDER RE: NOTICE OF PARDON

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1 On December 1, 2024, Defendant Robert Hunter Biden provided notice that
2 Joseph R. Biden Jr., President of the United States of America, issued a full and
3 unconditional pardon to Mr. Biden. (Notice of Pardon 1, ECF No. 236.) Rather than
4 providing a true and correct copy of the pardon with the notice, Mr. Biden provided a
5 hyperlink to a White House press release presenting a statement by the President
6 regarding the pardon and the purported text of the pardon. (Notice of Pardon 1 n.1
7 (citing *Statement from President Joe Biden*, The White House, (Dec. 1, 2024),
8 https://www.whitehouse.gov/briefing-room/statements-releases/2024/12/01/statement-
9 from-president-joe-biden-11 [https://perma.cc/5XEA-DTE7]).) The Court previously
10 noted its disapproval of this practice. (Order on Mots. to Dismiss 33, ECF No. 67.) The
11 President's statement illustrates the reasons for the Court's disapproval, as
12 representations contained therein stand in tension with the case record.

13 For example, the President asserts that Mr. Biden "was treated differently" from
14 others "who were late paying their taxes because of serious addictions," implying that
15 Mr. Biden was among those individuals who untimely paid taxes due to addiction. But
16 he is not. In his pretrial filings, Mr. Biden represented that he "was severely addicted to
17 alcohol and drugs" "through May 2019." (Disputed Joint Statement of the Case 4, ECF
18 No. 152.) Upon pleading guilty to the charges in this case, Mr. Biden admitted that he
19 engaged in tax evasion *after* this period of addiction by wrongfully deducting as
20 business expenses items he knew were personal expenses, including luxury clothing,
21 escort services, and his daughter's law school tuition. (*E.g.*, Indictment ¶¶ 141, 149,
22 ECF No. 1.) And Mr. Biden admitted that he "had sufficient funds available to him to
23 pay some or all of his outstanding taxes when they were due," but that he did not make
24 payments toward his tax liabilities even "well after he had regained his sobriety,"
25 instead electing to "spen[d] large sums to maintain his lifestyle" in 2020. (*Id.* ¶ 48.)

26 According to the President, "[n]o reasonable person who looks at the facts of [Mr.
27 Biden's] cases can reach any other conclusion than [Mr. Biden] was singled out only
28 because he is [the President's] son." But two federal judges expressly rejected Mr.

1 Biden's arguments that the Government prosecuted Mr. Biden because of his familial
2 relation to the President. (Order on Mots. to Dismiss 32–55); Mem. Opinion 6–19,
3 *United States v. Biden*, No. 1:23-cr-00061-MN (D. Del. Apr. 12, 2024), ECF No. 99.
4 And the President's own Attorney General and Department of Justice personnel
5 oversaw the investigation leading to the charges. In the President's estimation, this
6 legion of federal civil servants, the undersigned included, are unreasonable people.

7 In short, a press release is not a pardon. The Constitution provides the President
8 with broad authority to grant reprieves and pardons for offenses against the United
9 States, U.S. Const. art. II, § 2, cl. 1, but nowhere does the Constitution give the President
10 the authority to rewrite history.

11 Although Mr. Biden attached a purported copy of the pardon to a subsequent
12 filing, (*see* Reply Ex. A, ECF No. 238-1), the copy is not substantiated by an
13 authenticating declaration, *see* Fed. R. Crim. P. 47(b); C.D. Cal. R. 7-5(b); C.D. Cal.
14 Crim. R. 57-1; (*see also* Order on Mots. to Dismiss 33 (citing these rules)), so the Court
15 is left to assume it is a true and correct copy of the clemency warrant.[1] Mr. Biden
16 declares that he accepted the pardon, (Biden Decl. ¶ 2, ECF No. 236-1), and on that
17 basis he asserts that the Court "must dismiss the Indictment against Mr. Biden with
18 prejudice and adjourn all future proceedings in this matter," (Notice of Pardon 2). The
19 Government, treating the notice as a motion to dismiss the indictment, asserts that
20 "[n]othing requires the dismissal of the indictment in this case." (Opp'n 1, ECF No.
21 237.) The Government instead suggests that the Court terminate the charges against Mr.
22 Biden. (*Id.* at 3.)

23 Neither party has provided the Court with binding authority prescribing its
24 preferred procedural mechanic for effecting a grant of clemency, and neither party has
25

26 [1] As Mr. Biden notes, the Office of the Pardon Attorney published a similar copy to its
27 website. *Pardons Granted by President Joseph Biden (2021-Present)*, Off. of Pardon Att'y, (last updated Dec. 2, 2024), https://www.justice.gov/pardon/pardons-granted-
28 president-joseph-biden-2021-present [https://perma.cc/8K77-67WA].

presented a persuasive reason why its preferred resolution should be employed when the ultimate effect—the conclusion of the case—will be the same under either. Further, the Court has yet to receive the pardon from the appropriate executive agency. The Court directs the Clerk to comply with court procedures for effecting a grant of clemency once the pardon is formally received, which will result in the termination of the case. *Cf.* Oral Order, *United States v. Biden*, No. 1:23-cr-00061-MN (D. Del. Dec. 3, 2024), ECF No. 277 (terminating proceedings without expressly dismissing indictment). Pending the execution of those procedures, the Court vacates the sentencing hearing.

Subject to the following discussion, the Court assumes the pardon is effective and will dispose of the case. The Supreme Court long has recognized that, notwithstanding its nearly unlimited nature, the pardon power extends only to past offenses. *See Ex parte Garland*, 71 U.S. 333, 380 (1867) ("[The pardon power] extends to every offence known to the law, and may be exercised at any time *after its commission*, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." (emphasis added)).

The clemency warrant pardons Mr. Biden "[f]or those offenses against the United States which he has committed or may have committed or taken part in during the period from January 1, 2014 *through* December 1, 2024," including the charges prosecuted in this case. (Reply Ex. A (emphasis added).) The President signed the pardon on December 1, 2024. (*Id.*) Because the period of pardoned conduct extends "through" the date of execution, the warrant may be read to apply prospectively to conduct that had not yet occurred at the time of its execution, exceeding the scope of the pardon power. Under the canon of constitutional avoidance, the Court declines to interpret the warrant in that manner and instead understands the warrant to pardon conduct through the time of execution on December 1. *Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a

1 multitude of constitutional problems, the other should prevail—whether or not those
2 constitutional problems pertain to the particular litigant before the Court."); *see United*
3 *States v. Davis*, 588 U.S. 445, 494–95 (2019) (Kavanaugh, J., dissenting) (collecting
4 cases for the proposition "that courts should construe ambiguous laws to be consistent
5 with the Constitution"); *see also Ex parte Endo*, 323 U.S. 283, 298 (1944) (construing
6 executive order "as we would approach the construction of legislation"); *but see FCC*
7 *v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009) ("We know of no precedent for
8 applying [the canon of constitutional avoidance] to limit the scope of authorized
9 executive action."); *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1238
10 (9th Cir. 2018) ("In contrast to the many established principles for interpreting
11 legislation, there appear to be few such principles to apply in interpreting executive
12 orders.").

13 To the extent the pardon encompasses prospective conduct, the Court deems the
14 prospective component of the pardon severable from the component that demands the
15 termination of this proceeding. *See Minnesota v. Mille Lacs Band of Chippewa Indians*,
16 526 U.S. 172, 191 (1999) ("Because no party before this Court challenges the
17 applicability of these standards, for purposes of this case we shall assume, arguendo,
18 that the severability standard for statutes also applies to Executive Orders."). The
19 warrant explicitly brings the charges in this action within the ambit of the pardon,
20 indicating presidential intent for the pardon to apply to this case even if it is
21 unconstitutional in other respects. *See id.* at 191–92 (discussing whether the president
22 intended an order "to stand or fall as a whole").

23

24 **IT IS SO ORDERED.**

25

26 Dated: December 3, 2024

27 MARK C. SCARSI
UNITED STATES DISTRICT JUDGE

28

Appendix D:
Indictment
United States v. Robert Hunter Biden,
1:23-cr-00061-MN
(D. Del. Sept. 14, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal Action No. 23-00061-MN
	)	
ROBERT HUNTER BIDEN,	)	REDACTED
	)	
Defendant.	)	

INDICTMENT

FILED

SEP 14 2023

The Grand Jury for the District of Delaware charges that:

Introduction and Background

At times material to this Indictment:

1. Company 1, located in Wilmington, Delaware, possessed a federal firearms license ("FFL") and was authorized to deal in firearms under federal laws.

2. FFL holders are licensed, among other things, to sell firearms and ammunition. Various rules and regulations, promulgated under the authority of Chapter 44, Title 18, United States Code, govern the manner in which FFL holders are permitted to sell firearms and ammunition.

3. The rules and regulations governing FFL holders require that a person seeking to purchase a firearm fill out a Firearm Transaction Record, ATF Form 4473 ("Form 4473"). Part of the Form 4473 requires that the prospective purchaser certify that all his or her answers on the Form 4473 are true and correct.

4. Question 11.e. of the Form 4473 requires that the prospective purchaser certify truthfully that he or she is not an unlawful user of, or addicted to, any stimulant,

narcotic drug, or any other controlled substance. In the certification section of the Form 4473, the actual buyer must certify that his or her answers to the questions on the form are "true, correct, and complete." The actual buyer must also acknowledge by his or her signature that "I understand that a person who answers 'yes' to [Question 11.e.] is prohibited from purchasing or receiving a firearm" and "making any false oral or written statement . . . is a crime punishable as a felony under Federal law, and may also violate State and/or local law."

5. FFL holders are required by law to maintain a record, in the form of a completed Form 4473, of the identity of the actual buyer of firearms sold by the FFL holder, including the buyer's home address and date of birth.

COUNT ONE

6. Paragraphs 1 through 5 of this Indictment are re-alleged herein.

7. On or about October 12, 2018, in the District of Delaware, the defendant, Robert Hunter Biden, in connection with the acquisition of a firearm, that is, a Colt Cobra 38SPL revolver with serial number RA 551363 from Company 1, licensed under the provisions of Chapter 44, Title 18, United States Code, knowingly made a false and fictious written statement, intended and likely to deceive that dealer with respect to a fact material to the lawfulness of the sale of the firearm under the provisions of Chapter 44, Title 18, United States Code, in that defendant, Robert Hunter Biden, provided a written statement on Form 4473 certifying he was not an unlawful user of, and addicted to, any stimulant, narcotic drug, and any other controlled substance, when in fact, as he knew, that statement was false and fictitious.

In violation of Title 18, United States Code, Sections 922(a)(6) and 924(a)(2).

The Grand Jury for the District of Delaware further charges that:

COUNT TWO

8. Paragraphs 1 through 5 of this Indictment are re-alleged herein.

9. On or about October 12, 2018, in the District of Delaware, the defendant, Robert Hunter Biden, in connection with the acquisition of a firearm, that is, a Colt Cobra 38SPL revolver with serial number RA 551363, knowingly made a false statement and representation to Company 1, licensed under the provisions of Chapter 44, Title 18, United States Code, with respect to information required by the provisions of Chapter 44, Title 18, United States Code, to be kept in the FFL holder's records, in that defendant, Robert Hunter Biden, certified on the Form 4473 that he was not an unlawful user of, and addicted to, any stimulant, narcotic drug, and any other controlled substance, when in fact, as he knew, that statement was false and fictitious.

In violation of Title 18, United States Code, Section 924(a)(1)(A).

The Grand Jury for the District of Delaware further charges that:

COUNT THREE

10. Paragraphs 1 through 5 of this Indictment are re-alleged herein.

11. On or about October 12, 2018, through on or about October 23, 2018, in the District of Delaware, the defendant Robert Hunter Biden, knowing that he was an unlawful user of and addicted to any stimulant, narcotic drug, and any other controlled substance as defined in Title 21, United States Code, Section 802, did knowingly possess a firearm, that is, a Colt Cobra 38SPL revolver with serial number RA 551363, said firearm having been shipped and transported in interstate commerce.

In violation of Title 18, United States Code, Sections 922(g)(3) and 924(a)(2) (2018).

A TRUE BILL:

Foreperson

DAVID C. WEISS
SPECIAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

By:

Derek E. Hines
Leo J. Wise
Assistant Special Counsels

Dated: September 14, 2023

Appendix E:
Memorandum Opinion Denying Def.'s Mot. to Dismiss the Indictment for Selective & Vindictive Prosecution
United States v. Robert Hunter Biden, 1:23-cr-00061-MN (D. Del. Apr. 12, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 23-61 (MN)
	)	
ROBERT HUNTER BIDEN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

David C. Weiss, Special Counsel, Leo J. Wise, Principal Senior Assistant Special Counsel, Derek E. Hines, Senior Assistant Special Counsel, U.S. Department of Justice, Wilmington, DE – attorneys for Plaintiff

Bartholomew J. Dalton, DALTON & ASSOCIATES, P.A., Wilmington, DE; Abbe David Lowell, Christopher D. Man, WINSTON & STRAWN, Washington, DC – attorneys for Defendant

April 12, 2024
Wilmington, Delaware

Maryellen Noreika
NOREIKA, U.S. DISTRICT JUDGE

Defendant Robert Hunter Biden is charged with knowingly making a false written statement intended to deceive in connection with acquiring a firearm in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2), knowingly making a false statement in connection with acquiring a firearm in violation of 18 U.S.C. § 924(a)(1)(A), and possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2). (D.I. 40). Presently before the Court are Defendant's motion to dismiss the indictment for selective and vindictive prosecution (D.I. 63) with a related motion for discovery and an evidentiary hearing (D.I. 64), as well as Defendant's motion for issuance of subpoenas *duces tecum* pursuant to Federal Rule of Criminal Procedure 17(c) (D.I. 58). For the reasons set forth below, the Court DENIES Defendant's motions.

I. BACKGROUND

The Court has set forth a detailed factual background in a prior opinion. (*See* D.I. 97). The Court will not revisit those facts and instead will limit the discussion here to the facts relevant to the motions at issue.

In October 2018, during a time when Defendant was struggling with addition, he purchased a "small firearm" after certifying that he was not an unlawful user of or addicted to any controlled substance. (D.I. 63 at 5; *see also id.* (admitting his "past drug use" was widely reported) & D.I. 40). He contends that he never loaded the firearm, never fired it and only owned it for eleven days. (D.I. 63 at 5). The gun was taken from him at some point after purchase and was discarded (along with ammunition) in a public trash can. (D.I. 68 at 7). It was discovered by a member of the public (*id.*) and later recovered by local police in Delaware, who did not pursue charges against Defendant (D.I. 63 at 5).

At some point in 2018, the government began investigating Defendant's financial affairs. (D.I. 63 at 4). That investigation spanned roughly five years and involved at least the Internal Revenue Service ("IRS") and a number of Department of Justice ("DOJ") officials from the prior and current administrations, all of whom were investigating Defendant's "tax and financial affairs, and his foreign business dealings." (*Id.* at 1 & 4-5). During the investigation, federal law enforcement became aware of Defendant's firearm purchase and his "past drug use." (*Id.* at 5).

In June 2023, the government decided to charge Defendant with several misdemeanor tax offenses and one felony firearm offense. (*See* D.I. 2; *see also* Misdemeanor Information, *United States v. Biden*, Cr. A. No. 23-mj-274 (D. Del. June 20, 2023) (tax offenses)). The parties attempted to resolve these charges with a plea agreement on the tax offenses and pretrial diversion on the firearm offense. As detailed in an earlier opinion, those efforts were unsuccessful after negotiations fell apart when it became clear that the parties had fundamentally different understandings of the scope of immunity conferred by their agreements. (*See* D.I. 97).

After the government and Defendant failed to reach final agreement on a pretrial diversion resolution for the original firearm charge, on September 14, 2023, Defendant was indicted on the three felony firearm charges currently at issue. (D.I. 40). On November 15, 2023, Defendant filed a motion seeking issuance of subpoenas *duces tecum* under Rule 17(c) to four individuals allegedly in possession of documents and information bearing on the question of whether the investigation or prosecution of Defendant was based on pressure from any Executive Branch official or other outside influences. (*See generally* D.I. 58). Nearly a month later, on December 11, 2023, Defendant filed a number of pretrial motions. Relevant here, Defendant seeks to dismiss the indictment on the basis that his prosecution is selective and vindictive and violates the separation

of powers. (*See* D.I. 63). Defendant has also moved for discovery and requested an evidentiary hearing relating to this motion to dismiss. (*See* D.I. 64).

II. LEGAL STANDARD

A. Selective and Vindictive Prosecution

The Executive Branch, led by the President, is vested with the exclusive authority to prosecute cases. *See United States v. Nixon*, 418 U.S. 683, 693 (1974). "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982)). As long as probable cause exists, the decision of whether or not to prosecute or to present charges to a grand jury is generally committed entirely to the prosecutor's discretion. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). That being said, each charging decision must be consistent with and not run afoul of the rights and protections afforded by the Constitution. *See United States v. Batchelder*, 442 U.S. 114, 125 (1979) ("Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints."). A claim of selective prosecution is "an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). Such a claim is founded on principles of equal protection. *Id.* at 465.

To demonstrate selective prosecution, a defendant must show that the federal prosecutorial policy was "motivated by a discriminatory purpose" and had a "discriminatory effect." *Armstrong*, 517 U.S. at 465. The defendant bears the burden of showing that "persons similarly situated have not been prosecuted" for the same offense to satisfy the "discriminatory effect" element. *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989). The defendant must also show that "the decision to prosecute was made on the basis of an unjustifiable standard, such as race, religion, or

some arbitrary factor" to satisfy the "discriminatory purpose" element. *Id.* Each of these elements must be shown with "clear evidence sufficient to overcome the presumption of regularity that attaches to decisions to prosecute." *United States v. Taylor*, 686 F.3d 182, 197 (3d Cir. 2012) (cleaned up). This standard is "a demanding one." *Armstrong*, 517 U.S. at 463.

One form of selective prosecution is vindictive prosecution, which derives from the principle that "an individual certainly may be penalized for violating the law, [but] he just as certainly may not be punished for exercising a protected statutory or constitutional right." *Goodwin*, 457 U.S. at 372; *see also Bordenkircher*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . ."). There are two ways in which a defendant may demonstrate vindictive prosecution. "First, a defendant may use evidence of a prosecutor's retaliatory motive to prove actual vindictiveness. Second, in certain circumstances, a defendant may show facts sufficient to give rise to a presumption of vindictiveness." *United States v. Paramo*, 998 F.2d 1212, 1220 (3d Cir. 1993) (citations omitted). A presumption of vindictiveness only attaches where there is a "realistic likelihood" of vindictiveness. *Id.* "The inquiry here is not whether there is a possibility that the defendant might be deterred from exercising a legal right, but whether the situation presents a reasonable likelihood of a danger that the State might be retaliating against the accused for lawfully exercising a right." *United States v. Esposito*, 968 F.2d 300, 303 (3d Cir. 1992). As the Third Circuit has warned, "courts must be cautious in adopting" such a presumption. *Id.*

B. Discovery in Support of Selective or Vindictive Prosecution

Not only is the standard for showing selective prosecution a "rigorous" one, but so is the standard for obtaining discovery in support of such a claim. *See Armstrong*, 517 U.S. at 468. ("The justifications for a rigorous standard for the elements of a selective-prosecution claim thus

require a correspondingly rigorous standard for discovery in aid of such a claim."). Six years after *Armstrong*, the Supreme Court again reiterated the significant burden facing a defendant, explaining that defendant must show "some evidence of both discriminatory effect and discriminatory intent" even to obtain discovery in support of a selective-prosecution claim. *See United States v. Bass*, 536 U.S. 862, 863 (2002). The Third Circuit has recently explained the nuanced differences between the standard to obtain discovery and the standard to prevail on the merits of a selective prosecution claim:

> A criminal defendant, however, will not often have access to the information, statistical or otherwise, that might satisfy a "clear evidence" burden. Thus, the two component cases that make up the *Armstrong/Bass* test – *United States v. Armstrong* and *United States v. Bass*, both of which arose from selective prosecution challenges – propounded a facially less rigorous standard for criminal defendants seeking *discovery* on an anticipated selective prosecution claim. Instead of "clear evidence," a successful discovery motion can rest on "some evidence." "Some evidence" must still include a showing that similarly situated persons were not prosecuted. Furthermore, under *Armstrong/Bass*, the defendant's showing must be "credible" and cannot generally be satisfied with nationwide statistics.

United States v. Washington, 869 F.3d 193, 214-15 (3d Cir. 2017) (emphasis in original) (footnotes omitted). Although the Third Circuit has not squarely addressed the standard to obtain discovery for a vindictive-prosecution claim, it appears to be the same as for selective prosecution. *See, e.g.*, *United States v. Sanders*, 211 F.3d 711, 717 (2d Cir. 2000) ("We see no reason to apply a different standard to obtain discovery on a claim of vindictive prosecution."); *see also United States v. Bucci*, 582 F.3d 108, 113 (1st Cir. 2009); *United States v. Wilson*, 262 F.3d 305, 315-16 (4th Cir. 2001). Thus, a defendant may fail to demonstrate dismissal is warranted for selective or vindictive prosecution, but discovery may nevertheless be appropriate if the defendant comes forward with some evidence of the essential elements of the underlying selective- or vindictive-prosecution claim.

III. DISCUSSION

Defendant argues that his felony firearm possession charge and the two related false-statement charges are selective and vindictive and also that they violate the separation of powers, requiring their dismissal. Before turning to the merits of Defendant's arguments, the Court must first clarify the scope and reach of Defendant's selective- and vindictive-prosecution claims.

Defendant's motion sets forth a winding story of years of IRS investigations, Congressional inquiries and accusations of improper influence from Legislative Branch and Executive Branch officials within the prior administration, including former President Trump himself. (*See* D.I. 63 at 4-20). Yet, as Defendant explains in reply, his selective and vindictive prosecution claims are focused on "the prosecution's decision to abandon the Plea and Diversion Agreement framework it had signed in response to ever mounting criticism and to instead bring this felony indictment." (D.I. 81 at 2 n.1). That decision occurred in the summer of 2023. Any allegation of selective or vindictive prosecution stemming from the IRS investigations or prior administration officials or any conduct that preceded this past summer appears largely irrelevant to the present motions. Moreover, the only charges at issue in this case are firearm charges – Defendant's financial affairs or tax-related charges (or investigations thereof) also appear irrelevant. Thus, the only charging decision the Court must view through the selective and vindictive prosecution lens is Special Counsel David Weiss's decision to no longer pursue pretrial diversion and instead indict Defendant on three felony firearm charges.

A. Selective Prosecution

Defendant argues that he has been "selectively charged for an improper political purpose" because he is the son of the sitting President, the latter of whom is a candidate in the upcoming presidential election. (D.I. 63 at 26; *see also id.* at 23 ("This case exists because Mr. Biden is politically affiliated with his father, the sitting President and a candidate for reelection, at a time

when a historically divided nation prepares for a contentious presidential election."); D.I. 81 at 8 ("Mr. Biden is being targeted because he is the son of a sitting Democratic President and a political rival of former President Trump, who seeks to defeat President Biden in the upcoming presidential election.")). To prevail on his selective-prosecution claim, Defendant must demonstrate that the Special Counsel's decision to abandon pretrial diversion on the firearm charges and proceed with indictment was "motivated by a discriminatory purpose" and had a "discriminatory effect." *Armstrong*, 517 U.S. at 465. Defendant has failed to show either.

1. <u>Discriminatory Effect</u>

As to discriminatory effect, Defendant must show with "clear evidence" that similarly situated persons have not been prosecuted. *See Taylor*, 686 F.3d at 197. "A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced." *United States v. Lewis*, 517 F.3d 20, 27 (1st Cir. 2008); *see also Washington*, 869 F.3d at 214 ("Meeting this standard generally requires evidence that similarly situated individuals of a difference race or classification were not prosecuted, arrested, or otherwise investigated."). Defendant's claim of selective prosecution differs from the more common equal protection arguments seen in cases where selective prosecution is raised – *e.g.*, the protected class comprised of individuals of a certain race or nationality. In fact, Defendant struggles to define the class to which he belongs. (*Compare* D.I. 63 at 23, 26 & 27 n.45, *with* D.I. 81 at 8-9, 11, 14). Defendant never argues that he is being selectively prosecuted because he is a member of any specific political party or because he engaged in any specific political activity.[1] Instead, he claims that his prosecution is unconstitutionally

[1] "[M]embership in a political party is protected by the First Amendment, and the mere exercise of that right cannot be punished by means of selective prosecution." *United States v. Torquato*, 602 F.2d 564, 569 n.9 (3d Cir. 1979). The closest that Defendant comes to

selective because he is being targeted politically and because he is "politically affiliated with his father." (D.I. 63 at 23; *see also id.* at 26). Thus, Defendant's articulated protected class is apparently family members of politically-important persons.[2] Like the government (D.I. 68 at 20), this Court has been unable to find any instance where a defendant's familial relationship to a politically-important person on its own gave rise to a claim of selective prosecution. Even if that were a cognizable claim, however, Defendant has failed to come forward with "clear evidence" that similarly situated individuals (*i.e.*, people who are not family members of politically-important persons) have not been prosecuted for comparable firearm-related conduct.

Defendant points to several categories of evidence that he contends support a finding of discriminatory effect. First, citing a news article, Defendant contends that Special Counsel Weiss admitted that he originally did not want to pursue the current charges in this case because "the average American" would not be charged based on the same facts. (D.I. 63 at 6, 41). Next, Defendant claims that "[s]everal experienced legal experts and law enforcement officials" agree with the Special Counsel's initial decision to not pursue charges, again citing a news article.[3] (*Id.*

arguing this is his suggestion that he is being prosecuted because he is the son of the sitting Democratic President (and candidate for re-election) or, more broadly, because he is a Biden – a family with well-known and strong ties to the Democratic Party.

[2] To the extent that Defendant's claim that he is being selectively prosecuted rests solely on him being the son of the sitting President, that claim is belied by the facts. The Executive Branch that charged Defendant is headed by that sitting President – Defendant's father. The Attorney General heading the DOJ was appointed by and reports to Defendant's father. And that Attorney General appointed the Special Counsel who made the challenged charging decision in this case – while Defendant's father was still the sitting President. Defendant's claim is effectively that his own father targeted him for being his son, a claim that is nonsensical under the facts here. Regardless of whether Congressional Republicans attempted to influence the Executive Branch, there is no evidence that they were successful in doing so and, in any event, the Executive Branch prosecuting Defendant was at all relevant times (and still is) headed by Defendant's father.

[3] Defendant also detours into a discussion about the tax charges currently pending in California, claiming that former Attorney General Eric Holder and unidentified

at 41). Defendant then cites general statistics about federal firearm prosecutions from 2008 to 2017. (*Id.* at 42-43). According to Defendant, of the roughly 132,400 prosecutions for federal firearm offenses in this timeframe, only 1.8% were charges under § 922(g)(3). (D.I. 63 at 42). And as for charges under §§ 922(a)(6) and 924(a)(1)(A) for falsely denying unlawful drug use or addiction when attempting to purchase a firearm, Defendant claims that less than 1,000 of such false-statement cases are even referred for investigation – let alone prosecuted. (D.I. 63 at 42). None of this evidence, however, constitutes the requisite "clear evidence" that similarly situated persons were not prosecuted for the same offenses as Defendant.

As to the claim that the Special Counsel "admitted" others would not be prosecuted under the same facts, Defendant cites to a *New York Times* article quoting an anonymous source as providing that information. (D.I. 63 at 6 & n.9; *see also id.* at 37 & n.85). Yet, as the government points out, that same article goes on to say that "[a] senior law enforcement official forcefully denied" that the Special Counsel made any such statements. (D.I. 68 at 40). An anonymous source – let alone a contradicted one – is certainly not "clear evidence" of anything.

Next, as to Defendant's argument that "legal experts and law enforcement officials have agreed" with the initial decision not to prosecute Defendant for the firearm-related offenses (D.I. 63 at 41), the evidence he uses here is again a single *New York Times* article. That article also relies primarily on anonymous sources reaching generic conclusions about Defendant's case:

> A substantial percentage of those accused of lying on a federal firearms application, like Mr. Biden has been, are not indicted on that charge unless they are also accused of a more serious underlying crime, current and former law enforcement officials said. Most negotiate deals that include probation and enrollment in programs that include counseling, monitoring and regular drug testing. . . .

"Republican and Democratic U.S. attorneys . . . all agreed" that those tax charges would not have been brought absent "political pressure." (D.I. 63 at 41). Again, that is of minimal relevance here where the charging decision at issue relates only to the firearm offenses.

> When officials with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives reviewed Hunter Biden's gun application several years ago, they believed the case most likely would have been dropped if the target were a lesser-known person – because the gun had not been used in a crime and Mr. Biden had taken steps to get and stay sober, according to a former law enforcement official familiar with the situation.

Glenn Thrush, *The Gun Charges Against Hunter Biden Are Unusual. Here's Why.*, N.Y. TIMES (Sept. 15, 2023), https://www.nytimes.com/2023/09/15/us/politics/hunter-biden-gun-charges.html. The only individual identified by name is John Fishwick Jr., a former U.S. Attorney for the Western District of Virginia for the time period of 2015 to 2017. He states that this case is "rare" and that "[t]hese charges are usually brought against convicted felons who illegally possess a gun or who commit a violent or drug-related charge." *Id.* Yet neither Mr. Fishwick nor any of the anonymous sources provide any specific details about the individuals who have been prosecuted for the same offenses and those who have not. And nowhere in the article is there any mention of charging practices for prosecutors here in Delaware. *See Bass*, 536 U.S. at 863-64 ("Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case) . . . ."). Simply put, the "legal experts and law enforcement officials" that Defendant relies on offer no "clear evidence" regarding the charges (or lack thereof) brought against similarly situated individuals.

The statistics cited by Defendant also fail to constitute "clear evidence" that similarly situated individuals were not prosecuted when Defendant was. Citing a report issued by the Government Accountability Office, Defendant attempts to show the discriminatory effect element by arguing that just 1.8% of the 132,464 federal firearm prosecutions between 2008 and 2017 were for persons unlawfully using or addicted to controlled substances within the meaning of § 922(g)(3). (*See* D.I. 63 at 42). Even if national statistics could suffice as "clear evidence" to

warrant dismissal on the basis of selective prosecution,[4] the statistics cited by Defendant are nevertheless deficient because they say nothing about the individuals who have been prosecuted between 2008 and 2017 under § 922(g)(3) versus those who have not – *e.g.*, there is no information about their family connections, their family's political activity, their own political activity, etc. And Defendant's evidence regarding the false-statement charges is similarly lacking, again offering no specifics about whether those prosecuted versus not are family members of politically-important persons. (*See* D.I. 42-43). At best, Defendant has offered national statistics regarding how often the government prosecutes firearm charges against persons unlawfully using or addicted to controlled substances in general. That is not "clear evidence" that Defendant was selectively prosecuted because of his familial connection to politics when similarly situated persons were not. *See Bass*, 536 U.S. at 863-64 ("[R]aw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*." (emphasis in original)).

Finally, Defendant points to several DOJ announcements of firearm-related charging policies and press releases of successful prosecutions under § 922(g)(3). (*See* D.I. 63 at 43-46). In Defendant's view, these DOJ statements evidence a prosecutorial policy regarding drug-related firearm charges that targets only violent conduct or other "aggravating factors creating risk to public safety." (*Id.* at 43-44). Setting aside the fact that the United States Sentencing Commission does appear to consider false statements on firearms applications as an aggravating factor, as the government points out, roughly half of all prohibited-person prosecutions in 2021 actually lacked

[4] In the context of a request for discovery on selective prosecution, the Supreme Court has cast doubt on the utility of national statistics instead of statistics tailored to the specific charging prosecutors. *See Bass*, 536 U.S. at 863-64 ("Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case) . . . ."). If national statistics do not suffice to obtain discovery in support of a selective-prosecution claim, those same statistics do not warrant dismissal of the charges.

any aggravating factor. (*See* D.I. 68 at 28 (discussing UNITED STATES SENTENCING COMMISSION, *What Do Federal Firearms Offenses Really Look Like?* 24-25 (July 2022))). Defendant has offered no evidence that, in any given year, all firearm-related prosecutions have included aggravating factors. Thus, although Defendant claims that recent DOJ statements and press releases indicate a policy to only prosecute firearm offenses that involve violence or threats to public safety, that is not borne out by the evidence provided. Nothing in these DOJ materials demonstrates that Defendant was prosecuted when similarly situated others were not.

Because Defendant has failed to come forward with "clear evidence" that he has been prosecuted where others similarly situated were not, he is unable to show discriminatory effect, one of the two necessary elements of a selective-prosecution claim. As such, his motion to dismiss the indictment on that basis must be denied.

2. Discriminatory Purpose

Even if Defendant had made an adequate showing as to discriminatory effect, to prevail on his claim of selective prosecution, he would still need to prove that "the decision to prosecute was made on the basis of an unjustifiable standard, such as race, religion, or some other arbitrary factor, or that the prosecution was intended to prevent his exercise of a fundamental right." *Schoolcraft*, 879 F.2d at 68. Defendant contends that the arbitrary factor driving the prosecution here is his affiliation with his politically active father. To satisfy this second element, then, Defendant needs to show with "clear evidence" that the decision to prosecute him was because he is the family member of a politically-important person. *See Wayte*, 470 U.S. at 610 ("In the present case, petitioner has not shown that the Government prosecuted him *because of* his protest activities. Absent such a showing, his claim of selective prosecution fails." (emphasis in original)); *see also Taylor*, 686 F.3d at 197. Defendant has again failed to meet his burden.

Defendant contends that the discriminatory purpose behind his prosecution is targeting based on "his political affiliations and as a proxy for the political affiliations of his father." (D.I. 63 at 27 n.45; *see also id.* at 27 ("Top GOP government officials admittedly are openly weaponizing this case to influence voters and the next presidential election.")). In attempting to show discriminatory purpose, Defendant points to past and recent statements made by former President Trump, alleged conduct of one of the former president's personal attorneys (Rudy Giuliani) and a purported criticism and pressure campaign by Congressional Republicans. (*See id.* at 27-37). None of this evidence, however, is relevant to any alleged discriminatory purpose in this case. The charging decision at issue here – from 2023 – did not occur when the former president was in office. Nor did it occur when Mr. Giuliani was purportedly trying to uncover "dirt" about Defendant and presenting that information to U.S. Attorneys across the country. (*See id.* at 30). And the pressure campaign from Congressional Republicans may have occurred around the time that the Special Counsel decided to move forward with indictment instead of pretrial diversion, but the Court has been given nothing credible to suggest that the conduct of those lawmakers (or anyone else) had any impact whatsoever on the Special Counsel. It is all speculation.

Defendant also attempts to use statements and conduct by the DOJ to support his claim of discriminatory purpose. (*See* D.I. 63 at 37-40). He alleges that the "DOJ confirmed its own improper motive" when it pursued a "rarely used gun charge" that the Special Counsel purportedly admitted would not be brought against the average American. (*Id.* at 37; *see also id.* at 38 ("That is an admission of improper motive.")). The Court has already found this evidence insufficient to show discriminatory effect; the unsupported statement of a contradicted anonymous source also cannot suffice as "clear evidence" of any discriminatory intent of the prosecutors here. Defendant then claims that the "DOJ's efforts to torpedo [the original] plea deal in response to political

blowback puts the matter to rest."[5] (*Id.* at 39). According to Defendant, the abrupt change in course from proceeding with pretrial resolution of the tax and firearm charges to pursuing indictments in both cases evidences a "a 180-degree about-face in response to congressional ire and criticism" that can only be interpreted as an improper motive. (*Id.* at 39-40). The problem with Defendant's argument, however, is that he offers nothing concrete to support a conclusion that any member of Congress – or anyone else – actually influenced the Special Counsel or his team. The Court is provided with only Defendant's speculation and suspicion. But suspicion based on temporal proximity is not "clear evidence" of discriminatory purpose, particularly where there are non-discriminatory reasons to explain the government's decision.[6]

Although Defendant asks this Court to find that the prosecution's decision to abandon pretrial diversion and proceed with indictment on the three firearm charges only occurred because of Defendant's political affiliations (or his father's political affiliations), Defendant has failed to offer "clear evidence" that that is what happened here. Moreover, in this case, there appear to be legitimate considerations that support the decision to prosecute. *See Armstrong*, 517 U.S. at 465 (recognizing "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan" as legitimate factors that may motivate a particular prosecution). Defendant has published a book about his life, where he admitted that his firearm was taken from him at some

[5] Defendant complains about the initial reversal from non-prosecution for all charges to seeking a guilty plea for the misdemeanor tax offenses and pretrial diversion for the firearm charges. (*See* D.I. 63 at 38-39). Defendant has made clear, however, that his selective-prosecution claim is focused on the decision to abandon pretrial diversion and pursue indictment on the three felony firearm charges – a decision that occurred after the Court's hearing in July 2023. (*See* D.I. 81 at 2 n.1).

[6] For example, the government may have simply decided it no longer wanted to follow through with pretrial diversion when it became apparent that the Court had concerns over the role that the parties wanted the Court to assume.

point after purchase and it was discarded (along with ammunition) in a public trash can, only to be discovered by a member of the public. (D.I. 68 at 2, 7). The government has an interest in deterring criminal conduct that poses a danger to public safety, and prosecutors are not frozen in their initial charging decisions. *See Goodwin*, 457 U.S. at 382 ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.").

Because Defendant has failed to offer "clear evidence" that the firearm charges in this case were motivated by a discriminatory purpose and with a discriminatory effect, his claim of selective prosecution must fail. Dismissal of the indictment is not warranted.

B. Vindictive Prosecution

Defendant also claims that his prosecution is vindictive. To prevail on this theory, Defendant must show either actual animus on the part of the prosecutor or that a presumption of vindictiveness applies under the facts of this case. *See Paramo*, 998 F.2d at 1220. Defendant has failed to show either.

As to actual vindictiveness, Defendant does not accuse the prosecutor here, Special Counsel Weiss, of harboring any actual animus towards him. Instead, Defendant makes claims of animus by a number of other individuals – the former president, his supporters and "other opponents of the Bidens." (D.I. 63 at 49). Yet, as was the case with selective prosecution, the relevant point in time is when the prosecutor decided to no longer pursue pretrial diversion and instead indict Defendant. Whether former administration officials harbored actual animus towards Defendant at some point in the past is therefore irrelevant. This is especially true where, as here, the Court has been given no evidence or indication that any of these individuals (whether filled with animus or not) have successfully influenced Special Counsel Weiss or his team in the decision to indict Defendant in this case. At best, Defendant has generically alleged that individuals from

the prior administration were or are targeting him (or his father) and therefore his prosecution here must be vindictive. The problem with this argument is that the charging decision at issue was made during this administration – by Special Counsel Weiss – at a time when the head of the Executive Branch prosecuting Defendant is Defendant's father. Defendant has offered nothing credible to support a finding that anyone who played a role in the decision to abandon pretrial diversion and move forward with indictment here harbored any animus towards Defendant. Any claim of vindictive prosecution based on actual vindictiveness must fail.

Defendant argues that, even in the absence of actual vindictiveness, a presumption of vindictiveness should apply because the DOJ purportedly "upped the ante" several times in response to Congressional Republicans and other outside pressure. (D.I. 63 at 50-54). First, according to Defendant, when IRS whistleblowers came forward, the ensuing "Republican fervor" caused DOJ officials to change course from allegedly pursuing no charges to a guilty plea on the tax charges and pretrial diversion on the firearm charges. (*Id.* at 50). Then, DOJ "upped the ante again" when, in response to undefined criticism, it abandoned the plea and diversion agreements and brought additional felony firearm charges. (*Id.*). And finally, Defendant accuses the DOJ of "upping the ante" a third time, indicting Defendant on nine counts of tax offenses in California because members of Congress purportedly pressured the DOJ into doing so. (*Id.* at 50-51).

As to any presumption of vindictiveness, the Court begins by noting that the Supreme Court has cast doubt on the applicability of the presumption in pretrial settings.[7] *See generally Goodwin*, 457 U.S. 368, 372-84 (discussing the propriety of the presumption in cases where a defendant successfully challenges a conviction and faces enhanced punishment upon retrial but declining to

[7] The government pointed this out in its opposition (D.I. 68 at 44) and Defendant had no response (*See* D.I. 81 at 20-22). This Court has found no cases from within the Third Circuit where a presumption of vindictiveness was applied in the pretrial context.

apply the presumption in the pretrial context where the defendant faced additional charges and enhanced punishment after refusing to plead guilty as demanded by the prosecutor). As the Supreme Court explained:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins – and certainly by the time a conviction has been obtained – it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

Id. at 381. Although the Supreme Court did not go so far as to hold that the presumption is categorically unavailable in the pretrial context, this Court finds that there is no reason to disregard the general concern announced in *Goodwin* and allow a presumption in the pretrial setting here.

Defendant claims that the Special Counsel's decision to abandon pretrial diversion and indict Defendant on the three felony firearm charges in this case is presumptively vindictive. (*See* D.I. 81 at 2 n.1). Because that decision occurred in the summer of 2023, his complaints about original charging decisions (or lack thereof) in this case are irrelevant, as are charging decisions for the unrelated tax offenses being pursued in another venue. Yet even as to the Special Counsel's decision to indict after failing to reach agreement on pretrial diversion, Defendant fails to identify any right that he was lawfully exercising that prompted the government to retaliate. *See Esposito*, 968 F.2d at 303. He generically claims that the "self-serving and vindictive motives" at play here "rang[e] from a desire to punish him and others for engaging in constitutionally protected speech and political activity to influencing elections, avoiding scrutiny and criticism, and other interests

unrelated to the fair administration of justice." He goes on to claim that he is being targeted because of his "familial and political affiliations" and because of unspecified "actions taken by the Administration and democratic party."[8] (D.I. 63 at 49). The only thing that appears relevant to Defendant's vindictive-prosecution claim is the purportedly "constitutionally protected speech and political activity" of Defendant.[9] But Defendant identifies no such instances of protected speech or activity with any specificity – in fact, he offers no timeframe when the right was purportedly exercised. Under these circumstances, the Court cannot find that Defendant engaged in any constitutionally protected activity such that any charging decision by the Special Counsel should be viewed as presumptively vindictive. Thus, even if a presumption of vindictiveness could be invoked in the pretrial context, Defendant has failed to demonstrate that such a presumption is appropriate here.

In sum, Defendant has failed to show that his prosecution is vindictive.

C. Separation of Powers

At the end of his selective- and vindictive-prosecution arguments, Defendant argues that his prosecution also violates the separation of powers. (*See* D.I. 63 at 54-60). The gist of

[8] Defendant has offered no authority for the proposition that a claim of vindictiveness may exist where a defendant is being prosecuted only to target a family member, particularly where legitimate reasons may exist to prosecute the defendant in the first place.

[9] To the extent that Defendant believes that his prosecution is presumptively vindictive because additional charges were brought in response to something that transpired during the plea and pretrial diversion negotiations (and breakdown thereof), that argument would also be unavailing. If charges – including additional or more serious charges – are pursued following the failure to reach a plea agreement, that prosecution is not presumptively vindictive. *See Goodwin*, 457 U.S. at 379-80 ("Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation – in often what is clearly a 'benefit' to the defendant – changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.'"). This Court sees no reason why the same principle should not apply in the context of a failed diversion agreement.

Defendant's argument is that the Legislative Branch has failed to respect the prosecutorial discretion vested in the Executive Branch and instead attempted to usurp that authority. (*Id.*). In particular, Defendant claims that many members of Congress "are actively interfering with DOJ's investigation" and conducting "a criminal investigation of private conduct by a private citizen" – *i.e.*, Defendant. (*Id.* at 58). He goes so far as to assert that these Legislative Branch officials "have overcome Special Counsel Weiss's independent judgment" and, even further, those officials are the reason that pretrial diversion was abandoned in favor of indictment. (*Id.*). Defendant's separation-of-powers argument is not credible.

As an initial matter, Defendant never disputes that the Executive Branch holds the ultimate power to prosecute in his case and that that branch of government is headed by his father. And Defendant does not actually accuse the Legislative Branch of successfully encroaching on or usurping the Executive Branch's power. Indeed, Defendant's argument is more subtle and nuanced; he alleges that the Legislative Branch is exerting pressure on the Special Counsel, purportedly causing him to make charging decisions that he would not otherwise make simply because members of Congress are unhappy. Yet members of the Legislative Branch pressuring Executive Branch officials or the Special Counsel to act is fundamentally different than actually making charging decisions or influencing them. And, apart from Defendant's finger-pointing and speculation, the Court has been given no evidence to support a finding that anyone other than the Special Counsel, as part of the Executive Branch, is responsible for the decision to indict Defendant in this case instead of continuing to pursue pretrial diversion. There is thus no basis to find a violation of the separation of powers under the facts here.

D. Defendant's Request for Discovery and an Evidentiary Hearing

Defendant has also filed a motion seeking discovery for his claims of selective and vindictive prosecution, as well as discovery relating to the parties' proposed pretrial diversion agreement. (*See generally* D.I. 64). Defendant has failed to meet his burden to obtain discovery.

Defendant is correct that the standard to obtain discovery is different than the standard to prevail on a motion to dismiss the indictment for selective or vindictive prosecution. (*See* D.I. 82 at 1-2). Indeed, the Third Circuit has clarified that Defendant needs to show with "clear evidence" that his prosecution was selective or vindictive to obtain dismissal, but he only needs to come forward with "some evidence" to obtain discovery. Even with that clarification, however, the Court is mindful that both standards are considered "rigorous." *Armstrong*, 517 U.S. at 468. As the Supreme Court explained:

> If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

Armstrong, 517 U.S. at 468. In fact, the standard is so rigorous that, as of 2017, "neither the Supreme Court nor [the Third Circuit] has ever found sufficient evidence to permit discovery of a prosecutor's decision-making policies and practices." *Washington*, 869 F.3d at 215.[10]

This is not the rare case where discovery of a prosecutor's decision-making practices will be permitted. Although Defendant insists that he has come forward with "some evidence" to move past the "frivolous state" and thus warrant discovery, the Court disagrees that Defendant has

[10] This Court has been unable to locate Third Circuit cases since 2017 permitting such discovery.

offered sufficient evidence to warrant discovery under Supreme Court and Third Circuit precedent. Most of Defendant's "evidence" consists of his description of the actions of others – actions that Defendant subjectively believes influenced the Special Counsel here. (*See* D.I. 64 at 5 ("contemporaneous handwritten notes by a former high-ranking DOJ official while on the phone with then-President Trump, IRS criminal investigation agent memorandums, quotes of then-President Trump summarized by former Attorney General Bill Barr in his memoir, and an incessant pressure campaign by partisan congresspersons and their allies, among other things.")).[11] As the Court has explained several times herein, Defendant has failed to offer anything credible to suggest that the Special Counsel's decision to abandon pretrial diversion and pursue indictment was actually influenced by any member of Congress or anyone else. And to the extent that Defendant contends his statistics entitled him to discovery, the Court disagrees. As was the case in *Washington*, Defendant's national statistics "revealed nothing about similarly situated individuals" who were not prosecuted for the same firearm-related conduct. 869 F.3d at 215. Defendant has thus failed to offer "some evidence" of discriminatory effect. That failure is itself enough to deny Defendant's request for discovery. *See Bass*, 536 U.S. at 864 ("[B]ecause respondent failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery.").

Finally, part of Defendant's motion for discovery and an evidentiary hearing relates to the parties' attempts to enter into a pretrial diversion agreement ("the Diversion Agreement"). (*See, e.g.*, D.I. 64 at 1 n.1). Defendant apparently seeks an evidentiary hearing where all of the attorneys involved in the pretrial diversion negotiations are required to testify. (*Id.*). Because the Court has

[11] Defendant's motion requesting discovery and an evidentiary hearing is just five pages long, and he waits until the fifth page to identify these "concrete instances" that purportedly entitle him to discovery. (D.I. 64 at 4-5).

previously found that the Diversion Agreement unambiguously required but did not receive Probation's approval, there is no need for discovery or such an evidentiary hearing. Extrinsic evidence is not necessary or appropriate to consider. By its unambiguous approval terms, the Diversion Agreement never went into effect and extrinsic evidence will not change that conclusion. (*See* D.I. 97).

E. Defendant's Motion for Issuance of Rule 17(c) Subpoenas

Defendant also requests an order directing that subpoenas *duces tecum* be issued to Donald J. Trump, William P. Barr, Richard Donoghue and Jeffrey A. Rosen under Rule 17(c). (*See* D.I. 58). Rule 17(c) allows a party to obtain from a witness before trial documents and other evidentiary materials that may be used at trial. FED. R. CRIM. P. 17(c). A party seeking documents under this Rule must demonstrate that (1) the documents are evidentiary and relevant, (2) the documents cannot reasonably be obtained before trial through other means, (3) the moving party cannot prepare for trial without the documents and failure to obtain the documents may unreasonably delay trial and (4) the documents are sought in good faith and not as a "general fishing expedition." *Nixon*, 418 U.S. at 699-700. The Supreme Court has cautioned that Rule 17(c) was "not intended to provide a means of discovery for criminal cases" but instead exists "to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). "Courts must be careful that [R]ule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases found in [Rule] 16." *United States v. Cuthbertson* (*Cuthbertson I*), 630 F.2d 139, 146 (3d Cir. 1980).

Defendant seeks from the four subpoena targets documents and records relating to any investigations or prosecutions of (or decisions to investigate or prosecute) Defendant or, even more

broadly, any discussion of Defendant whatsoever.[12] (*See, e.g.*, D.I. 58-1 at Page 6 of 6). The time period covered by the subpoenas is vast – *i.e.*, January 2017 to present. (*Id.* at Page 4 of 6). Defendant argues that the requested documents "may be used either in pre-trial pleadings or in a pre-trial evidentiary hearing on [his] motions to dismiss the Indictment (or, potentially, another issue)." (D.I. 58 at 10). According to Defendant, he is only seeking documents "reflecting one issue, to determine whether the Subpoena Recipients or those with whom they worked pressured, discussed, influenced, or requested any investigation or prosecution of Mr. Biden, including whether any Executive Branch official placed any undue pressure on another government official to undertake the same." (*Id.* at 12). In other words, Defendant is attempting to obtain discovery from Mr. Trump, Mr. Barr, Mr. Donoghue and Mr. Rosen to support his claim of selective or vindictive prosecution. (*See id.* at 14 ("Mr. Biden seeks specific information . . . that goes to the heart of his pre-trial and trial defense that this is, possibly, a vindictive or selective prosecution that arose out of a n incessant pressure campaign that began in the last administration . . . .")). Defendant is not entitled to such discovery for at least two reasons.

First, as the government points out, Defendant was not charged with the current (or any) firearm offenses while any of the four individuals held office. (D.I. 59 at 2). The decision to prosecute Defendant was made by and during the current administration – one headed by Defendant's father and an Attorney General appointed by and serving at the pleasure of Defendant's father. And that Attorney General appointed the current Special Counsel – *i.e.*, the prosecutor who decided to abandon pretrial diversion and seek indictment in this case in the

[12] Defendant also seeks documents and records that mention Hunter Biden and relate to the January 6th, 2021 attack on the United States Capitol. (*See, e.g.*, D.I. 58-1 at Page 6 of 6). The Court has been given no indication that such materials would have even tangential bearing on the issues in this case.

summer of 2023. None of the four individuals subject to Defendant's proposed Rule 17(c) subpoenas were involved in that charging decision and Defendant has offered nothing to suggest otherwise. Any argument that those individuals have documents in support of his selective or vindictive prosecution claim seems likely doomed from the outset.

Moreover, any materials sought by a Rule 17(c) subpoena must be relevant, admissible and specific. *See Nixon*, 418 U.S. at 700. Yet the Court has found that Defendant failed to make out a claim of selective or vindictive prosecution and, further, that Defendant is not entitled to discovery from the government on those issues. The documents requested by Defendant's Rule 17(c) subpoenas are thus not relevant evidentiary material because there is no viable claim of selective or vindictive prosecution in this case and there is no other purported use for the information sought. *See, e.g.*, *Cuthbertson I*, 630 F.2d at 145-46 ("[O]nly evidentiary material is subject to subpoena under [R]ule 17(c). . . . [S]tatements made by nonwitnesses have no value as possible prior inconsistent statements to impeach trial testimony. The defendants have presented no other evidentiary use for such statements at trial, except for a general assertion that this material might contain exculpatory information."); *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir. 1981) ("[N]aked exculpatory material held by third parties that does not rise to the dignity of admissible evidence simply is not within [Rule 17(c)]."). [13] If Defendant is not entitled to the same type of discovery from the government under Rule 16, the Court can discern no reason why the result under Rule 17(c) would be any different for the third parties here. *See United States v. Charamella*, 294 F. Supp. 280, 282 (D. Del. 1968) ("If the documents sought to be produced and inspected pursuant to Rule 17(c) can have no relevance or evidentiary value to defendant in the

[13] "[R]ule 17(c) is designed as an aid for obtaining relevant evidentiary material that the moving party may use at trial." *Cuthbertson*, 630 F.2d at 144. The Rule does not exist to allow a defendant to search for possible claims or defenses.

conduct of his defense, the Court should decline to permit a pre-trial inspection."). Defendant's will not be permitted to issue the four proposed subpoenas *duces tecum*.

IV. CONCLUSION

For the foregoing reasons, Defendant's motions to dismiss the indictment for selective and vindictive prosecution (D.I. 63), for discovery and an evidentiary hearing (D.I. 64) and for issuance of Rule 17(c) subpoenas (D.I. 58) are DENIED.

Appendix F:
Indictment
United States v. Alexander Smirnov,
2:24-cr-00091-ODW
(C.D. Cal. Feb. 14, 2024)

FILED
CLERK, U.S. DISTRICT COURT
2/14/2024
CENTRAL DISTRICT OF CALIFORNIA
BY TV DEPUTY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 2023 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. ALEXANDER SMIRNOV, Defendant.	No. 2:24-cr-00091-ODW <u>I N D I C T M E N T</u> [18 U.S.C. § 1001: false statement; 18 U.S.C. § 1519: creating a false and fictitious record]

The Grand Jury charges:

INTRODUCTORY ALLEGATIONS

1. Defendant ALEXANDER SMIRNOV was a resident of Los Angeles, California in 2020.

A. The Defendant was an FBI Confidential Human Source.

2. The Defendant was a confidential human source ("CHS") with the Federal Bureau of Investigation ("FBI"). As a CHS, the Defendant was assigned a handling agent (hereafter "the Handler") who was a special agent on an FBI squad that investigated violations of federal criminal law.

1 3. As a CHS, the Defendant provided information to the Handler
2 that was then used in various criminal investigations conducted by the
3 FBI. The Defendant knew that information he provided was used in
4 criminal investigations because, among other reasons, the Handler
5 advised him that he might have to testify in court based on the
6 information he provided on multiple occasions, including, but not
7 limited to: 10/1/2010, 5/17/2011, 11/28/2012, 04/12/2013, 8/29/2013,
8 7/10/2015 and 3/11/2020. The Defendant also knew the information he
9 provided was used in criminal investigations because the Defendant
10 participated in a number of operations where he was authorized to
11 engage in criminal activity as part of an on-going criminal
12 investigation.

13 4. The Defendant was admonished by the Handler that he must
14 provide truthful information to the FBI when he first became a CHS in
15 2010 and on multiple occasions thereafter, including, but not limited
16 to: 10/1/2010, 1/20/2011, 5/17/2011, 9/14/2011, 8/29/2012, 11/28/2012,
17 4/12/2013, 8/29/2013, 1/22/2014, 7/9/2014, 7/10/2015, 9/29/2016,
18 9/26/2017, 9/26/2018, 9/27/2019, 3/11/2020, 2/19/2021, 10/28/2021,
19 10/17/2022 and 9/29/2023.

20 5. In addition, when the Defendant was authorized to engage in
21 illegal activity for investigative purposes, he was further admonished
22 that: "Under no circumstances may the CHS … Participate in an act that
23 constitutes obstruction of justice (e.g., perjury, witness tampering,
24 witness intimidation, entrapment, or fabrication, alteration, or
25 destruction of evidence, unless such illegal activity has been
26 authorized)." When the Defendant was given this admonishment, he
27 signed an FBI form that contained this statement, including on
28 10/8/2014, 1/18/2017, 10/8/2018, 1/10/2019, and 8/7/2020.

6. Despite repeated admonishments that he must provide truthful information to the FBI and that he must not fabricate evidence, the Defendant provided false derogatory information to the FBI about Public Official 1, an elected official in the Obama-Biden Administration who left office in January 2017, and Businessperson 1, the son of Public Official 1, in 2020, after Public Official 1 became a candidate for President of the United States of America.

a. As described in greater detail below, in March 2017, the Defendant reported to the Handler that he had had a phone call with the owner of Ukrainian industrial conglomerate Burisma Holdings, Limited (hereafter "Burisma Official 1") concerning Burisma's interest in acquiring a U.S. company and making an initial public offering ("IPO") on a U.S.-based stock exchange. In reporting that conversation to the Handler, the Defendant also noted that Businessperson 1, Public Official 1's son, was a member of Burisma's Board, a fact that was publicly known.

b. Three years later, in June 2020, the Defendant reported, for the first time, two meetings in 2015 and/or 2016, during the Obama-Biden Administration, in which he claimed executives associated with Burisma, including Burisma Official 1, admitted to him that they hired Businessperson 1 to "protect us, through his dad, from all kinds of problems," and later that they had specifically paid $5 million each to Public Official 1 and Businessperson 1, when Public Official 1 was still in office, so that "[Businessperson 1] will take care of all those issues through his dad," referring to a criminal investigation being conducted by the then-Ukrainian Prosecutor General into Burisma and to "deal with [the then-Ukrainian Prosecutor General]."

1 c. The Defendant also reported two purported phone calls
2 between himself and Burisma Official 1 wherein Burisma Official 1
3 stated that he had been forced to pay Public Official 1 and
4 Businessperson 1 and that it would take investigators 10 years to find
5 records of illicit payments to Public Official 1.
6 d. As alleged herein, the events the Defendant first
7 reported to the Handler in June 2020 were fabrications. In truth and
8 fact, the Defendant had contact with executives from Burisma in 2017,
9 after the end of the Obama-Biden Administration and after the then-
10 Ukrainian Prosecutor General had been fired in February 2016, in other
11 words, when Public Official 1 had no ability to influence U.S. policy
12 and when the Prosecutor General was no longer in office. In short,
13 the Defendant transformed his routine and unextraordinary business
14 contacts with Burisma in 2017 and later into bribery allegations
15 against Public Official 1, the presumptive nominee of one of the two
16 major political parties for President, after expressing bias against
17 Public Official 1 and his candidacy.
18 e. When he was interviewed by FBI agents in September 2023,
19 the Defendant repeated some of his false claims, changed his story as
20 to other of his claims, and promoted a new false narrative after he
21 said he met with Russian officials.
22 B. In 2017, the Defendant provided the FBI Handler with information
23 that Burisma was interested in acquiring an American oil and gas
24 company.
25 7. On or about March 1, 2017, the Defendant provided information
26 to the Handler concerning Burisma for the first time. That information
27 was memorialized in an official record of the FBI on a Form 1023
28 (hereafter the "2017 1023"). The following is the entirety of what

1 the Defendant told the Handler in March 2017 that was memorialized in
2 the 2017 1023:

3 During the week of 2/27/2017, CHS received a telephone call from [Associate 1] (a subject of prior CHS reporting regarding ties to ROC). Also on the call was [Burisma Official 1], whom CHS understood is the "CEO or owner" of Burisma Holdings - Ukraine. During the call, [Associate 1] mentioned they are interested in acquiring a U.S.-based petroleum business with a market capitalization between $50-$100 million. They would then use this US-based entity as the parent company for Burisma Holdings (or a subdivision thereof), which they would then seek to register on a US exchange.
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10 This CEO and [Associate 1] made statements that led CHS to believe that Burisma Holdings has overstated its corporate assets in various public filings in Ukraine (NFI).
11

12 The individual in Ukraine who is currently assigned to manage this acquisition is [Burisma Official 2], whose title is "Board Advisor - Director for International Cooperation and Strategic Development", email [] @burisma.com, 10-A Ryleyeva Str., Kyiv 04073, Ukraine, office phone [], fax: []. During the week of March 6, 2017, [Burisma Official 2] plans to travel to Washington D.C. (NFI), and may meet with the CHS sometime thereafter on the West Coast.
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17 **During this call, there was a brief, non-relevant discussion about [Public Official 1]'s son, [Businessperson 1], who is currently on the Board of Directors for Burisma Holdings [No Further Information].**
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19

20 (emphasis added). Notably, the Defendant did not report in 2017 that
21 in the preceding two years, Burisma Official 1 admitted to the Defendant
22 that he had paid Public Official 1 $5 million when Public Official 1
23 was still in office, as the Defendant later claimed.
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C. Three years later, in May 2020, the Defendant sent the Handler a series of messages expressing bias against Public Official 1, who was then a candidate for President of the United States of America and the presumptive nominee of one of the two major political parties.

8. On May 19, 2020, the Defendant messaged the Handler the following:

It's all over the news in Russia and Ukraine as well as live calls between Public Official 1 and President of Ukraine

5:37 PM

Smells bad for Public Official 1 5:37 PM

9. On that day, May 19, 2020, it was publicly reported that:

> A Ukrainian lawmaker who met with [] late last year released recordings of private phone calls several years ago between [Public Official 1] and [], then Ukraine's president, in a new broadside against the presumptive [] nominee for U.S. president that has raised questions about foreign interference in the 2020 election.

1 10. Approximately 20 minutes after his first message on May 19,
2 2020, the Defendant volunteered his view that:

Public Official 1 going to jail)))) 5:56 PM

11. One minute later, the Defendant opined:

May 19, 2020

Dems tried to impeacn Public Official 2 for same 5:57 PM

Even less 5:57 PM

All those polititions same shit 5:57 PM

Jail for all of them 5:57 PM

Plus bribe of Public Official 1 should be soon in the news))) 5:57 PM

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12. To which the Handler responded:

??? Only if you believe that his request to get rid of Prosecutor General was only because of Burisma...which my all accounts it was not

5:58 PM

13. The Defendant offered the following:

For sure yes 5:58 PM

I'll try to prove it for you bro

5:58 PM

14. To which the Handler responded:

Bride payment to Public Official 1 Or are you talking about the aid withheld unless they fired Prosecutor General 5:59 PM

15. The Defendant then further offered the following:

I'll get those other recordings of Public Official 1 son telling to Boriama that his dad will take care of Prosecutor General

Bribe to Public Official 1 and his son 5:59 PM

16. To which the Handler responded:

That would be a game changer

5:59 PM

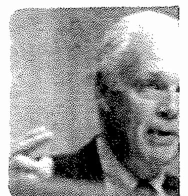
17. The Defendant then stated:

I'll meet with the guys as soon as I will be able to fly 5:59 PM

The Defendant did not indicate who "the guys" were.

[this space intentionally left blank]

18. The following day, May 20, 2020, the Defendant messaged the Handler a link to an article titled, "Senate Republicans issue first subpoena in [Public Official 1]-Burisma probe":



Senate Republicans issue first subpoena in [redacted: Public Official 1]

Senate Republicans issued th...

apple.news

https://apple.news/AxND2CK0jQmm7Qah0s5p_gQ

11:08 AM

19. The Handler did not respond.

[this space intentionally left blank]

1 20. The next day, May 21, 2020, the Defendant messaged the
2 Handler the following:

May 21, 2020

Ukraine opening investigation))))$

9:11 AM

Ok Public Official 1 9:11 AM

I think it's gonna help him to be elected))))

9:12 AM

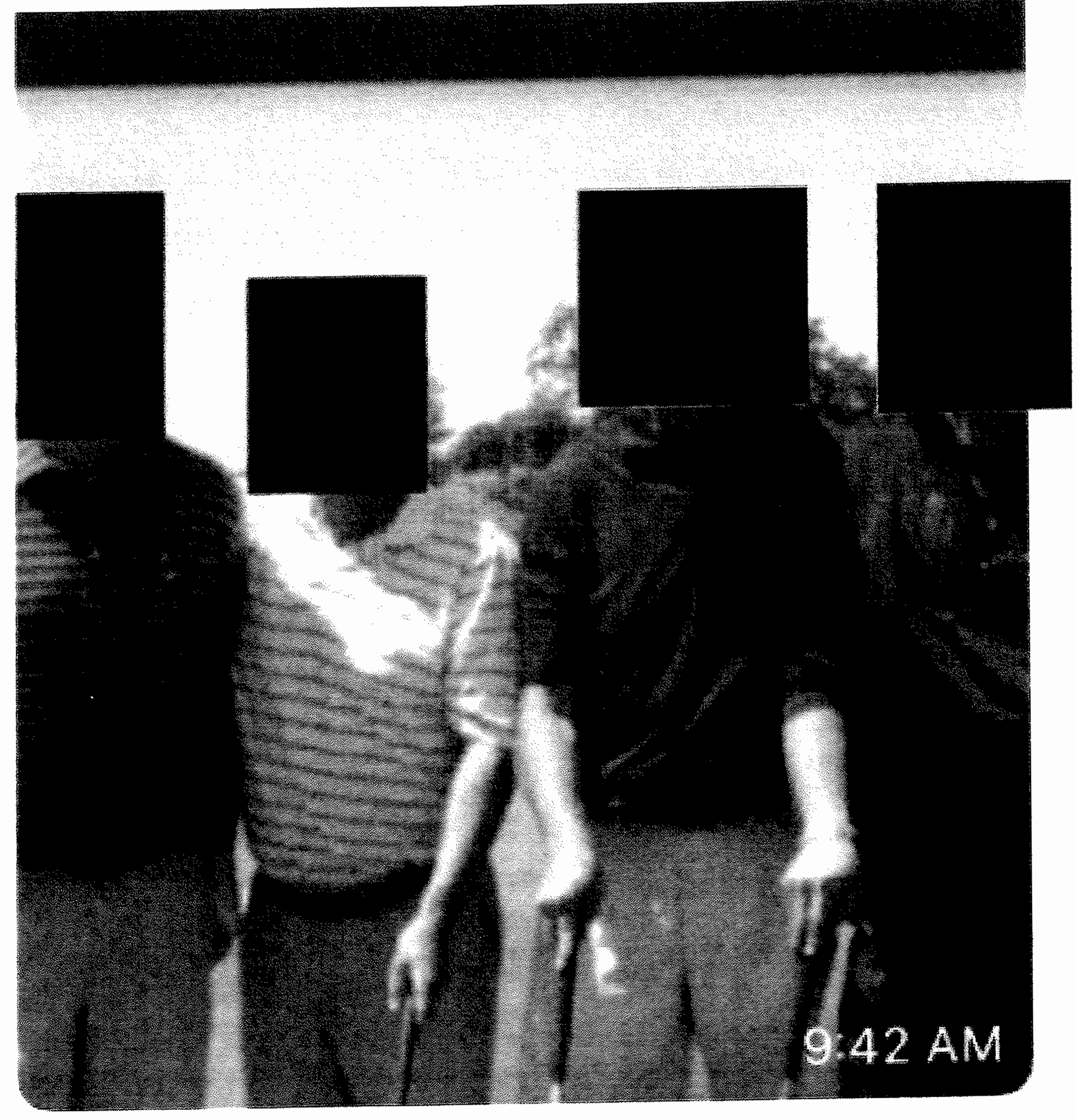
We need a new runner 9:12 AM

Let me know when you can talk. Have some interesting update

9:13 AM

[this space intentionally left blank]

21. Less than thirty minutes later, the Defendant messaged the Handler the following:



Public Official 1 & Businessperson 1 with CEO of Burisma

Contrary to the Defendant's representation, this was not, in fact, a photograph of Public Official 1 and Businessperson 1 with the CEO of Burisma.

D. <u>One month later, and three years after first reporting on Burisma, the Defendant reported bribery allegations against Businessperson 1 and Public Official 1</u>.

22. In June 2020, the Handler reached out to the Defendant concerning the 2017 1023. This was done at the request of the FBI's Pittsburgh Field Office (hereafter "FBI Pittsburgh"). In the first half of 2020, the United States Attorney's Office for the Western District of Pennsylvania (hereafter "USAO WDPA") had been tasked by the Deputy Attorney General of the United States to assist in the "receipt, processing, and preliminary analysis of new information provided by the public that may be relevant to matters relating to Ukraine." As part of that process, FBI Pittsburgh opened an assessment, 58A-PG-3250958, and in the course of that assessment identified the 2017 1023 in FBI holdings and shared it with USAO WDPA. USAO WDPA then asked FBI Pittsburgh to reach out to the Handler to ask for any further information about the reference in his 2017 1023 that stated, "During this call, there was a brief, non-relevant discussion about former [Public Official 1]'s son, [Businessperson 1], who is currently on the Board of Directors for Burisma Holdings [No Further Information]".

23. On or about June 26, 2020, FBI Pittsburgh contacted the Handler regarding the 2017 1023. That same day, the Handler spoke with the Defendant, who was in Los Angeles, by telephone. The information the Defendant provided the Handler was memorialized on a Form 1023 (hereafter the "2020 1023"), an official record of the FBI, which was finalized on June 30, 2020.

24. During their call on June 26, 2020, when the Handler asked the Defendant about the "brief, non-relevant discussion about former [Public Official 1]'s son, [Businessperson 1], who is currently on the Board of Directors for Burisma Holdings," the Defendant described, for the first time, two purported meetings and two purported phone calls with various Burisma executives where Businessperson 1 and Public Official 1 were discussed. The two phone calls were in addition to the one the Defendant reported on in the 2017 1023. This time, rather than a passing reference to Businessperson 1 being on Burisma's Board, the Defendant claimed that Burisma executives at two meetings in 2015 and/or 2016, during the Obama-Biden Administration, told him that they were paying Businessperson 1 to "protect us, through his dad, from all kinds of problems," and later that they had specifically paid $5 million each to Public Official 1, when he was in office, and Businessperson 1 so that "[Businessperson 1] will take care of all those issues through his dad," referring to a criminal investigation being conducted by the then-Ukrainian Prosecutor General into Burisma and to "deal with" the then-Ukrainian Prosecutor General. In describing the phone calls, the Defendant claimed that Burisma Official 1 said he was "pushed to pay" Public Official 1 and Businessperson 1, had text messages and recordings that show he was coerced to make such payments, and it would take investigators ten years to find the records of illicit payments to Public Official 1. The Defendant made these statements to the Handler in June 2020, when Public Official 1 was a candidate for President of the United States and the presumptive nominee of one of the two major political parties.

25. Critically, the payments the Defendant described occurred, according to the Defendant, during the Obama-Biden Administration in

2016, when Public Official 1 was in a position to influence U.S. policy towards Ukraine, and prior to February 2016 when the then-Ukrainian Prosecutor General was fired and, in any event, prior to the change in Administrations in January 2017.

26. Specifically, the Defendant claimed the following about the first and second meetings:

> First Meeting with Burisma Executives in Kyiv, Ukraine 2015/2016. **In late 2015 or 2016, during the Obama/Biden administration, CHS was first introduced to officials at Ukraine natural gas business Burisma Holdings ("Burisma") through CHS's associate, [Associate 1]** (alternate transliteration - [Associate 1]; for full identification of [Associate 1], see attachments to [], a FD-1023 by CHS serialized on 1/2/2018).
>
> CHS and [Associate 1] traveled to Ukraine and went to Burisma's office that was located 20 minutes away from the City Center. The purpose of the meeting was to discuss Burisma's interest in purchasing a US-based oil and gas business, for purposes of merging it with Burisma for purposes of conducting an IPO in the US. Burisma was willing to purchase a US-based entity for $20-30 million.
>
> **At this meeting was CHS, CHS's former business partner, [Associate 2] (an USPER who does not speak Russian), [Associate 1], Burisma's CFO, [Burisma Official 2]** (email []@Burisma.com, telephone []), **[Burisma Official 3] (the daughter to Burisma's CEO and founder [Burisma Official 1) and her husband (FNU LNU)**. The conversation was in Russian, and thus [Associate 2] did not participate therein.
>
> During the meeting, [Burisma Official 2] asked CHS whether CHS was aware of Burisma's Board of Directors. CHS replied "no", and [Burisma Official 2] advised the board members included: 1) the former President or Prime Minister of Poland; and, 2) **[Public Official 1]'s son, [Businessperson 1]**. [Burisma Official 2] said Burisma hired the former President or Prime Minister of Poland to leverage his contacts in Europe for prospective oil and gas deals, **and they hired [Businessperson 1] to "protect us, through his dad, from all kinds of problems"** (CHS was certain [Burisma Official 2] provided no further/specific details about what that meant).

1 CHS asked why they (Burisma) needed to get CHS's assistance regarding the purchase/merger of a US-based company when [Businessperson 1] was on their board. [Burisma Official 2] replied that [Businessperson 1] was not smart, and they wanted to get additional counsel. The group then had a general conversation about whether the purchase/merger with a US company would be a good business decision.

Meeting with CHS, [Associate 1], and [Burisma Official 1] in Vienna, Austria in 2016. **Approximately one or two months after the aforementioned Burisma meeting in Ukraine, CHS traveled to Vienna, Austria with [Associate 1] and met with [Burisma Official 1] at an outside coffee shop.** The trio continued to talk about the feasibility of Burisma acquiring a US-based entity. **CHS recalled this meeting took place around the time [Public Official 1] made a public statement about [the then-Ukrainian Prosecutor General] being corrupt, and that he should be fired/removed from office.** CHS told [Burisma Official 1] that **due to [the then-Ukrainian Prosecutor General]'s investigation into Burisma**, which was made public at this time, **it would have a substantial negative impact on Burisma's prospective IPO in the United States. [Burisma Official 1] replied something to the effect of, "Don't worry [Businessperson 1] will take care of all of those issues through his dad."** CHS did not ask any further questions about what that specifically meant.

CHS asked [Burisma Official 1] why Burisma would pay $20-30 million to buy a US company for IPO purposes when it would be cheaper to just form a new US-entity, or purchase a corporate shell that was already listed on an exchange. [Burisma Official 1] responded that [Businessperson 1] advised Burisma it could raise much more capital if Burisma purchased a larger US-based business that already had a history in the US oil and gas sector. CHS recalled [Burisma Official 1] mentioned some US-based gas business(es) in Texas, the names of which CHS did not recall. **CHS advised [Burisma Official 1] it would be problematic to raise capital in the US given [the then-Ukrainian Prosecutor General]'s investigation into Burisma as nobody in the US would invest in a company that was the subject of a criminal investigation.** CHS suggested it would best if Burisma simply litigate the matter in Ukraine, and pay some attorney $50,000. [Burisma Official 1] said he/Burisma would likely lose the trial because he could not show that Burisma was innocent; [Burisma Official 1] also laughed at CHS's number of $50,000 (not because of the small amount, but because the number contained a "5") **and said that "it cost 5 (million) to pay [Public Official 1], and 5 (million) to**

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> **[Businessperson 1]." CHS noted that at this time, it was unclear to CHS whether these alleged payments were already made.**
>
> CHS told [Burisma Official 1] that **any such payments to [Public Official 1 and Businessperson 1]** would complicate matters, and Burisma should hire "some normal US oil and gas advisors" because [Public Official 1 and Businessperson 1] have no experience with that business sector. [Burisma Official 1] made some comment that although [Businessperson 1] "was stupid, and his ([Burisma Official 1]'s) dog was smarter," **[Burisma Official 1] needed to keep [Businessperson 1] (on the board) "so everything will be okay." CHS inquired whether [Businessperson 1] or [Public Official 1] told [Burisma Official 1] he should retain [Businessperson 1]; [Burisma Official 1] replied, "They both did."** CHS reiterated CHS's opinion that [Burisma Official 1] was making a mistake and he should fire [Businessperson 1] and deal with [**the then-Ukrainian Prosecutor General]'s investigation** directly so that the matter will remain an issue in Ukraine, and not turn in to some international matter. [Burisma Official 1] responded something to the effect of, **"Don't worry, this thing will go away anyway."** CHS replied that, notwithstanding [the then-Ukrainian Prosecutor General]'s investigation, it was still a bad decision for Burisma to spend $20-$30 million to buy a US business, and that CHS didn't want to be involved with the [Public Official 1 and Businessperson 1] matter. [Burisma Official 1] responded that he appreciated CHS's advice, but that "it's too late to change his decision." **CHS understood this to mean that [Burisma Official 1] had already had [sic.] paid [Public Official 1 and Businessperson 1], presumably to "deal with [the then-Ukrainian Prosecutor General]."**

(emphases added).

E. The Defendant's 2020 story was a fabrication.

27. The Defendant's claim that "in late 2015/2016 during the Obama/Biden Administration" he first met with Burisma Official 2 and that at that meeting Burisma Official 2 told him that they hired Businessperson 1 to "protect us, through his dad, from all kinds of problems" was false, as he knew.

28. Similarly, the Defendant's claims that he met with Burisma Official 1 "one or two months later," around the time "[Public Official 1] made a public statement about [the then-Ukrainian Prosecutor General] being corrupt, and that he should be fired/removed from office," which occurred on December 9, 2015, and that at that meeting Burisma Official 1 admitted that he had paid Businessperson 1 $5 million and Public Official 1 $5 million each so that "[Businessperson 1] will take care of all those issues through his dad," referring to the then-Ukrainian Prosecutor General's investigation into Burisma, and to "deal with [the then-Ukrainian Prosecutor General]," were false, as the Defendant knew.

29. No such statements were made to the Defendant because, in truth and fact, Defendant met with officials from Burisma for the first time in 2017, *after* Public Official 1 left office in January 2017, and *after* the then-Ukrainian Prosecutor General had been fired in February 2016. The first meeting the Defendant had with officials from Burisma occurred at a time when Public Official 1 no longer had the ability to influence U.S. policy and after the then-Ukrainian Prosecutor General was out of office. The Defendant's story to the FBI was a fabrication, an amalgam of otherwise unremarkable business meetings and contacts that had actually occurred but at a later date than he claimed and for the purpose of pitching Burisma on the Defendant's services and products, not for discussing bribes to Public Official 1 when he was in office.

30. The Defendant began to pursue business opportunities with Burisma in spring 2017, at the earliest, through two associates of his.

a. Associate 1 was a Ukrainian business consultant. He was introduced to the Defendant by a mutual acquaintance who told

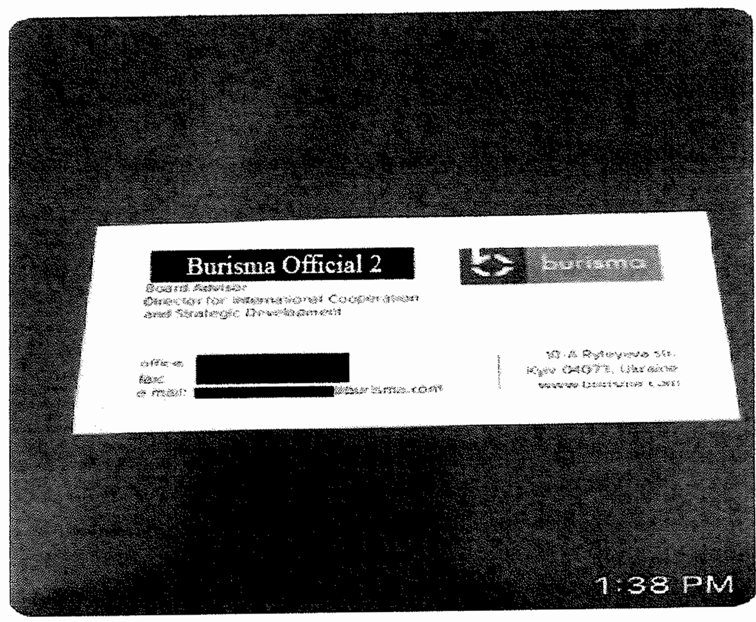
Associate 1 that the Defendant was an expert in IPOs in the United States. The Defendant and Associate 1 subsequently met in Kiev, Ukraine, and the Defendant asked Associate 1 to connect him to businesses in Ukraine interested in IPOs in the United States. Associate 1 subsequently identified Burisma as such a company.

b. Associate 2 was an American who owned a cryptocurrency business. In the spring of 2017, the Defendant presented Burisma to Associate 2 as a company that might be interested in a cryptocurrency product Associate 2 was trying to commercialize. Around this time, the Defendant sent Associate 2 a link to the Board of Directors of Burisma. The Defendant specifically called out the fact that Businessperson 1 was on the Board and indicated that because Businessperson 1 was on the Board, the Defendant thought Burisma was a company with which they could do business.

31. Between March 2017, when the Defendant first reported on Burisma to the Handler, and June 2020, when he first made his false claims about bribes paid to Public Official 1 when he was in office, directly and through his son Businessperson 1, the Defendant had a series of routine business contacts with executives at Burisma. All of these contacts occurred in 2017 and 2018, when Public Official 1 was out of office and after the then-Ukrainian Prosecutor General had been fired. Specifically:

a. The same day that he first reported on Burisma, March 1, 2017, the Defendant messaged the Handler a photograph of a business card for Burisma Official 2.

Mar 1, 2017



b. In response, on that same day, the Handler asked the Defendant, "How's [Burisma Official 2] fit into the story", to which the Defendant responded, "This is the guy that will do the public company from there [sic.] side."

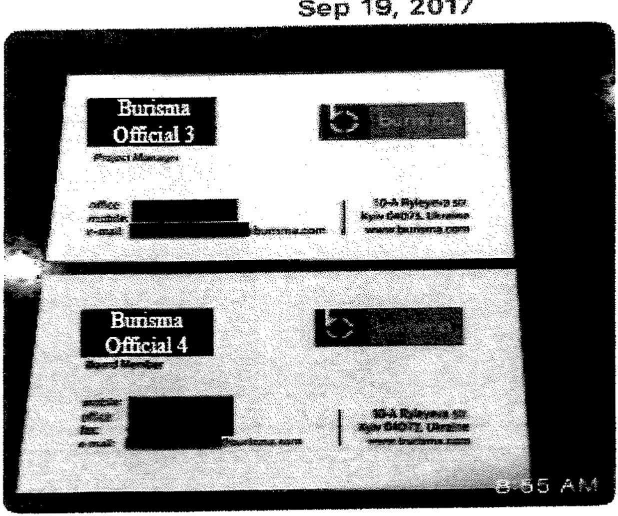
c. The Handler then messaged the Defendant, "Looks like the CEO or Owner might be [Burisma Official 1] or []. Either sound familiar?", to which the Defendant responded with the first name of Burisma Official 1. The Handler then asked the Defendant whether he was meeting with Burisma Official 1, to which the Defendant responded, "No. The guy that I send [sic.] you the business card."

d. On April 13, 2017, the Handler messaged the Defendant asking him, "U know who from Burisma will be in the meeting," to which

1 the Defendant responded, "Not yet Will know after we [sic.] I will get
2 the email."
3 e. Four days later, on April 17, 2017, Associate 1 sent
4 the Defendant and Burisma Official 2 an email introducing them to each
5 other.
6 f. That same day, Associate 1 sent another email to Burisma
7 Official 2 summarizing, in general terms, how a company could undertake
8 an IPO in the United States.
9 g. On or about April 27, 2017, Burisma Official 2 responded
10 to Associate 1's April 17, 2017, email. Burisma Official 2 thanked
11 Associate 1 for introducing him to the Defendant and promised to send
12 the Defendant and Associate 1 information about Burisma's desire to
13 buy an oil and gas company in the United States.
14 h. On or around May 11, 2017, Burisma Official 4, another
15 Burisma executive, emailed Associate 1 telling him that Burisma was
16 not interested in pursuing an IPO in the United States and that their
17 priority was acquiring a U.S.-based oil and gas company.
18 i. Seven days later, on or about May 18, 2017, Associate 1
19 forwarded Burisma Official 3's email to the Defendant.
20 j. On July 24, 2017, the Defendant messaged the Handler,
21 "Cutting a deal with Burisma Will update you soon bro" and "It's gonna
22 be a contract so we can review it first."
23 k. On September 16, 2017, Associate 2, the individual whom
24 the Defendant claimed in the 2020 1023 attended the first meeting the
25 Defendant had with Burisma executives in late 2015 or 2016, flew from
26 New York to Kiev, via London. Associate 2 remained in Ukraine until
27 September 23, 2017, when he returned to the United States through
28 London.

l. During the six (6) day period that Associate 2 was in Ukraine, he and the Defendant met with representatives from Burisma, including Burisma Official 3, the daughter of Burisma's owner Burisma Official 1, to discuss a cryptocurrency product. The meeting was in Russian, and on the drive back from Burisma's headquarters, the Defendant described to Associate 2 what had been discussed. The Defendant told Associate 2 that the Burisma representatives were not interested in the cryptocurrency product the Defendant and Associate 2 were selling and were instead trying to find an oil and gas company in the United States that Burisma could purchase. The Defendant did not describe to Associate 2 any discussion of Businessperson 1 or Public Official 1 during this meeting.

m. On September 19, 2017, the Defendant messaged the Handler photographs of business cards for Burisma Official 3, the



person the Defendant claimed he met at the first meeting in late 2015 or 2016 during the Obama-Biden Administration, and Burisma Official 4, the individual who had sent an email to Associate 1, which Associate 1 then forwarded to the Defendant, in May 2017, as described above.

1 n. After the September 2017 meeting, Associate 2 prepared
2 a document outlining steps that Burisma could take in order to acquire
3 a company in the United States and use it for an IPO. Associate 2 sent
4 this document to the Defendant on September 22, 2017.
5 o. Associate 2's trip to Kiev in September 2017 was the
6 first time he had left North America since 2011. Thus, he could not
7 have attended a meeting in Kiev, as the Defendant claimed, in late 2015
8 or 2016, during the Obama-Biden Administration. His trip to Ukraine
9 in September 2017 was more than seven months after Public Official 1
10 had left office and more than a year after the then-Ukrainian Prosecutor
11 General had been fired.
12 p. On January 23, 2018, Associate 2 flew from Los Angeles
13 to London. During the previous week, on January 16, 2018, the Defendant
14 messaged Associate 2 asking him, "Brother Send me the name of the place
15 in London please," to which Associate 2 replied, "Baglioni." On January
16 25, 2018, the Defendant attempted to call Associate 2. Associate 2
17 responded, "Downstairs getting breakfast," and the Defendant responded,
18 "Cool. See you in a few." Both the Defendant and Associate 2 were
19 staying at the Hotel Baglioni in London at that time. When Associate
20 2 was with the Defendant in London, the Defendant told Associate 2 that
21 he had received a call from the owner of Burisma, Burisma Official 1,
22 and that Burisma Official 1 was interested in doing business with them.
23 q. On January 26, 2018, Associate 2 flew from London to
24 Kiev, staying until January 30, 2018.
25 r. During that five (5) day time period, the Defendant and
26 Associate 2 traveled to Burisma's headquarters. Once there, they had
27 a brief meeting with Burisma Official 2, who told them that Burisma
28 was not interested in their cryptocurrency product. Burisma Official

2 spoke English during the meeting, and Associate 2 was able to participate. At no point during this meeting between the Defendant, Associate 2, and Burisma Official 2 did Burisma Official 2 tell the Defendant that Burisma had hired Businessperson 1 to "protect us, through his dad, from all kinds of problems."

32. As described above, all the contacts that the Defendant had with Burisma occurred no earlier than spring 2017, after the end of the Obama-Biden Administration. Notably, the Defendant was only introduced to Burisma Official 2, via email, on or about April 17, 2017. Therefore, the Defendant's claim that he had met with Burisma Official 2 in "late 2015 or 2016, during the Obama/Biden administration," was false because if the Defendant had met Burisma Official 2 then, he would not have needed Associate 1 to introduce him to Burisma Official 2 in April 2017, and Burisma Official 2 would not have thanked Associate 1 for introducing them in April 2017.

33. As to the second meeting, the one that supposedly happened in Vienna, contrary to what the Defendant told the Handler, Associate 1 did not meet with the Defendant and Burisma Official 1 at a café in Vienna around the time that Public Official 1 "made a public statement about [the then-Ukrainian Prosecutor General] being corrupt, and that he should be fired/removed from office," which occurred in December 2015. In fact, Associate 1 has never met or spoken with Burisma Official 1.

34. Further, the Defendant did not travel to Vienna "around the time [Public Official 1] made a public statement about [the then-Ukrainian Prosecutor General] being corrupt, and that he should be fired/removed from office," which occurred in December 2015.

1 35. When the Handler interviewed the Defendant on June 26, 2020,
2 the Defendant also falsely told the Handler that he had two phone calls
3 with Burisma Official 1, one in "2016/2017" shortly after the U.S.
4 election but before the end of the Obama-Biden Administration and a
5 second one in 2019. The following is what the Defendant told the
6 Handler about those two calls that was also memorialized in the 2020
7 1023:
8
9 Subsequent Telephone Calls Between CHS and [Burisma Official 1].
10
11 2016/2017 Telephone Call. Shortly after the 2016 US election
12 and during [Public Official 2] transition period, CHS
13 participated in a conference call with [Associate 1] and
14 [Burisma Official 1]. CHS inquired whether [Burisma Official
15 1] was happy with the US election results. [Burisma Official
16 1] replied that he was not happy [Public Official 2] won the
17 election. CHS asked [Burisma Official 1] **whether he was
18 concerned about Burisma's involvement with [Public Official
19 1 and Businessperson 1]. [Burisma Official 1] stated he
20 didn't want to pay the [Public Official 1 and Businessperson
21 1] and he was "pushed to pay" them.** (CHS explained the Russian
22 term [Burisma Official 1] used to explain the payments was
23 "poluchili" (transliterated by the CHS), which literally
24 translates to got it" or "received it", but is also used in
25 Russian-criminal-slang for being "forced or coerced to pay."
26 [Burisma Official 1] stated [the then-Ukrainian Prosecutor
27 General] had already been fired, and no investigation was
28 currently going on, **and that nobody would find out about his financial dealings with the [Public Official 1 and Businessperson 1]. CHS then stated, "I hope you have some back-up (proof) for your words (namely, that [Burisma Official 1] was 'forced' to pay [Public Official 1 and Businessperson 1]). [Burisma Official 1] replied he has many text messages and "recordings" that show that he was coerced to make such payments** (See below, subsequent CHS reporting on 6/29/2020). CHS told [Burisma Official 1] he should make certain that he should retain those recordings. [Burisma Official 1] asked whether it would make any (legal) difference whether he voluntarily made such payments, or if he was "forced" to make them.

[Burisma Official 1] then asked CHS whether CHS could provide any assistance in Ukraine (with the [] regime) if something

were to happen to [Burisma Official 1] in the future. CHS replied that CHS didn't want to get involved in any such matters.

[Note: See previous CHS report dated 3/1/2017 Serial 7, wherein CHS reported the foregoing, and stated the call took place during the week of 2/27/2017. At that time, CHS stated that [Burisma Official 1] briefly discussed [Businessperson 1], but the topic was not relevant to Burisma's interest in acquiring a US-based petroleum business for $50-$100 million. At this time CHS also reported aforementioned [Burisma Official 2] (alternate transliteration [Burisma Official 2]) was assigned by Burisma to manage the acquisition, and he was planning to travel to Washington, D.C. in March, 2017.

2019 Telephone call. After the aforementioned 2016 telephone call, CHS had no Interactions with [Burisma Official 1]/Burisma whatsoever, until 2019. In 2019, CHS met with [Associate 1] in London to discuss various business matters (which had nothing to do with [Burisma Official 1], Burisma, or the gas/oil industry; CHS noted that CHS's meeting with [Associate 1] took place at a "Russian coffee house near Knightsbridge Street located near Harrods department store," and that [Associate 1]'s fiancée lives in London). **At some point during this meeting, [Associate 1] advised CHS he was going to call [Burisma Official 1].** At this time, CHS understood [Burisma Official 1] was living somewhere in Europe (NFI). During the call, [Burisma Official 1] asked CHS and/or [Associate 1] if they read the recent news reports about the investigations into [Public Official 1 and Businessperson 1] and Burisma, and [Burisma Official 1] jokingly asked CHS if CHS was an "oracle" (due to CHS's prior advice that [Burisma Official 1] should not pay [Public Official 1 and Businessperson 1] and instead to hire an attorney to litigate the allegations concerning [the then-Ukrainian Prosecutor General]'s investigation). **CHS mentioned [Burisma Official 1] might have difficulty explaining suspicious wire transfers that may evidence any (illicit) payments to [Public Official 1 and Businessperson 1]. [Burisma Official 1] responded he did not send any funds directly to the "Big Guy" (which CHS understood was a reference to [Public Official 1]). CHS asked [Burisma Official 1] how many companies/bank accounts [Burisma Official 1] controls; [Burisma Official 1] responded it would take them (investigators) 10 years to find the records (i.e. illicit payments to [Public Official 1]).** CHS told [Burisma Official 1] if he ever needed help in the future and wanted to speak to somebody in the US government about that matter, that CHS could introduce him to someone.

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> Regarding the seemingly open and unsolicited admissions by [Burisma Official 2] and [Burisma Official 1] about the purpose for their retention of [Businessperson 1], and the "forced" payments [Burisma Official 1] made to [Public Official 1 and Businessperson 1], CHS explained it is very common for business men in post-Soviet countries to brag or show-off. Additionally, it is extremely common for businesses in Russia and Ukraine to make **"bribe" payments** to various government officials. CHS noted that in corporate budgets for other Russian and Ukrainian businesses which CHS has inspected in the past, CHS observed budget-line-items in Russian called "Podmazat" (transliterated by CHS), which literally translates to "oil, lubricate, or make things run smoothly," which companies routinely use to account for anticipated **bribe payments**. As such, given the pervasive necessity to **bribe government officials** in Ukraine and Russia, CHS did not perceive [Burisma Official 2]'s or [Burisma Official 1]'s statements to be unusual, self-serving, or pretextual. Additionally, regarding important business meetings, it is also common in Ukraine and Russia for persons to make covert recordings. However, CHS has only met [Burisma Official 1] in person on one occasion and has spoken to him only twice on the telephone; as such, CHS is not able to provide any further opinion as to the veracity of [Burisma Official 1]'s aforementioned statements.

(emphases added).

36. Associate 1 never spoke to Burisma Official 1 on the phone, or in person. Therefore, the Defendant's claim that Associate 1 called Burisma Official 1 in 2019 is false for that reason as well.

37. Moreover, at no point when the Defendant was messaging the Handler in May 2020 about Public Official 1 did he mention that he had had two purported meetings when Public Official 1 was in office in the United States where Burisma executives told him that they paid Businessperson 1 to "protect us, through his dad, from all kinds of problems," and later that they had specifically paid $5 million each to Public Official 1 and Businessperson 1 so that "[Businessperson 1] will take care of all those issues through his dad," referring to a

criminal investigation being conducted by the then-Ukrainian Prosecutor General into Burisma, and to "deal with" the then-Ukrainian Prosecutor General. Nor did he tell the Handler he had two subsequent phone calls where Burisma Official 1 told him that he had been forced to pay Public Official 1 and Businessperson 1 and that it would take investigators 10 years to find records of illicit payments to Public Official 1. This was despite the Defendant's stated interest in proving to the Handler that the bribe had occurred and his offer to go to Ukraine to "meet with the guys" to obtain incriminating recordings of Businessperson 1 telling Burisma officials that his father would "take care" of the then-Ukrainian Prosecutor General.

38. On June 29, 2020, the Defendant provided further supplemental information to the Handler concerning his allegations. These were memorialized in the 2020 1023 before it was finalized and consisted of the following:

> Regarding CHS's aforementioned reporting that [Burisma Official 1] said - "he has many text messages and 'recordings' that show he was coerced to make such payments ' - CHS clarified [Burisma Official 1] said he had a total of "17 recordings" involving [Public Official 1 and Businessperson 1]; two of the recordings included [Public Official 1], and the remaining 15 recordings only included [Businessperson 1]. CHS reiterated that, per [Burisma Official 1], these recordings evidence **[Burisma Official 1] was somehow coerced into paying [Public Official 1 and Businessperson 1] to ensure [the then-Ukraine Prosecutor General] was fired.** [Burisma Official 1] stated he has two "documents (which CHS understood to be wire transfer statements, bank records, etc.), that evidence some payment(s) to [Public Official 1 and Businessperson 1] were made, presumably in exchange for [the then-Ukrainian Prosecutor General]'s firing.
>
> Regarding aforementioned [Associate 1] (alternate spelling, [Associate 1]), who originally introduced CHS into this matter, [Associate 1] currently "works in some office for the administration of [] (NFI)", and also works for [], who

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> is the founder/CEO of cryptocurrency and blockchain technology business [].

(emphasis added)

39. After the Defendant made these reports, the FBI asked him for travel records, which he provided, in an attempt to determine whether the information he provided was accurate.

40. By August 2020, FBI Pittsburgh concluded that all reasonable steps had been completed regarding the Defendant's allegations and that their assessment, 58A-PG-3250958, should be closed. On August 12, 2020, FBI Pittsburgh was informed that the then-FBI Deputy Director and then-Principal Associate Deputy Attorney General of the United States concurred that it should be closed.

F. The Defendant was interviewed by FBI investigators in September 2023, and repeated some of his false claims, changed his story as to other of his claims, and promoted a new false narrative after meeting with Russian officials.

41. In July 2023, the FBI requested that the U.S. Attorney's Office for the District of Delaware assist the FBI in an investigation of allegations related to the 2020 1023. At that time, the United States Attorney's Office for the District of Delaware was handling an investigation and prosecution of Businessperson 1.

42. On August 11, 2023, the Attorney General appointed David C. Weiss, the United States Attorney for the District of Delaware, as Special Counsel. The Special Counsel was authorized to conduct the investigation and prosecution of Businessperson 1, as well as "any matters that arose from that investigation, may arise from the Special Counsel's investigation, or that are within the scope of 28 C.F.R. § 600.4(a)."

1 43. On August 29, 2023, FBI investigators spoke with the Handler
2 in reference to the 2020 1023. During that conversation, the Handler
3 indicated that he and the Defendant had reviewed the 2020 1023 following
4 its public release by members of Congress in July 2023, and the
5 Defendant reaffirmed the accuracy of the statements contained in it.
6 44. The Handler provided investigators with messages he had with
7 the Defendant, including the ones described above. Additionally, the
8 Handler identified and reviewed with the Defendant travel records
9 associated with both Associate 2 and the Defendant. The travel records
10 were inconsistent with what the Defendant had previously told the
11 Handler that was memorialized in the 2020 1023. The Defendant also
12 provided email communications with both Associate 2 and Burisma
13 personnel beginning in 2017 to the Handler, which the Handler reviewed
14 with the Defendant and shared with FBI investigators.
15 45. The Defendant was interviewed by FBI investigators on
16 September 27, 2023. At the start of the interview, the Defendant was
17 warned of his duty to tell the truth pursuant 18 U.S.C. § 1001.
18 46. The Defendant repeated his claim that his first meeting with
19 Burisma was much earlier than 2017. He further told investigators that
20 the first meeting was arranged after Associate 1 called him and said
21 that a company wanted to enter the U.S. market either through an IPO
22 or an acquisition. The Defendant repeated the claim that Burisma
23 Official 2 was at this meeting and possibly Burisma Official 4, based
24 on the Defendant's recent review of his messages with the Handler that
25 included an image of Burisma Official 4's business card, as described
26 above. The Defendant told investigators that, during this meeting,
27 Burisma Official 2 said something to the effect of "Did you see my
28 Board, I'm not going to be fucked," and that one member of the Board

was the son of Public Official 1. The Defendant told investigators that Burisma Official 2 said, "I am paying for familia," which the Defendant said was a reference to family or a last name. Later in the interview, the Defendant said he was 100 percent certain that Associate 1 attended the first meeting.

47. The Defendant also told investigators that while he had initially recalled two Burisma meetings, after reviewing Associate 2's travel records provided by the Handler, along with an email the Defendant found, the Defendant concluded that there were maybe two to five meetings. Later in the interview, the Defendant said he did recall that Associate 2 was present for two meetings.

48. The Defendant told investigators that he had a meeting with Burisma Official 1 at a coffee shop in a German speaking country, possibly Vienna as he had previously reported, after the 2016 election, so in late 2016. Then he told investigators he could not recall when it occurred, and then, when shown the emails he had with Associate 1 as described above, stated he thought it was after those, which would put it in 2017. Notably, these new and inconsistent statements arose only after the Defendant had reviewed messages, emails, and travel information that were in direct conflict with what he reported in the 2020 1023. The Defendant also told investigators that the meeting in the German speaking country, possibly Vienna, occurred because Associate 1 told the Defendant that Burisma Official 1 wanted to meet, and the Defendant agreed. Later in the interview, he told investigators that this meeting occurred before the then-Ukrainian Prosecutor General resigned, which was in early 2016.

49. The Defendant told investigators he did not recall talking to Burisma Official 1 ever again after the meeting in the German

1 speaking country and did not have any phone calls with Burisma Official
2 1 after this meeting.
3 50. The Defendant told investigators that he had asked the then-
4 Ukrainian President to arrange a meeting between himself and the then-
5 Ukrainian Prosecutor General to talk about Burisma. The Defendant told
6 investigators that this meeting occurred before the then-Ukrainian
7 Prosecutor General resigned, which was early 2016. The Defendant also
8 told investigators this meeting occurred before his meeting with
9 Burisma Official 1 in the coffee shop in a German speaking country.
10 The Defendant told investigators that after he met with the then-
11 Ukrainian Prosecutor General, he met with the then-Ukrainian President.
12 The Defendant did not provide any of this information to the Handler
13 in 2020.
14 51. The Defendant also shared a new story with investigators. He
15 wanted them to look into whether Businessperson 1 was recorded in a
16 hotel in Kiev called the Premier Palace. The Defendant told
17 investigators that the entire Premier Palace Hotel is "wired" and under
18 the control of the Russians. The Defendant claimed that Businessperson
19 1 went to the hotel many times and that he had seen video footage of
20 Businessperson 1 entering the Premier Palace Hotel.
21 52. The Defendant suggested that investigators check to see if
22 Businessperson 1 made telephone calls from the Premier Palace Hotel
23 since those calls would have been recorded by the Russians. The
24 Defendant claimed to have obtained this information a month earlier by
25 calling a high-level official in a foreign country. The Defendant also
26 claimed to have learned this information from four different Russian
27 officials.
28

53. The Defendant told investigators that the four different Russian officials are all top officials and two are the heads of the entities they represent. These Russians said that conversations with Ukrainians about ending the war will include the next U.S. election. The Defendant told investigators he is involved in negotiations over ending the war and had been for the previous four months. According to the Defendant, the Russians want Ukraine to assist in influencing the U.S. election, and the Defendant thinks the tapes of Businessperson 1 at the Premier Palace Hotel is all they have. The Defendant told investigators he wants them to ask Businessperson 1 how many times he visited and what he did while at the Premier Palace Hotel.

54. Businessperson 1 has never traveled to Ukraine. The few Burisma Board meetings that Businessperson 1 did attend were all outside of Ukraine.

55. At the conclusion of the interview, the Defendant was asked if he wanted to clarify or correct anything he had stated during this interview, and the Defendant said that he did not need to clarify or correct anything he had stated.

1 COUNT ONE

2 [18 U.S.C. § 1001: false statement to a government agent]

3 56. The Grand Jury re-alleges paragraphs 1 through 55 of this
4 Indictment here.

5 57. That on or about June 26, 2020, the defendant ALEXANDER
6 SMIRNOV, did willfully and knowingly make a materially false,
7 fictitious, and fraudulent statement and representation in a matter
8 within the jurisdiction of the executive branch of the Government of
9 the United States, to a special agent of the Federal Bureau of
10 Investigation at Los Angeles, California, in the Central District of
11 California, that is to say:

12 a. The Defendant's claims that "in late 2015/2016 during
13 the Obama/Biden Administration" he met with Burisma Official 2 and that
14 at that meeting Burisma Official 2 told him that Burisma hired
15 Businessperson 1 to "protect us, through his dad, from all kinds of
16 problems," were false, as he knew.

17 b. The Defendant's claims that he met with Burisma Official
18 1 "one or two months later," in Vienna, Austria, around the time
19 "[Public Official 1] made a public statement about [the then-Ukrainian
20 Prosecutor General] being corrupt, and that he should be fired/removed
21 from office," which occurred on December 9, 2015, and that at that
22 meeting Burisma Official 1 admitted that he had paid Businessperson 1
23 $5 million and Public Official 1 $5 million so that "[Businessperson
24 1] will take care of all those issues through his dad," referring to
25 the then-Ukrainian Prosecutor General's investigation into Burisma,
26 and to "deal with" the then-Ukrainian Prosecutor General, were false,
27 as the Defendant knew.

28

c. The Defendant's claims that he had a telephone call with Burisma Official 1 in 2016 or 2017 wherein Burisma Official 1 stated he did not want to pay Public Official 1 and Businessperson 1 and he was "pushed to pay" them; that nobody would find out about his financial dealings with Public Official 1 and Businessperson 1; and that Burisma Official 1 had many text messages and "recordings" that show that he was coerced to make such payments, were false, as he knew.

d. The Defendant's claims that in 2019 he was present when Associate 1 called Burisma Official 1 and Burisma Official 1 stated that he did not send any funds directly to the "Big Guy" (which the Defendant understood was a reference to Public Official 1) and that Burisma Official 1 stated it would take them (investigators) 10 years to find the records (i.e., illicit payments to Public Official 1), were false, as he knew.

58. The statements and representations were false because, as ALEXANDER SMIRNOV then and there knew:

a. The Defendant met with officials from Burisma for the first time in 2017, after the end of the Obama-Biden Administration. Thus, Public Official 1, then a private citizen, had no ability to "protect" Burisma from "all kinds of problems." And, there was no discussion of Public Official 1 or Businessperson 1 at this first meeting with Burisma.

b. The Defendant's second meeting with officials from Burisma also occurred in 2017, not at the end of 2015 when Public Official 1 made public statements critical of the Ukrainian Prosecutor General's Office. The second meeting also occurred *after* Public Official 1 left office and *after* the then-Ukrainian Prosecutor General had been fired in February 2016. Like the first meeting, the second

meeting the Defendant had with officials from Burisma occurred at a time when Public Official 1 no longer had the ability to influence U.S. policy. The Defendant also did not travel to Vienna, Austria in December 2015, as he claimed. And, there was no discussion of Public Official 1 or Businessperson 1 at this second meeting.

c. As to phone calls with Burisma Official 1 in 2016 or 2017 and then in 2019, in a subsequent interview with law enforcement in 2023, the Defendant told investigators he had never spoken to Burisma Official 1 on the phone after meeting with Burisma Official 1 in a German speaking country in 2016, and that his last contact with Burisma Official 1 was that meeting in early 2016.

d. Further, Associate 1 never spoke to Burisma Official 1 on the phone or in person, in 2019 or at any other time.

In violation of Title 18, United States Code, Section 1001.

COUNT TWO

[18 U.S.C. § 1519: falsification of records in federal investigation]

1. The Grand Jury re-alleges paragraphs 1 through 55 of this Indictment here.

2. Between on or about June 26 and 30, 2020, in the Central District of California, the defendant, ALEXANDER SMIRNOV, did knowingly cause the making of a false entry in an FBI Form 1023, a record and document, with the intent to impede, obstruct, and influence a matter that the Defendant knew and contemplated was within the jurisdiction of the United States Department of Justice, a department and agency of the United States, in violation of Title 18, United States Code, Section 1519, and Title 18, United States Code, Section 2.

A TRUE BILL

/S/

Foreperson

DAVID C. WEISS
Special Counsel

LEO J. WISE
Principal Senior Assistant Special Counsel

DEREK E. HINES
Senior Assistant Special Counsel

SEAN F. MULRYNE
CHRISTOPHER M. RIGALI
Assistant Special Counsels

United States Department of Justice

Appendix G:
Indictment
United States v. Alexander Smirnov,
2:24-cr-00702-ODW
(C.D. Cal. Nov. 21, 2024)

FILED
CLERK, U.S. DISTRICT COURT
11/21/2024
CENTRAL DISTRICT OF CALIFORNIA
BY: ASI DEPUTY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 2024 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. ALEXANDER SMIRNOV, Defendant.	No. 2:24-cr-00702-HDV I N D I C T M E N T [26 U.S.C. § 7201: evasion of assessment; 26 U.S.C. § 7206: false or fraudulent tax return]

The Grand Jury charges:

INTRODUCTORY ALLEGATIONS

At times relevant to this Indictment:

1. Defendant ALEXANDER SMIRNOV was a resident of Los Angeles, California and a self-described "consultant."

2. Defendant was born in the U.S.S.R. and was naturalized as a U.S. citizen on July 21, 2015.

3. Defendant received more than two million dollars in income from multiple sources in 2020, 2021 and 2022. He used these funds to pay personal expenses for himself and his Domestic Partner, a woman that he has referred to as his girlfriend and at other times his wife,

1 although they are not married. These expenditures included a $1.4
2 million Las Vegas condominium, a Bentley, and hundreds of thousands of
3 dollars of clothes, jewelry and accessories for himself and Domestic
4 Partner purchased at high-end retailers in Los Angeles and Las Vegas.
5 Defendant directed the payors to wire the money to

6 a. a Bank of America (hereafter "BoA") account ending in 3928
7 held in the name of Avalon Group Inc. (hereafter "Avalon
8 Account"), which the defendant controlled;

9 b. a Wells Fargo account ending in 1356 held in the name of
10 Domestic Partner, ("Domestic Partner Account") which the
11 defendant controlled and into which the Defendant also
12 transferred approximately $1.8 million from the Avalon
13 Account; and

14 c. a Wells Fargo account ending in 1299 held in the name of
15 Goldman Investments Group, which the defendant controlled
16 and into which he also transferred $150,000 from the Avalon
17 Account.

18 4. Avalon Group Inc. ("Avalon") is the Defendant's alter ego.
19 Avalon was incorporated in the State of Delaware on January 22, 2020.
20 The Defendant identified himself in a State of Delaware Annual
21 Franchise Tax Report as the CEO of Avalon and its only officer and
22 director. According to bank account applications, the Defendant
23 identified himself as the president of Avalon. On a business credit
24 card application dated June 18, 2022, Smirnov listed $60,000 in total
25 annual income and $250,000 in gross business income, identified
26 investment income as the source of his income, and listed his current
27 position as real estate. Despite having an IRS tax filing requirement,
28 Avalon never filed a U.S. Corporation Income Tax Return on Form 1120.

I. Sources of Income

A. Company 1

5. In 2020, 2021 and 2022, Defendant received into the Avalon Account, $1,534,000 from Company 1, including the payments listed below.

DATE	PAYOR	AMOUNT
9/22/2020	Wire - Company 1	$600,000
12/14/2020	Wire - Company 1	$750,000
8/31/2021	Wire - Company 1	$60,000
9/29/2021	Wire - Company 1	$60,000
10/27/2021	Wire - Company 1	$64,000
TOTAL		**$1,534,000**

B. BCG, LLC and Payor 1

6. In 2021 and 2022, Defendant received into the Avalon Account, $800,000 from Payor 1 and BCG, LLC ("BCG"), an entity owned and controlled by Payor 1, including the payments listed below.

DATE	PAYOR	AMOUNT
12/1/2021	Wire - BCG	$500,000
3/30/2022	Wire - Payor 1	$250,000
8/29/2022	Wire - BCG	$50,000
	TOTAL	**$800,000**

II. Transfers to the Domestic Partner Wells Fargo Account

7. In 2020, 2021 and 2022, the Defendant transferred more than $1.8 million from the Avalon Account to the Domestic Partner Account. Specifically,

a. The Defendant wired the following amounts on the dates listed below:

DATE	AMOUNT
12/21/2020	$740,000
12/6/2022	$45,000

b. On the following dates, the Defendant purchased BoA cashiers' checks in the amounts listed below, which were drawn on the Avalon Account and then deposited into the Domestic Partner Account.

DATE	AMOUNT
3/6/2020	$150,000
6/25/2020	$99,500
10/13/2020	$599,000
7/29/2021	$14,500
8/31/2021	$50,000
9/2/2021	$50,000
9/7/2021	$60,000
10/4/2021	$59,500
11/5/2021	$60,000
11/22/2021	$60,000
11/29/2021	$45,000
12/6/2021	$30,000
2/24/2022	$50,000
3/11/2022	$150,000
3/23/2022	$150,000
4/5/2022	$50,000
5/2/2022	$150,000
11/25/2022	$45,000
TOTAL	**$1,872,500**

8. The Defendant co-mingled these funds with other funds in the Domestic Partner Account.

III. Defendant Used His Unreported Income to Pay His and Domestic Partner's Personal Expenses

9. The Defendant used unreported income he received in the Avalon Account and the Domestic Partner Account to pay various personal expenses for the Defendant and for Domestic Partner.

10. The largest personal expense was the purchase of a million dollar condominium where he and Domestic Partner lived in Las Vegas in 2022.

11. The second largest single expense occurred on October 11, 2022, when the Defendant leased a Bentley using $122,360 in funds from the Domestic Partner Account. The Defendant signed the check made out to Bentley Financial Services for the lease:

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16-24/1220 4588

10/11/22 Date

Pay to the Order of Bentley Financial services $ 122360 14/100
one hundred twenty two thousand three hundred sixty 14/100 Dollars

Photo Safe Deposit®

WELLS FARGO
Wells Fargo Bank, N.A.
California
wellsfargo.com

RECEIVED 00999401
OCT 17 '22 PM 3:40

For Bentley

MP

12. From 2021 to 2024, more than $400,000 in personal credit card debt on the Defendant's Citi credit card was paid off from funds from the Domestic Partner Account.

IV. False and Fictitious Tax Returns

13. In order to conceal the millions of dollars he received in income in 2020, 2021 and 2022, the Defendant created and filed false Forms 1040, U.S. Individual Income Tax Returns, for himself and in Domestic Partner's name that included false and fictitious income and expenses. The Defendant used a professional tax return preparer to create these returns. The professional tax return preparer, who worked in Los Angeles, used a tax preparation software to create returns for the Defendant. The Defendant provided the professional tax return preparer with the income and expense figures included in the returns

filed on his own behalf and the ones filed in Domestic Partner's name. The Defendant did not provide any documents that substantiated any of these figures. As a result, the professional tax return preparer refused to sign the returns. The Defendant told the professional tax return preparer that he would not disclose how he earned any income and that the professional tax return preparer should not inquire about how he earned his income. The Defendant also instructed the tax return preparer to delete any emails or messages with the Defendant, which the professional tax return preparer did. The professional tax return preparer advised the Defendant that the Schedule C to an U.S. Individual Income Tax Return was the most audited part of a tax return because it was often used to cheat on taxes and that, as a result, the Defendant should collect and maintain records that supported all the income and expenses he instructed the professional tax return preparer to include on Schedule C. The Defendant provided income and expense numbers to the professional tax return preparer both for his Form 1040 and the Form 1040 that he submitted in Domestic Partner's name. The professional tax return preparer never spoke to or interacted with Domestic Partner in 2020, 2021 or 2022.

14. In addition, on or about March 19, 2021, the Defendant prepared and filed a false Form 1120-S, U.S. Income Tax Return for an S Corporation, for Goldman Investments Group in 2020. This return included false and fictious income and expenses for Goldman Investments Group. The Defendant did not use the services of the professional tax return preparer in the creation of this return.

A. Alexander Smirnov Forms 1040

15. Defendant filed false Forms 1040, U.S. Individual Income Tax Returns, for himself where he falsely claimed on the Schedule C attached to each return that he received:

a. $40,000, in gross receipts for "consulting" in 2020,

a. $40,000 in gross receipts for "consulting" in 2021, and

b. $50,000 in gross receipts for "consulting" in 2022.

16. The Defendant did not pay taxes on this fictitious income. Instead, on those Schedules C, he claimed fictitious expenses in the following amounts in the following tax years:

a. In 2020, $31,980;

b. In 2021, $39,878; and

c. In 2022, $26,768.

17. As a result, the Defendant falsely self-assessed owing the U.S. Treasury:

a. In 2020, only $1,133 in taxes; Defendant further reduced his tax obligations by falsely claimed a $600 COVID-19 pandemic rebate for persons who earned $75,000 or less, and $538 in earned income credit(EIC) which he falsely claimed entitled him to a refund of $5;

b. In 2021, $0 in taxes; Defendant again further reduced his tax obligations by falsely claiming a $1,400 COVID-19 pandemic rebate for persons who earned less than $80,000, and $19 in EIC, which he then claimed entitled him to a refund in the amount of $1,419; and

c. In 2022, only $4,136 in taxes.

B. Domestic Partner Forms 1040

18. To further conceal the millions of dollars in income he received and used to pay his and Domestic Partner's personal expenses, including income deposited into the Domestic Partner Account from which his personal expenses were paid, Defendant also prepared and filed false Forms 1040 in the name of Domestic Partner in 2020, 2021 and 2022 where he falsely claimed on the Schedule C attached to each return that Domestic Partner received:

d. $40,000, in gross receipts for "consulting" in 2020,

e. $40,000 in gross receipts for "consulting" in 2021, and

f. $60,000 in gross receipts for "consulting" in 2022.

19. Like his own Form 1040, Defendant claimed on those Schedules C similar fictitious expenses in the following amounts in the following tax years:

a. In 2020, $31,314;

b. In 2021, $36,689; and

c. In 2022, $31,553.

20. As a result, the Defendant falsely assessed that Domestic Partner owed the U.S. Treasury:

a. In 2020, $1,228 in taxes; the Defendant further reduced any tax obligations by falsely claiming that Domestic Partner was entitled to a $538 EIC which he claimed resulted in Domestic Partner owing the U.S. Treasury only $690;

b. In 2021, $468 in taxes; the Defendant again further reduced any tax obligations by falsely claiming that Domestic Partner was entitled to $470 EIC, which he then claimed entitled her to a refund in the amount of $2; and

c. In 2022, $5,933 in taxes.

C. Goldman Investments Group Forms 1120

21. To further conceal the millions of dollars in income he received into a bank account held in the name of Goldman Investments Group, the Defendant filed a Form 1120-S, U.S. Income Tax Return for an S Corporation, in the name of Goldman Investments Group in 2021. The Defendant falsely reported that Goldman had $89,282 in gross sales and $92,300 in total deductions.

D. Defendant Signed the False Returns

22. In 2021, the Defendant signed his own false return and the false returns he prepared in the name of Domestic Partner and Goldman Investments Group for tax year 2020.

a. 2020 Alexander Smirnov Form 1040

Sign Here
Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.) ►
[signature]	04/21/2021	CONSULTING	
Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.) ►
Phone no.	Email address		

b. 2020 Domestic Partner Form 1040

Sign Here
Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.) ►
[signature]	04/21/2021	CONSULTING	
Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.) ►
Phone no.	Email address		

c. 2020 Goldman Investments Group Form 1120

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Signature of officer	Date	Title	May the IRS discuss this return with the preparer shown below? See instructions.
[signature]	03/13/2021	ceo	[X] Yes [ ] No

Paid

Print/Type preparer's name	Preparer's signature	Date	Check [ ] if self-employed	PTIN
SELF PREPARED	SELF PREPARED			

23. In 2022, the Defendant signed his own false Form 1040 and signed the false Form 1040 that he prepared for Domestic Partner for tax year 2021:

a. 2021 Alexander Smirnov Form 1040

Sign Here

Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
[signature]	03/23/22	CONSULTING	
Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
Phone no.	Email address		

b. 2021 Domestic Partner Form 1040

Sign Here

Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
[signature]	03/23/22	CONSULTING	
Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
Phone no.	Email address		

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1 24. In 2023, the Defendant prepared a false and fictious Form
2 1040 for Domestic Partner and while he signed his own false and
3 fictitious Form 1040 his signature did not appear on Domestic Partner's
4 return for tax year 2022:

5 a. 2022 Alexander Smirnov Form 1040

Sign Here	Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.			
Joint return? See instructions. Keep a copy for your records.	Your signature	Date 04/14/23	Your occupation CONSULTING	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
	Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
	Phone no.	Email address		

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11 b. 2022 Domestic Partner Form 1040

Sign Here	Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.			
Joint return? See instructions. Keep a copy for your records.	Your signature	Date 04/14/23	Your occupation CONSULTING	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
	Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
	Phone no.	Email address		

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COUNT ONE

[26 U.S.C. § 7201: 2020 tax evasion]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On February 10, 2020, the Defendant caused the opening of the Avalon Bank Account, in the name of Avalon Group Inc., which he identified on the account opening document as an "S Corporation." An individual (hereafter "Bookkeeper") was identified as "president" of Avalon and the Defendant was identified as a "signer" on the account opening document. Bookkeeper agreed to be listed on the account because the Defendant had told her he wanted to use her services as a bookkeeper for Avalon's business and having signatory authority on the account meant she could access its statements for bookkeeping purposes. Bookkeeper never accessed any of the funds in the Avalon Account. Later the Defendant told Bookkeeper that he didn't need her services because Avalon wasn't operating. On July 21, 2021, the Defendant submitted a revised signature card to Bank of America that removed Bookkeeper, making him the sole signatory on the account.

3. On August 5, 2020, the Defendant submitted to Wells Fargo an "Addendum to Certificate of Authority," for the Goldman Investments Group account ending in 1299, adding himself as an authorized signer. The Defendant had previously, on June 27, 2018, caused Domestic Partner's adult son to open the Goldman Investments Group account ending in 1299 at Wells Fargo.

4. On August 24, 2020, the Defendant entered into a stock purchase agreement with Company 1. The defendant signed the stock purchase agreement on behalf of "Avalon Group Inc., a Delaware corporation" as its "President" and "Authorized Officer." Pursuant

to that agreement, Company 1 purchased 51% of Avalon's common stock for a cash payment of $1,350,000 "at Closing," and 1,500,000 shares of Company 1 "after closing."

5. The Defendant never delivered to Company 1 any stock certificates for Avalon because it was his alter ego.

6. In order to cause Company 1 to purchase 51% of Avalon's common stock, the Defendant represented that Avalon owned valuable intellectual property. Specifically, in the stock purchase agreement, the Defendant represented that "Avalon has all rights, without encumbrance, to the Best Finex System and Ai Trading Algorithms." The Defendant never provided Company 1 with access to the "Best Finex System and Ai Trading Algorithms."

7. Further, in that agreement, the Defendant represented that:

a. "Avalon has provided to Company 1 financial statements for the year ended December 31, 2019 (collectively, the "Financial Statements")." The Defendant did not, in fact, provide any financial statements for Avalon to Company 1 because Avalon had none, as it was the Defendant's alter ego.

b. Avalon has "timely filed all tax returns and reports (including information returns and reports) as required by law." In fact, the Defendant had never filed tax returns on behalf of Avalon Group Inc. because it was his alter ego.

c. "No employee, officer, director or shareholder of Avalon or member of his or her immediate family (together, "Related Parties") is indebted to Avalon, nor is Avalon indebted (or committed to make loans or extend or guarantee credit) to the Related Parties in the aggregate in excess of $10,000." Thus, the money that the

1 Defendant took from Avalon's BoA account ending in 3928 was not the
2 repayment of a loan from him to Avalon.
3 d. "Avalon has furnished to Company 1 true and complete
4 copies of … (b) the minute books of Avalon and (c) the stock transfer
5 books of Avalon." The Defendant did not, in fact, provide Company 1
6 with the minute books of Avalon or the stock transfer books of Avalon
7 because neither existed since it was his alter ego.
8 8. On September 22, 2020, Company 1 wired the Defendant
9 $600,000 and on December 14, 2020, Company 1 wired the Defendant
10 $750,000, for a total of $1.35 million, the amount contained in the
11 stock purchase agreement. Both wires were made into the Avalon
12 Account at BoA ending in 3928.
13 9. When the Avalon Account was opened on February 10, 2020,
14 $100 was deposited into it. On July 9, 2024, the balance in the
15 Avalon Account was $31.12. The next transaction in the account was
16 when Company 1 wired $600,000 into the account on September 22, 2020,
17 pursuant to the stock purchase agreement. The Defendant then paid
18 various personal expenses totaling $617 out of the Avalon Account.
19 10. On October 13, 2020, less than 30 days after he received
20 the $600,000 payment from Company 1, the Defendant withdrew $599,000
21 and purchased a cashier's check in the same amount, which was then
22 deposited in Domestic Partner Account. Various personal expenses
23 were then paid out of the Wells Fargo account for the Defendant's and
24 Domestic Partner's benefit including property taxes and homeowner's
25 association fees for their home in California at the time, utilities
26 for that home, healthcare costs, personal credit cards and other
27 expenses. Similarly, on December 21, 2020, less than one week after
28 the Defendant received a $750,000 wire from Company 1 into the Avalon

1 Account, he wired $740,000 to the Domestic Partner Account. After
2 December 21, 2020, personal expenses were paid out of the Domestic
3 Partner Account for the benefit of the Defendant and Domestic
4 Partner.

5 The Charge

6 11. From on or about January 1, 2020, through on or about April
7 21, 2021, in the Central District of California and elsewhere, the
8 Defendant ALEXANDER SMIRNOV, willfully attempted to evade and defeat
9 income tax due and owing by him to the United States of America, for
10 the calendar year 2020, by committing the following affirmative acts
11 among others:

12 a. On March 13, 2021, the Defendant prepared and caused
13 to be prepared, and signed, a false and fraudulent U.S. Income Tax
14 Return for an S Corporation, Form 1120-S, for Goldman Investments
15 Group, which was submitted to the Internal Revenue Service.

16 b. On April 21, 2021, the Defendant prepared and caused
17 to be prepared, and signed, a false and fraudulent U.S. Individual
18 Income Tax Return, Form 1040, for himself, which was submitted to the
19 Internal Revenue Service.

20 c. On April 21, 2021, the Defendant prepared and caused
21 to be prepared, and signed, a false and fraudulent U.S. Individual
22 Income Tax Return, Form 1040, for Domestic Partner, which was
23 submitted to the Internal Revenue Service.

24 In violation of Title 26, United States Code, Section 7201.

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COUNT TWO

[26 U.S.C. § 7206: Smirnov false 2020 1040]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On or about April 21, 2021, in the Central District of California, and elsewhere, the Defendant ALEXANDER SMIRNOV willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a Form 1040, U.S. Individual Income Tax Return, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. Specifically, among other items,

a. "total income," in the amount of $8,020 at line 9;

b. "Earned Income Credit" in the amount of $538 at line 27; and

c. "Recovery rebate credit," in the amount of $600 at line 30.

In violation of Title 26, United States Code, Section 7206(1).

COUNT THREE

[26 U.S.C. § 7206: Domestic Partner false 2020 1040]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On or about April 21, 2021, in the Central District of California, and elsewhere, the Defendant ALEXANDER SMIRNOV willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a U.S. Individual Income Tax Return, on Form 1040, in the name of Domestic Partner, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. Specifically, among other items:

a. "total income," in the amount of $8,686 at line 9; and

b. "earned income credit," in the amount of $538 on line 27.

3. The return also contained the Defendant's signature, rather than Domestic Partner's:

a. 2020 Alexander Smirnov Form 1040

Sign Here

Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
[signature]	04/21/2021	CONSULTING	
Spouse's signature. If a joint return, **both** must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
Phone no.	Email address		

b. 2020 Domestic Partner Form 1040

Sign Here

Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
[signature]	04/21/2021	CONSULTING	
Spouse's signature. If a joint return, **both** must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
Phone no.	Email address		

In violation of Title 26, United States Code, Section 7206(1).

COUNT FOUR

[26 U.S.C. § 7206: Goldman Investments Group's false 2020 1120-S]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On or about March 13, 2021, in the Central District of California, and elsewhere, the Defendant ALEXANDER SMIRNOV willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a U.S. Income Tax Return for an S Corporation, on Form 1120-S, in the name of Goldman Investments Group, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. Specifically, among other items:

a. "gross receipts or sales," in the amount of $89,282 on line 1a; and

b. "Total deductions," in the amount of $92,300 on line 20.

3. The return also contained the Defendant's signature:

a. 2020 Alexander Smirnov Form 1040

Sign Here

Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
[signature]	04/21/2021	CONSULTING	
Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
Phone no.	Email address		

b. 2020 Goldman Investments Group Form 1120

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Signature of officer	Date	Title	May the IRS discuss this return with the preparer shown below? See instructions.
[signature]	03/13/2021	CEO	[X] Yes [ ] No

Paid	Print/Type preparer's name	Preparer's signature	Date	Check [ ] if self-employed	PTIN
	SELF PREPARED	SELF PREPARED			

In violation of Title 26, United States Code, Section 7206(1).

COUNT FIVE

[26 U.S.C. § 7201: 2021 tax evasion]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On September 27, 2021, the Defendant submitted a "Business Signature Card and Substitute Form W-9" to BoA for the Avalon Account ending in 3928 where he identified himself as "president" of Avalon.

3. On August 31, 2021, the Defendant received in the Avalon Account a $60,000 wire from Company 1.

4. On September 7, 2021, the Defendant purchased a BoA cashiers' check in the amount of $60,000 drawn on the Avalon Account, which was deposited into the Domestic Partner Account. These funds were co-mingled with other funds in the Domestic Partner Account and used to pay the Defendant's and Domestic Partner's personal expenses.

5. On September 29, 2021, the Defendant received in the Avalon Account a $60,000 wire from Company 1.

6. On October 4, 2021, the Defendant purchased a BoA cashiers' check in the amount of $59,500 drawn on the Avalon Account, which was deposited into the Domestic Partner Account. These funds were co-mingled with other funds in the Domestic Partner Account and used to pay the Defendant's and Domestic Partner's personal expenses.

7. On October 27, 2021, the Defendant received in the Avalon Account a $64,000 wire from Company 1.

8. On November 5, 2021, the Defendant purchased a BoA cashiers' check in the amount of $60,000 drawn on the Avalon Account, which was deposited into the Domestic Partner Account. These funds were co-mingled with other funds in the Domestic Partner Account and used to pay the Defendant's and Domestic Partner's personal expenses.

1 9. The Defendant caused Company 1 to make these payments--
2 $60,000 on August 31, 2021, $60,000 on September 29, 2021, and
3 $64,000 on October 27, 2021--on the representation that he would use
4 them to pay marketing expenses associated with Avalon's intellectual
5 property. The Defendant did not use these funds to pay marketing
6 expenses associated with Avalon's intellectual property. Instead,
7 the Defendant used these funds to pay personal expenses for himself
8 and Domestic Partner.
9 10. On December 1, 2021, BCG LLC wired the Defendant $500,000
10 into the Avalon Account. The Defendant used the funds from BCG LLC
11 to pay personal expenses for himself and Domestic Partner.
12 11. On the following dates, the Defendant purchased BoA
13 cashiers' checks in the amounts listed below, which were drawn on the
14 Avalon Account and then deposited into the Domestic Partner Account.
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DATE	AMOUNT
2/24/2022	$50,000
3/11/2022	$150,000
3/23/2022	$150,000
TOTAL	**$350,000**

19 These funds were co-mingled with other funds in the Domestic Partner
20 Account and used to pay the Defendant's and Domestic Partner's
21 personal expenses.
22 <u>The Charge</u>
23 12. From on or about January 1, 2021, through on or about March
24 23, 2022, in the Central District of California and elsewhere, the
25 Defendant ALEXANDER SMIRNOV, willfully attempted to evade and defeat
26 income tax due and owing by him to the United States of America, for
27 the calendar year 2021, by committing the following affirmative acts
28 among others:

1 a. On March 23, 2022, the Defendant prepared and caused
2 to be prepared, and signed, a false and fraudulent U.S. Individual
3 Income Tax Return, Form 1040, for himself, which was submitted to the
4 Internal Revenue Service.

5 b. On March 23, 2022, the Defendant prepared and caused
6 to be prepared, and signed, a false and fraudulent U.S. Individual
7 Income Tax Return, Form 1040, for Domestic Partner, which was
8 submitted to the Internal Revenue Service.

9 In violation of Title 26, United States Code, Section 7201.

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COUNT SIX

[26 U.S.C. § 7206: Smirnov false 2021 1040]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On or about March 23, 2022, in the Central District of California, and elsewhere, the Defendant ALEXANDER SMIRNOV willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a U.S. Individual Income Tax Return, on Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. Specifically, among other items:

a. "total income," in the amount of $122 at line 9;

b. "Earned Income Credit in the amount of $19 at line 27a; and

c. "Recovery rebate credit," in the amount of $1,400 at line 30.

In violation of Title 26, United States Code, Section 7206(1).

COUNT SEVEN

[26 U.S.C. § 7206: Domestic Partner false 2021 1040]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On or about March 23, 2022, in the Central District of California, and elsewhere, the Defendant ALEXANDER SMIRNOV willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a U.S. Individual Income Tax Return, on Form 1040, in the name of Domestic Partner, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. Specifically,

a. "total income," in the amount of $3,311 at line 9; and

b. "Earned income credit" in the amount of $470 at line 27.

3. The return also contained the Defendant's signature, rather than Domestic Partner's:

a. 2021 Alexander Smirnov Form 1040

Sign Here

Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
[signature]	03/23/22	CONSULTING	
Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
Phone no.	Email address		

b. 2021 Domestic Partner Form 1040

Sign Here

Joint return? See instructions. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	If the IRS sent you an Identity Protection PIN, enter it here (see inst.)
[signature]	03/23/22	CONSULTING	
Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)
Phone no.	Email address		

In violation of Title 26, United States Code, Section 7206(1).

COUNT EIGHT

[26 U.S.C. § 7201: 2022 tax evasion]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On March 30, 2022, the Defendant received in the Avalon Account a $250,000 wire from Payor 1.

3. On August 29, 2022, the Defendant received in the Avalon Account a $50,000 wire from BCG LLC, an entity owned and controlled by Payor 1.

4. Defendant told Payor 1, that the money Payor 1 was wiring to the Avalon Account was to pay marketing, software developers, and payroll in connection with a business venture Payor 1 had with the Defendant. The Defendant did not use the funds for that purpose and instead used Payor 1's funds to pay various personal expenses of the Defendant and Domestic Partner.

5. On the following dates, the Defendant purchased BoA cashiers' checks in the amounts listed below, which were drawn on the Avalon Account and then deposited into the Domestic Partner Account:

DATE	AMOUNT
4/5/2022	$50,000
4/18/2022	$150,000
5/2/2022	$50,000
10/18/2022	$40,000
11/25/2022	$45,000
12/6/2022	$45,000
TOTAL	**$380,000**

6. On December 6, 2022, the Defendant wired $45,000 from the Avalon Account to the Domestic Partner Account.

7. The funds the Defendant transferred to the Domestic Partner Account were co-mingled with funds in that account and used to pay the Defendant's and Domestic Partner's personal expenses.

The Charge

8. From on or about January 1, 2022, through on or about April 14, 2023, in the Central District of California and elsewhere, the Defendant ALEXANDER SMIRNOV, willfully attempted to evade and defeat income tax due and owing by him to the United States of America, for the calendar year 2022, by committing the following affirmative acts among others:

a. On April 14, 2023, the Defendant prepared and caused to be prepared, and signed, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, for himself, which was submitted to the Internal Revenue Service.

b. On April 14, 2023, the Defendant prepared and caused to be prepared, and signed, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, for Domestic Partner, which was submitted to the Internal Revenue Service.

In violation of Title 26, United States Code, Section 7201.

COUNT NINE

[26 U.S.C. § 7206: Smirnov false 2022 1040]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On or about April 14, 2023, in the Central District of California, and elsewhere, the Defendant ALEXANDER SMIRNOV willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a U.S. Individual Income Tax Return, on Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. Specifically, among other items, "total income," in the amount of $23,232 at line 9.

In violation of Title 26, United States Code, Section 7206(1).

COUNT TEN

[26 U.S.C. § 7206: Domestic Partner false 2022 1040]

1. The Grand Jury re-alleges paragraphs 1 through 20 of the Introductory Allegations in this Indictment here.

2. On or about April 14, 2023, in the Central District of California, and elsewhere, the Defendant ALEXANDER SMIRNOV willfully made and subscribed and filed and caused to be filed with the Internal Revenue Service, a U.S. Individual Income Tax Return, on Form 1040, in the name of Domestic Partner, which was verified by a written declaration that it was made under the penalties of perjury and which Defendant did not believe to be true and correct as to every material matter. Specifically, among other items, "total income," in the amount of $28,447 at line 9

In violation of Title 26, United States Code, Section 7206(1).

A TRUE BILL

/S/
Foreperson

DAVID C. WEISS
Special Counsel

LEO J. WISE
Principal Senior Assistant Special Counsel

DEREK E. HINES
Senior Assistant Special Counsel

United States Department of Justice

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January 13, 2025

VIA E-MAIL

The Honorable Merrick Garland
Attorney General of the United States
United States Department of Justice
c/o Brad Weinsheimer
Associate Deputy Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Final Report by Special Counsel David C. Weiss

Dear Attorney General Garland:

We write on behalf of our client, Robert Hunter Biden, in advance of any release of Special Counsel David Weiss's final report.

Pursuant to 28 C.F.R. § 600.8(c), Special Counsels "shall provide" you, the Attorney General, with "a confidential report" at the conclusion of their work. Recent media reports indicate that Special Counsel Weiss is planning to do so soon. *See* Brooke Singman et al., *Special Counsel Weiss expected to release Hunter Biden report as soon as next week*, FOX NEWS (Jan. 9, 2025). It is then up to you to decide whether, pursuant to 28 C.F.R. § 600.9(c), to further disclose the confidential report to the American public. Many legal commentators have remarked about the incongruity of this reporting process as against normal Justice Department procedures, which do not disclose such information. *See, e.g.*, Dick Thornburgh et al., Prepared Statement Regarding Attorney General's Special Counsel Regulations, Comm. on the Judiciary, 106th Cong., 1st Sess., H.R. No. 2083 (Sept. 15, 1999).

Nevertheless, you likely are aware of the arguments we have made about the initiation and conduct of the prosecutions against our client. We have endeavored to compile these in our own summary report which, as a matter of fairness and completeness, we respectfully request be attached to any disclosure you make of Special Counsel Weiss's final submission. (Attached hereto.)

Sincerely,

Abbe David Lowell
Counsel for Robert Hunter Biden