

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

**HERITAGE FOUNDATION, &
MIKE HOWELL,**

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

JOSEPH R. BIDEN,

Defendant-Intervenor.

Case No. 1:24-cv-00645 (DLF)

**PLAINTIFFS' OPPOSITION TO INTERVENOR'S MOTION FOR PRELIMINARY
INJUNCTION
(Hearing Requested)¹**

¹ Plaintiffs request a live evidentiary hearing to cross-examine former President Joseph R. Biden, Jr. about the privacy interests his counsel allege.

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INTRODUCTION

Former President Joseph R. Biden cannot have his cake and eat it, too. He has intervened at the eleventh hour in a case that has been ongoing for nearly two years, only once the parties came to the precipice of settling. He claims he has a privacy interest in the source materials for a book that made him many millions of dollars and fueled his run to the White House. The former President has no issue selling the Nation's secrets and previously private personal information for massive financial profit and electoral gain, but then turns around and asks the Court to countenance denying the American People access to records going directly to covering up the constitutional crisis brought on by President Biden's use of the autopen in the wake of his apparently failing capacity to govern. Indeed, President Biden's intervention itself is part of a continued strident denial. Its goal is to continue to conceal any evidence showing: (1) Biden's lack of mental fitness for the Office of the Presidency; (2) Biden's retention of classified documents dating back to before he became President; and (3) Biden's activities during his Presidency, where he failed to personally exercise non-delegable duties in favor of the use of an autopen by undisclosed person or persons.

1. President of the United States Joseph R. Biden was investigated by Special Counsel Robert K. Hur for disclosing highly classified information while he was Vice President—a serious felony. The Special Counsel concluded that there was sufficient information to allow the case to go to the jury because President Biden disclosed classified information to his ghostwriter Mark Zwonitzer in the process of writing the highly lucrative book, *Promise Me Dad*. Nonetheless, Special Counsel Hur declined to recommend prosecution in large part because President Biden would “likely present himself to the jury, as he did during his interview with our office, as a sympathetic, well-meaning, elderly man with a poor memory” as well as with “diminished faculties.”² The records in issue here represent small portions of the more than 70 hours of

² Robert K. Hur, *Report of the Special Counsel on the Investigation Into Unauthorized Removal, Retention, & Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr.* at 5–6, 248 (Feb. 5, 2024) (“Hur Report”), available at <https://www.justice.gov/sco-hur>.

interviews between President Biden and Zwonitzer in February and March of 2017 that Special Counsel Hur thought important enough to curate and have transcribed for use in his investigation and in drafting his eventual Report. Special Counsel Hur “recognized that these materials constituted both the primary evidence of the 2017 wrongful disclosures, as well as the primary basis for his decision to decline prosecution of President Biden with respect to these wrongful disclosures.” Declaration of Amy Jeffress (May 29, 2026) (“Jeffress Decl.”) at Ex. 2 (ECF No. 60-4) at 3. Those recordings are the key pieces of contemporaneous evidence on this issue. *See* Hur Report at 6–7. Even President Biden’s Department of Justice (“DOJ” or the “Department”) admitted this fact. *See* Declaration of Bradley J. Weinsheimer at ¶ 15 (Nov. 13, 2024) (ECF No. 33-2) (“Weinsheimer Decl.”). Contrary to President Biden’s protestations, Plaintiffs here do not seek to rummage through “personal conversations,” but rather seek to provide the American People with the corpus of supporting evidence Special Counsel Hur deemed important enough to pull and curate from the approximately 70 hours of tape at issue. *Intervenor’s Motion for a Preliminary Injunction* at 1 (May 29, 2026) (ECF No. 65-1) (“Motion” or “Mot.”). Plaintiffs disclaim interest in the many, many hours of tape that Special Counsel Hur did not curate.

Every aspect of the Special Counsel’s investigation was immensely controversial and covered in real time by the media. But critically here, the President and his allies have repeatedly and vehemently disputed Special Counsel Hur’s conclusions regarding the President’s “poor memory” and “diminished faculties.” Hur Report. at 6, 248. And the President vigorously denied disclosing classified information to Zwonitzer. Thus, the American People are confronted with a question as perplexing as it is concerning. The Special Counsel, exercising the authority of the United States, investigated the sitting President for serious felonies and came to two prominent conclusions on all available evidence. But the President, the boss of the Attorney General who oversaw Special Counsel Hur, vehemently denied those conclusions. Who was right? The public has a right to see the critical underlying evidence to judge that for themselves. That is what this underlying FOIA action was and is about.

2. Not surprisingly, President Biden’s DOJ acted as Praetorians vigorously fighting release of information in this matter at any point and seeking to impose delay. The timeline of the delay included claiming to process the request—and then refusing to process it by rewriting it—leading to wasteful summary judgment briefing on the search that the Biden Justice Department finally mooted out. *See* ECF No. 26. It also included denying the existence of transcripts curated by Special Counsel Hur for months—until they were, in fact, admittedly located. *See* JSR, ECF No. 28 at 3–9 (setting out timeline). Eventually, the matter was fully briefed and awaited summary judgment. *See* ECF Nos. 33–38.

3. When President Trump returned to Office, the Department reconsidered its position and determined that faithful application of its FOIA obligations as a matter of law required disclosure of material withheld by President Biden’s DOJ. This new position was unsurprising in light of prior similar determinations regarding other Hur-related materials. Those prior disclosures adhered to a balance of public versus privacy interests and faithful application of FOIA’s segregability requirement. They were not a wholesale “dump” of materials, but in many instances, contained *extensive redactions*—redactions which Plaintiffs here did not challenge, as they believed them to be fundamentally fair applications of FOIA.

4. As to the transcript and audio curated by Special Counsel Hur at issue here—as detailed in the correspondence between the Department and Counsel for President Biden—the Department painstakingly evaluated its position, consulted with Counsel for President Biden, considered the submissions by Counsel for President Biden, and at the end “[b]ased on [their] comments . . . expanded [its] redactions both to the audio files as well as the transcript, providing greater privacy protection to President Biden’s family and correcting inadvertent errors” Jeffress Decl. at Ex. 2 at 2. After affording President Biden every courtesy and multiple opportunities to be heard both in writing and in person, the Department determined to produce the remaining records now at issue here. Plaintiffs were amenable to this disposition as it paved the way for this case to be fully settled on the merits. *See* ECF No. 59 at 13–14.

5. Now President Biden has entered this case in his personal capacity and seeks to upturn months of painstaking negotiation with emergency litigation he delayed launching. His central submission? *His* DOJ got it right; *Trump's* DOJ got it wrong. *See* Mot. at 1–3. Why? Because *his* DOJ engaged in the “straightforward application of the law that is the daily work of any independent Justice Department” (*id.* at 1) and *his* DOJ relied in part on “the Declaration of The Department’s highest-ranking career official, who served across administrations for more than 30 years. *Id.* at 2. Whereas *President Trump's* DOJ “may well be because the decision is nakedly political” (*id.*) and “is not operating through normal channels.” *Id.* at 1. That is wrong at least four times over.

a. To start, President Biden’s submission is a rancid attack on Republican Government. Elections have consequences. President Biden withdrew from the 2024 Election because *his own party* forced him out because they viewed him a hopeless candidate plagued by incapacity problems. Then President Trump won. One of the many consequences of an election is that the Department’s position can and does change; after all, in a unitary Executive, the President Controls the *entire* Executive Branch. *See, e.g., Trump v. Slaughter*, 146 S. Ct. 18 (2025); *Trump v. United States*, 603 U.S. 593, 608 (2024). Nothing is nefarious about that. Biden’s DOJ *did it all the time*.³ Indeed, the contrary submission is nefarious. If President Biden is right, the American People can *never* vote to change how the first DOJ interprets and applies the law (contrary to administrative law); that is the submission of a Stuart King, not a former President. Indeed, this principle goes back even farther than the seventeenth century. *See Burnham v. Superior Ct. of Calif., County of Marin*, 495 U.S. 604, 619 (1990) (this would be “to

³ Compare *Ways & Means Comm.'s Request for the Former President's Tax Returns & Related Tax Info. Pursuant to 26 U.S.C. S 6103(f)(1)*, 2021 WL 3418600 (O.L.C. July 30, 2021) with *Cong. Comm.'s Request for the President's Tax Returns Under 26 U.S.C. S 6103(f)*, 2019 WL 2563046 (O.L.C. June 13, 2019) (reversing position on releasing President Trump’s personal tax returns); Fifth Declaration of Samuel Everett Dewey, Ex. 1 (Jun. 5, 2026) (“5th Dewey Decl.”); 5th Dewey Decl. Ex. 2. *See also* 5th Dewey Decl. Ex. 2.5 (referencing FOIA suits mooted out, in essence, by President Biden reversal of a President Trump Executive Order).

stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians” quoting *Hurtado v. Calif.*, 110 U.S. 516, 528–29 (1884)).

And it is equally contrary to our Republican Government to submit that there are “career” officials whose views ***must always control***. Democratic accountability is our system—not some bizarre government of Platonic expert career guardians. And, in any event, to claim that the submissions by President Biden’s DOJ were somehow apolitical is rich indeed. ***Of course they were political***; President Biden’s DOJ reacted to the immense pressure applied to shield him and did so with considerable success while Biden was in Office. “Career” officials (arguably just *de facto* politicals in career roles) followed their orders. Indeed, if anything, it was President Biden’s DOJ that ignored faithful application of the law as concerns the Special Counsel. That is not Plaintiffs’ position; it is that of former Attorney General Mukasey. See Declaration of the Hon. Michael B. Mukasey, *Judicial Watch et al. v. DOJ*, 24-cv-700, (June 18, 2024) (ECF No. 40-3).

b. President Biden’s merits submission is wrong in many ways. To start, FOIA unambiguously ***requires*** the production of the records in issue here (as redacted by the Department). So, all of this much ado about nothing. Moreover, the Department’s current decision that FOIA does, in fact, require disclosure of the production set now at issue is both an unremarkable correction of the Biden DOJ’s contorted submissions and, in any event, is entitled to extreme deference, reversible only under arbitrary and capricious review. *A fortiori*, Biden’s submission falls.

Biden and Zwonitzer have little, if any, privacy interest in the recordings ***where the underlying text was previously produced***. (The notion that a privacy interest exists in the sound of President Biden’s voice, where one of the most important functions of a President is to speak on the American and world stages, was always, and remains, a complete canard). Moreover, the corresponding transcript ***was publicly quoted in the Hur Report***, and the public well knows how Biden speaks.

As to remaining materials, Biden bemoans their status as “personal conversations” (Mot. at 1) and submits they were like a “personal diary” (*id.* at 15 (quotation and citation omitted)), and

that they were “never intended to be shared with a wider audience.” *Id.* at 1. But that ignores that the records in issue are not the full 70 hours of tape, as almost all of those records are not in issue; all that is at stake is a (comparatively) small subset of records curated by Special Counsel Hur as essential to the SCO investigation and his Report. Moreover, that production set has *already* been redacted for privacy and then *further redacted per the submission of Biden’s own Counsel*. More fundamentally, Biden’s position now seeks to whitewash out the non-private, for-profit, for political/media benefit purposes of the conversations. What is in issue are conversations with a paid ghostwriter to draft a book with an \$8 million advance designed to lay the groundwork for an impending presidential run. It does not get any less private than that. Moreover, Biden took no steps to safeguard these supposedly private materials. He has never cited an NDA and he allowed Zwonitzer to retain the materials unguarded. Nor has he put forward testimony (which even if he did, Plaintiffs should be able to cross-examine) that there was an oral agreement between him and Zwonitzer to keep the materials confidential. No doubt because this would be nonsensical. The whole point of Biden talking to Zwonitzer was so *a book could be sold to the public*.

Conversely there is immense public interest in the audio and transcripts curated by Special Counsel Hur, as it is undisputed that they were key evidence in Special Counsel Hur’s conclusions that Biden had a “poor memory” and “diminished faculties.” Hur Report at 6–7, 248. Thus, they are key to allowing the American People to evaluate the controversy the President and his Administration have themselves stoked. They are also critical in allowing the American People to evaluate whether the Biden-Harris Administration concealed the fact that President Biden was not mentally fit to hold Office. The evidence of President Biden’s decline is painfully apparent. And Special Counsel Hur himself testified that the audio recordings from 2017 provide powerful comparative evidence of the state of that decline, even 3–4 years before Biden assumed the Nation’s highest Office. Release of these records represents a minimal privacy intrusion, precisely because it would merely fill in the fine details of a controversy Biden himself started from the (very public) White House podium. The public interests in allowing the American People to make up their own minds about whether the President shared classified information with his ghostwriter

or was mentally fit are, of course, immense. Moreover, the senior-most members of the Biden-Harris Administration have strenuously denied Special Counsel Hur's conclusions and have even attacked him for arriving at them. Thus, the records in issue go directly to whether senior-most members of the Biden-Harris Administration encountered an impaired President, but strived every day to conceal that fact, including by attacking Special Counsel Hur's conclusions, *despite knowing them to be true.*

The compelling interests at stake here also include providing the data that would allow the American public and the history books to assess whether President Biden *actually authorized* non-delegable Presidential decisions while actually impaired. The current President has deemed this issue "one of the most dangerous and concerning scandals in American history." 5th Dewey Decl. Ex. 3 ("Trump Memo"). Indeed, many of President Biden's own senior staff testified to a complete lack of such documentation and authorization for use of the autopen on official documents as something cloaked by a game of three-card monte. See 5th Dewey Decl. Ex. 4; 5th Dewey Decl. Ex. 5. In evaluating how such an unprecedented situation should be approached, the American People deserve as much information as possible as to the timeline and depth of President Biden's cognitive decline

c. Finally, President Biden cannot satisfy the equitable factors to obtain emergency preliminary relief. To start, he cannot show the great and irreparable harm required to obtain a preliminary injunction. This is not a case about a personal diary or a family scrapbook; it is a case about recordings made to make \$8 million and line up a sympathetic political and media narrative. Moreover, there is no actually direct and competent evidence that President Biden will be harmed, only third-party declarations relaying on multiple levels of hearsay that should not be credited.

Should the Court have any doubt on this point, Plaintiffs intend to call President Biden to testify at hearing to examine the actual evidence on this point. Both the Court and the American People should not have to rely on attorney declarations strewn with hearsay—they deserve to hear it from the Joe Biden's own mouth. Whatever privacy interest Biden may have in records that Special Counsel curated is minimal and certainly not of the "great" sort to obtain emergency relief

and bring to a crashing halt settlement of longstanding litigation by enjoining the Department. And on the flip side of the coin, the harm to the American People in yet more delay is exceptionally weighty. They should be able to access records relied upon by Special Counsel Hur for themselves. The American People are entitled to know now whether Special Counsel Hur or his boss's boss were right as to President Biden's mental decline, the timeline of that decline, the veracity of senior members of the Biden-Harris Administration, who claimed he was fit for purpose, and gain access to the key underlying material curated by Special Counsel Hur to test whether Biden himself actually authorized certain non-delegable decisions. There has already been too much delay.

BACKGROUND

On February 5, 2024, DOJ released the Hur Report. The Hur Report prompted immediate reactions from the White House, Congress, and the media for several of its conclusions. First, the Hur Report is clear that despite its conclusion to decline prosecution, there is evidence that the President Biden willfully retained and disclosed classified information. Hur Report at 1, 6–7. In particular, there is clear evidence that Biden disclosed classified information as concerns the Biden-Zwonitzer transcripts. *See* Hur Report at 4, 103–08, 108. And further, Hur found that any prosecution of President Biden was unlikely to succeed in significant part because his defense would portray him to a jury as he presented to Special Counsel Hur—as “a sympathetic well-meaning elderly man with a poor memory” and “diminished faculties.” Hur Report at 5, 6, 207, 207, 219, 242, 247–48. This conclusion was central to the Special Counsel's decision not to prosecute President Biden—the Special Counsel believed the President's memory was a significant factor in concluding a prosecution would not be successful. *See* Hur Report at 5, 6, 207, 219, 242, 247–48.

Special Counsel Hur maintained this position despite strident denials and withering criticism from President Biden, his Administration, its chattering-class proxies, congressional Democrats, and certain members of the media. Special Counsel Hur's own words before the House Committee on the Judiciary (“Judiciary Committee”) speak volumes:

There has been a lot of attention paid to language in the report about the President's memory, so let me say a few words about that. My task was to determine whether the President retained or disclosed national defense information willfully. That means knowingly and with the intent to do something the law forbids. I could not make that determination without assessing the President's state of mind. For that reason, I had to consider the President's memory and overall mental state and how a jury likely would perceive his memory and mental state in a criminal trial. These are the types of issues that prosecutors analyze every day and because these issues were important to my ultimate decision, I had to include a discussion of them in my report to the Attorney General.

The evidence and the President himself put his memory squarely at issue. We interviewed the President and asked him about his recorded statement "*I just found* all the classified stuff downstairs." He told us that he didn't remember saying that to his ghostwriter. He also said he didn't remember finding any classified material in his home after his Vice Presidency. He didn't remember anything about how classified documents about Afghanistan made their way into his garage.

My assessment in the report about the relevance of the President's memory was necessary, accurate, and fair. Most importantly, what I wrote is what I believe the evidence shows and what I expect jurors would perceive and believe. I did not sanitize my explanation, nor did I disparage the President unfairly. I explained to the Attorney General my decision and the reasons for it. That is what I was required to do.

Third Declaration of Samuel Everett Dewey at Ex. 1 at 8 (Nov. 27, 2024) ("3d Dewey Decl.") ("Hur Hearing") (emphasis added); *see also* Hur Report at 17, 38, 50, 65, 72.

1. The Hur Report is clear that despite its conclusion to decline prosecution, there is evidence that the President willfully retained and disclosed classified information. *See, e.g.* Hur Report at 1 ("Our investigation uncovered evidence that President Biden willfully retained and disclosed classified materials after his vice presidency when he was a private citizen."); *id.* at 6–7 ("FBI agents recovered from unlocked drawers in the office and basement den of Mr. Biden's Delaware home a set of notebooks he used as vice president. Evidence shows that he knew the notebooks contained classified information."). Under immense criticism from the President himself on down, Special Counsel Hur stood by his conclusion in his testimony before the Judiciary Committee that if the President was charged, there was sufficient evidence to send the case to the jury:

Mr. HUR. As I said in the report, some reasonable jurors may have reached the inferences that the government would present in its case-in-chief.

Mr. KILEY. So, a reasonable juror could have voted to convict, based on the facts that you—

Mr. HUR. Correct.

Hur Hearing at 68.

2. The Hur Report was unequivocal that President Biden shared classified information with Zwonitzer. *See* Hur Report at 103 (subheading that reads “Mr. Biden disclosed classified information in his notebooks to Zwonitzer.”). In some instances, “Mr. Biden read his notes from classified meetings to Zwonitzer word-for-word.” Hur Report at 103. The Hur Report details multiple instances where this occurred:

- President Biden read portions of a notebook “aloud and nearly verbatim to Zwonitzer, including portions containing classified information that remains classified up to the Secret level” about a summer 2015 Situation Room meeting “relating to a foreign country and a foreign terrorist organization.” Hur Report at 104.
- In an April 24, 2017 interview with Zwonitzer, President Biden read from another notebook entry containing notes he took during a November 2014 National Security Council meeting in the Situation Room. In the interview with Zwonitzer, President Biden “read aloud from notes summarizing a range of issues relating to a foreign terrorist organization, including specific activities of the U.S. military and views expressed by the intelligence community, including the Director of National Intelligence and the CIA Director.” President Biden also had problems reading his handwriting of his notes and asked Zwonitzer for help deciphering his handwriting. In that exchange, Biden cautioned “some of this may be classified, so be careful.” The Hur Report wrote further, “[s]ome of the portions that Mr. Biden read to Zwonitzer remains classified at the Secret level.” Hur Report at 105–06.
- “More generally, during his dozens of hours of interviews with Zwonitzer, Mr. Biden read from notebook entries related to many classified meetings, including National Security Council meetings, CIA briefings, Department of Defense briefings, and other meetings and briefings with foreign policy officials.” Hur Report at 106.
- On February 16, 2017, President Biden told Zwonitzer that he “*just found* the classified stuff downstairs” in reference to classified documents relating to American military and foreign policy downstairs. Hur Report at 108 (emphasis added). This phraseology strongly suggests someone diligently searching for something who is happy he found it. And this phraseology also suggests knowledge by Biden that it is classified information he had retained, then searched, and eventually found—presumably all so he could share it with his paid agent Zwonitzer. These points would almost certainly be confirmed by the audio.

Special Counsel Hur was clear that although he recommended against prosecution, the “best case for charges would rely on Mr. Biden’s possession” of classified materials in his residence in February 2017, “when he was a private citizen and when he told his ghostwriter he had *just found* classified material.” Hur Report at 4 (emphasis added). Importantly, again, Special Counsel Hur’s declination was not because there was insufficient evidence to send the case to the jury (*see* Hur Hearing at 68); rather Special Counsel Hur determined that an ultimate lack of evidence demonstrating willful intent by President Biden, mitigating circumstances, and probable defenses would likely undermine any potential prosecution.

3. Key to Special Counsel Hur’s recommendation against prosecution was his analysis of how the case would be viewed by a jury. Central to Hur’s analyses and conclusions was that for jurors, “Mr. Biden’s apparent lapses and failures in February and April 2017 will likely appear consistent with the diminished faculties and faulty memory he showed in Zwonitzer’s interview recordings and in our interview of him.” Hur Report at 248. In his prosecutorial judgment, the Special Counsel felt those diminished faculties would cause a jury to see the President as “a sympathetic well-meaning elderly man with a poor memory.” Hur Report at 6. The Report is replete with similar references:

- “Mr. Biden’s memory was significantly limited both during his recorded interviews with the ghostwriter [Zwonitzer] in 2017, and in his interview with our office in 2023.” Hur Report at 5.
- “Mr. Biden’s memory also appeared to have significant limitations—both at the time he spoke to Zwonitzer in 2017, as evidenced by their recorded conversations, and today, as evidenced by his recorded interview with our office. Mr. Biden’s recorded conversations with Zwonitzer from 2017 are often painfully slow, with Mr. Biden struggling to remember events and straining at times to read and relay his own notebook entries.” Hur Report at 207.
- “In his interview with our office, Mr. Biden’s memory was worse. He did not remember when he was vice president, forgetting on the first day of the interview when his term ended (‘if it was 2013—when did I stop being Vice President?’), and forgetting on the second day of the interview when his term began (‘in 2009, am I still Vice President?’). He did not remember, even within several years, when his son Beau died. And his memory appeared hazy when describing the Afghanistan debate that was once so important to him.” Hur Report at 208.

- “We also believe some of the same evidence that supports reasonable doubt for the classified Afghanistan documents also supports reasonable doubt for the notebooks, including Mr. Biden’s cooperation with the investigation, his diminished faculties in advancing age, and his sympathetic demeanor.” Hur Report at 242.
- “For these jurors, Mr. Biden’s apparent lapses and failures in February and April 2017 will likely appear consistent with the diminished faculties and faulty memory he showed in Zwonitzer’s interview recordings and in our interview of him.” Hur Report at 247–248.

4. The Special Counsel repeatedly explained to the Judiciary Committee that all available demeanor evidence informed his conclusions about President Biden’s memory and faculties:

Mr. HUR. The totality of the time that I spent with the President during his voluntary interview was something that I certainly considered in framing my assessment and articulating it in the report. That includes not only the words in the cold record of the transcript of the interview, but also the experience of being there in the room with him and frankly considering how he would present to a jury in a criminal trial if charges were brought.

Chair JORDAN. I guess I’m asking specifically. I know you cite in the report the dates that he couldn’t remember when he was Vice President, when he began, when his term ended. You cite that in your report. Is there anything else specifically that stands out from that interview with the President?

Mr. HUR. A number of things stand out. Again, I’m aware that the transcript has now been made available. I do provide certain examples in my report of significant personally painful experiences about which the President was unable to recall certain information. I also took into account the President’s overall demeanor in interacting with me during the five-plus hour voluntary interview. So, it was a wealth of details about being there in the moment with the President, including his inability to recall certain things. I’ll also say, as reflected in the transcript, the fact that he was prompted on numerous occasions by the members of the White House Counsel’s Office.

Hur Report at 65. That necessarily includes the recordings at issue here: “It was based on a number of different sources . . . including various recordings, some of them from the 2016–2017 timeframe, some from our interview with the President in October 2023.” *Id.* at 50; *see also* Hur Report at 5 (“Mr. Biden’s memory was significantly limited, both during his recorded interviews with the ghostwriter in 2017, and in his interview with our office in 2023.”); *id.* at 207 (“Mr. Biden’s memory also appeared to have significant limitations—both at the time he spoke to Zwonitzer in 2017, as evidenced by their recorded conversations, and today, as evidenced by his

recorded interview with our office. Mr. Biden’s recorded conversations with Zwonitzer from 2017 are often painfully slow, with Mr. Biden struggling to remember events and straining at times to read and relay his own notebook entries.”).

5. Special Counsel Hur further testified he also relied upon President Biden’s and Zwonitzer’s conversations from February and April of 2017 (at issue here) as a critical *comparative* reference point for assessing President Biden’s “diminished faculties and faulty memory.” Hur Report at 248:

Ms. HAGEMAN. OK. You did not compare President Biden’s current memory or condition with his memory or condition when he was in the Senate or when he left the Vice Presidency and took the classified documents subject to your investigation, is that right?

Mr. HUR. Actually, I believe that’s not correct, Congresswoman. One of the things that’s in the report is an assessment of the President’s memory, based on recordings from the 2016–2017 timeframe, recordings of conversations between Mr. Biden and his ghostwriter, and comparing that with the President’s memory that he exhibited during our interview of him in October 2023. So, there was a comparison there.

Hur Hearing at 72; *see also* Hur Report at 208 (“*In his interview with our office, Mr. Biden’s memory was worse*” than in the *Biden-Zwonitzer audio* (emphasis added)).

6. The Hur Report makes clear that the recordings were developed solely for commercial and media/political purposes. The Hur Report discusses the process by which proposals were developed and pitched as the start of the project: “Mr. Biden used this proposal to shop his book to potential publishers, and this bidding process resulted in a book contract netting Mr. Biden an advance of \$8 million.” Hur Report at 141. This is a considerable sum of money and was itself the subject of considerable political attention during the House Judiciary Committee’s Hearing with Special Counsel Hur:

Chair JORDAN. Eight million dollar[s]. Joe Biden had \$8 million reasons to break the rules. Took classified information and shared it with the guy who was writing the book. That is why he knew the rules, but he broke them, for \$8 million in a book advance. You know what? Wasn’t just the money. Joe Biden—here is—this is page 231, very next page. In your report, “Joe Biden viewed his notebooks as an irreplaceable contemporaneous record of the most important moments [o]f his Vice Presidency.” He had written this all down for the book, for the \$8 million. The next thing you say in your report is, quote, “Such a record would buttress his legacy as a world leader.” You know what this is? It wasn’t just the money. It wasn’t just \$8 million. It was also his ego. Pride and money are

why he knowingly violated the rules. The oldest motives in the book: Pride and money. You agree with that, Mr. Hur? You wrote about it in your report.

Mr. HUR. That language does appear in the report, and we did identify evidence supporting those assessments.

3d Dewey Decl. at Ex. 1 at 24.

7. The White House disputed some of the Hur Report's conclusions even before its public release on February 7, 2024. Both the White House Counsel and the President's private counsel jointly wrote to Special Counsel Hur on February 5, 2024, to ensure "a final report that is both accurate and consistent with Department of Justice policy and practice." Hur Report at 384. The White House requested Special Counsel Hur "revisit [his] descriptions of President Biden's memory and revise them so that they are stated in a manner that is within the bounds of your expertise and remit." Hur Report at 385. The White House took umbrage that Special Counsel Hur "refer[red] to President Biden's memory on at least nine occasions—a number that is itself gratuitous." Hur Report at 386. The letter also took issue with the Report's use of the phrase "totally irresponsible" to describe President Biden's document storage practices. Hur Report at 385. The letter added, "this kind of criticism of an uncharged party violates 'long-standing Department practice and protocol'. . . . Using President Biden's own words does not make the criticism compliant with Department practice." Hur Report at 385–86 (citation omitted). Special Counsel Hur provided no substantive response to the White House Counsel but attached the White House Counsel's Letter to his Report along with an explanation of minor typographical and factual corrections. *See* Hur Report at 1–2.

8. Unable to move the Special Counsel off his evaluation of the evidence, both the White House Counsel and the President's private counsel went over Special Counsel Hur's head and subsequently wrote Attorney General Garland on February 7, 2024, objecting "to the multiple denigrating statements about President Biden's memory[.]" 3d Dewey Decl. at Ex. 3 at 2. The White House Counsel argued "[t]he Special Counsel can certainly and properly note that the President lacked memory of a specific fact or series of events. But his Report goes further to include allegations that the President has a failing memory in a general sense, an allegation that

has no law enforcement purpose.” *Id.* at 2. DOJ responded on February 8, 2024, writing “the Department concludes that the report as submitted to the Attorney General, and its release, are consistent with legal requirements and *Department policy*.” 3d Dewey Decl. at Ex. 4 at 2 (emphasis added).

9. Following the Hur Report’s public release on February 8, 2024, the Administration, from top to bottom, vigorously attacked Special Counsel Hur’s characterizations and conclusions. On February 8, 2024, the then-President himself strenuously denied Special Counsel Hur’s conclusion as to his mental state, insisting to reporters that “[m]y memory is fine.” *See* 3d Dewey Decl. at Ex. 5 at 3; *see also* 3d Dewey Decl. at Ex. 6 (collecting similar articles). The President also vehemently denied sharing classified information with Zwonitzer:

Q: Mr. President, why did you share classified information with your ghostwriter?

THE PRESIDENT: I did not share classified information. I did not share it.

Q: With your ghostwriter?

THE PRESIDENT: With my ghostwriter, I did not. Guarantee you, I did not. What the—

3d Dewey Decl. at Ex. 5 at 5–6.

Vice President Kamala Harris dismissed the Report’s conclusions as to the President’s memory as “inaccurate and inappropriate” and “clearly, politically motivated, gratuitous.” *See* 3d Dewey Decl. at Ex. 7 at 2; *see also* 3d Dewey Decl. at Ex. 8 (collecting similar articles). Spokesman for the White House Counsel’s Office, Ian Sams, told reporters the Report “left [one] to wonder why this Report spends time making gratuitous and inappropriate criticisms of the President.” 3d Dewey Decl. at Ex. 9 at 6; *see also* 3d Dewey Decl. at Ex. 10 (collecting media coverage). White House Press Secretary Karine Jean-Pierre said those portions of the Report speaking to the President’s memory “don’t [] live[] in reality.” 3d Dewey Decl. at Ex. 9 at 29; *see also* 3d Dewey Decl. at Ex. 10.

10. Attorney General Garland, in contrast, deferred to Special Counsel Hur’s analyses and conclusions. *See* 3d Dewey Decl. at Ex. 11 at 2. In his testimony before the House Judiciary

Committee on June 5, 2024, Attorney General Garland repeatedly deferred to the Hur Report when questioned about the Special Counsel’s conclusions. *See, e.g.*, 3d Dewey Decl. at Ex. 12 at *13.

11. White House proxies mirrored the Administration’s response—with added energy. Senator John Fetterman called the Report “a smear and cheap shots and just taking things out of context, or even just inventing.” 3d Dewey Decl. at Ex. 13 at 2. Representative Dan Goldman said, “what I did understand from talking to folks at the White House is . . . part of the frustration with Special Counsel Hur, a Republican appointee, cherry-picking very few remarks from a five-hour interview[.]” 3d Dewey Decl. at Ex. 14 at 2. Former General Counsel for the Federal Bureau of Investigation, Andrew Weissmann, bemoaned the Report as “a redux of what we saw with respect to James Comey at the FBI with respect to Hillary Clinton, in terms of really not adhering to what I think are the highest ideals of the Department of Justice.” 3d Dewey Decl. at Ex. 15 at 3.

On social media, former Attorney General Eric Holder wrote: “Special Counsel Hur report on Biden classified documents issues contains way too many gratuitous remarks and is flatly inconsistent with long standing DOJ traditions. Had this report been subject to a normal DOJ review these remarks would undoubtedly have been excised.” 3d Dewey Decl. at Ex. 16. Jim Messina, a former Deputy Chief of Staff for President Barack Obama, wrote: “Let’s be clear—the special counsel isn’t a dummy and we should be very careful not to take the bait after Comey pulled this in 2016. Hur, a lifelong Republican and creature of DC, didn’t have a case against Biden, but he knew exactly how his swipes could hurt Biden politically.” 3d Dewey Decl. at Ex. 17.

12. Despite facing a very public pressure campaign from the President himself on down, during his March 12, 2024 House Judiciary Committee Hearing, Special Counsel Hur confirmed his assessments in his opening statement and maintained throughout questioning that he had sufficient evidence to present the case to a jury but believed that Mr. Biden would prove a sympathetic defendant. *See Hur Hearing at 7, 8, 17, 68.* Special Counsel Hur also testified that President’s Biden’s statement that he did not disclosure classified information to Zwonitzer was

“inconsistent with the findings based on the evidence in my report.” 3d Dewey Decl. at Ex. 5 at 30.

Nevertheless, Democratic members of the Judiciary Committee repeatedly denigrated the Special Counsel’s investigation and Special Counsel Hur personally. *See, e.g., id.* at 37 (“you used your report to trash and smear President Biden because he said in response to questions over a five-hour interview that he didn’t recall how he got the documents. You knew that this would play into the Republicans’ narrative that the President is unfit for office because he is senile . . . You knew that this is what was going to happen, didn’t you?”); *id.* at 40 (“You could have written your report with comments about his specific recollection as to documents, a set of documents, or a set of documents, but you chose a general, pejorative reference to the President. You understood when you made that decision, didn’t you, Mr. Hur, that you would ignite a political firestorm with that language, didn’t you?”).

These attacks continued. Minority Members of the House Judiciary Committee mirrored the White House’s position in congressional contempt proceedings. Despite Special Counsel Hur’s clear repeated statements to the contrary, the Minority begins from the position that “[t]he Hur Report exonerates President Biden of any prosecutable charges[.]” and “President Biden’s age was not a material aspect of Hur’s decision to decline prosecution[.]” 3d Dewey Decl. at Ex. 25 at 32. Further, in the Minority’s view, Special Counsel Hur’s conclusions as to President Biden’s memory are “superfluous dicta,” “wildly inappropriate,” and “unsupported by the actual record[.]” as “[t]he transcript shows that President Biden was in clear command of his cognitive functions[.]” *Id.* at 34.

13. The controversy surrounding the audio recording was heightened by the reality that President Biden’s physical and mental fitness was not only central to Special Counsel Hur’s investigation and conclusions, but was also one of the central questions in the 2024 Presidential Election prior to President Biden dropping out of the race. In one poll, seventy-nine percent of voters consider the phrase “too old to be president” to describe President Biden very or somewhat well. *See* 3d Dewey Decl. at Ex. 30 at 12. An April 2024 poll by Pew Research Center found

sixty-two percent of voters were not too or not at all confident that President Biden has the mental fitness needed to be President. *See* 3d Dewey Decl. at Ex. 31 at 14. A June 2024 poll by CBS News found sixty-five percent of voters thought President Biden does not have mental and cognitive health to serve as President. *See* 3d Dewey Decl. at Ex. 32 at 3.

14. In early June, the *Wall Street Journal* released a long form article entitled “Behind Closed Doors, Biden Shows Signs of Slipping” that was “based on interviews with more than 45 people over several months.” 3d Dewey Decl. at Ex. 33 at 2. *The Wall Street Journal*’s story prompted a stern rebuke from the White House with Spokesman Andrew Bates telling *Axios* “it’s a little surprising that The Wall Street Journal thought it was breaking news when congressional Republicans told them the same false claims they’ve spouted on Fox News for years, but it’s also telling that the only individuals willing to smear the President in this story are political opponents afraid to use their names[.]” 3d Dewey Decl. at Ex. 34 at 2. Moreover, the White House apparently strong armed at least one prominent congressional Democrat into calling *The Wall Street Journal* back and sitting for a second interview because it was displeased with what he had to say. 3d Dewey Decl. at Ex. 33 at 3.

15. Allies of the President were quick to note that the absence of their statements in *The Wall Street Journal*’s piece. On X.com, Senator Patty Murray wrote: “I made clear to the @wsj regarding the January meeting on Ukraine that the President was absolutely engaged & ran that meeting in a way that brought everyone together. I’m not quoted—I wonder why.” 3d Dewey Decl. at Ex. 35. Representative Nancy Pelosi wrote: “Many of us spent time with @wsj to share on the record our first-hand experiences with @POTUS, where we see his wisdom, experience, strength, and strategic thinking. Instead, the Journal ignored testimony by Democrats, focused on attacks by Republicans and printed a hit piece.” 3d Dewey Decl. at Ex. 36. *The Hill* reported that Biden campaign manager Julie Chavez Rodriguez “brushed back the premise of the Journal story” and said of the President, “he is, you know, just one of the strongest leaders that I’ve been able to engage and to be able to work with and to advise.” 3d Dewey Decl. at Ex. 37 at 3. White House communications director Ben LaBolt described the story as a “[c]omplete and utter editorial fail

by the @wsj.” 3d Dewey Decl. at Ex. 38. *MSNBC*’s Joe Scarborough said of the President, “[i]f you want to talk about international affairs, if you want to talk about how to get bipartisan legislation, Joe Biden is light-years ahead of all of them.” 3d Dewey Decl. at Ex. 37 at 1. In short, the Biden’s “memory” and “faculties” was an issue in the Hur Investigation, and it remains an issue that the White House had deliberately placed firmly before the electorate in the 2024 Election.

16. President Biden’s June 27, 2024 debate performance brought his competency for Office profoundly into question and weighs substantially in the ongoing debates between the Special Counsel on the one hand, and the Biden-Harris Administration on the other. It also raises the question of whether senior Biden-Harris Administration officials covered for President Biden, in part, by attacking Special Counsel Hur’s conclusions. *See, e.g.*, 3d Dewey Decl. at Ex. 41.

17. Following the debate, President Biden’s public appearances and press accounts suggested that he was suffering from steady progressive mental and physical decline that appeared to be accelerating. Several articles chronicled (albeit contested by the White House and its allies) the apparent decline based on public reporting and interviews with insiders. *See, e.g.*, 3d Dewey Decl. at Ex. 42; 3d Dewey Decl. at Ex. 43. Several notable instances stand out in this and subsequent reporting. Some in the media demanded Special Counsel Hur was vindicated in his assessment of President Biden. Fox News host Kayleigh McEnany wrote “Biden is worse than anyone knew. Robert Hur must have been truly shocked. Now the country is.” 5th Dewey Decl. Ex. 6.

- **June 13–15, 2024 G7 Summit.** Accounts reflect that foreign leaders and officials: repeatedly raised major concerns with President Biden’s conduct; may have acted to “shield” him from press scrutiny during his off-moments; and even that one “senior European official” said he could not “imagine” placing President Biden in a room with Russian President Vladimir Putin. *See* 3d Dewey Decl. at Ex. 42; 3d Dewey Decl. at Ex. 43.
- **July 11, 2024 NATO Press Conference.** President Biden introduced Ukrainian President Volodymyr Zelensky as President Putin at a preceding event causing “loud gasps in the audience.” 3d Dewey Decl. at Ex. 44. During the press conference, President Biden

referred to Vice President Harris as Vice President Trump and misstated a key jobs number. *See* 3d Dewey Decl. at Ex. 45. The video is striking. *See* 3d Dewey Decl. at Ex. 46.

- **July 16, 2024 Las Vegas Speech.** President Biden flubbed a “basic feature” of his plan to fight rent increases. *See* 3d Dewey Decl. at Ex. 47.
- **September 21, 2024 Press Conference with the Indian Prime Minister.** “Biden was supposed to introduce Prime Minister Narendra Modi in Wilmington, Delaware. He instead became confused and appeared to think he was waiting for a question from reporters. An announcer then introduces Modi following an uncomfortable pause.” 3d Dewey Decl. at Ex. 48. The video of the event is alarming.

18. On July 21, 2024, President Biden dropped out of the 2024 presidential race. All available contemporaneous reporting indicates that President Biden was pressured to drop out by his own party precisely because of widespread concerns and public perceptions regarding his mental and physical fitness for Office. There is even reporting by a Pulitzer Prize-winning journalist that President Biden dropped out only under threat of removal via Section 4 of the 25th Amendment. 3d Dewey Decl. at Ex. 49. The press coverage of these events was extraordinary even by modern standards.

Subsequent to President Biden dropping out of the 2024 Presidential race, numerous articles, and President Biden’s few public appearances, have all provided substantial evidence that Special Counsel Hur had the better of his dispute with the Biden-Harris Administration over whether President Biden in fact had “diminished faculties and [a] faulty memory.” This also raises the related question of whether senior Administration officials covered up the President’s decline. Despite this fact, the seniormost Administration officials continued to vigorously defend President Biden’s fitness for Office. For example, it remained an issue in the 2024 General Election and Vice President Harris was repeatedly questioned on whether President Biden was fit for Office and continued to insist that President Biden has the “intelligence, the commitment and the judgment and disposition” Americans expect from their President. 3d Dewey Decl. at Ex. 50; *see also* 3d Dewey Decl. at Ex. 51.

19. Post Biden-Harris Administration analysis of the Biden White House’s autopen use raised serious questions regarding both whether President Biden lacked the capacity to perform

the functions of his Office and the senior-most members of the Biden-Harris Administration performed non-delegable presidential functions without his authorization. The Oversight Project’s analysis found widespread evidence of the Biden White House deploying an autopen to affix President Biden’s signature while he was present in Washington D.C., often when his schedule revealed a late start and an early lid. For example, of the 51 warrants issued by the Biden White House awarding pardons or clemency to thousands of federal inmates, over half—32 in total—were signed with an autopen. *See* 5th Dewey Decl. Ex. 8. Twenty six of the 32 autopenned clemency warrants were autopenned while President Biden was physically present in Washington, D.C. and presumably available to affix his signature to these documents executing powers belonging solely to the President. In addition, The Oversight Project identified at least eight days where President Biden hand signed a bill into law, but issued an executive order via autopen. *See* 5th Dewey Decl. Ex. 8

President Trump has deemed this issue “one of the most dangerous and concerning scandals in American history.” 5th Dewey Decl. Ex. 3. The considered judgement of the current President is remarkably damning. Indeed, President Biden’s many own senior staff testified to a complete lack of such documentation and authorization for use of the autopen on official documents, cloaked by a game of three-card monte. They also testified that Biden was totally isolated by his closest advisors that to an appalling lack of discipline in documenting putative decisions. *See* 5th Dewey Decl. Ex. 4; 5th Dewey Decl. Ex. 5.

President Biden’s attempt to defend his use of the autopen resulted in stunning contradiction. On one hand, President Biden reportedly said to *The New York Times* “I made every decision” and that he “orally granted all the pardons and commutations issued at the end of his term.” *See* 5th Dewey Decl. Ex. 11. But on the other hand, for the *same article*, President Biden emphatically stated he *did not* personally approve the individual names of people that received clemency via his autopen. Instead, he made broad approvals by “category” of people to award clemency to and White House staff, in consultation with the Bureau of Prisons, would select the individuals that received the clemency awards. *Id.* (“Mr. Biden did not individually approve each

name for the categorical pardons that applied to large numbers of people, he and aides confirmed. Rather, after extensive discussion of different possible criteria, he signed off on the standards he wanted to be used to determine which convicts would qualify for a reduction in sentence. Even after Mr. Biden made that decision, one former aide said, the Bureau of Prisons kept providing additional information about specific inmates, resulting in small changes to the list. Rather than ask Mr. Biden to keep signing revised versions, his staff waited and then ran the final version through the autopen, which they saw as a routine procedure, the aide said.”); *see also* 5th Dewey Decl. Ex. 12.

20. Interest in President Biden’s cognitive decline did not noticeably wane with his departure from the White House. On May 16, 2025, Axios published audio recordings of President Biden’s October 2023 interviews with Special Counsel Hur. *See* 5th Dewey Decl. Ex. 13. The press reaction was immediate, widespread, and damning.

21. Mr. Thompson and Jake Tapper, moderator of the June 27, 2024 debate, released *Original Sin: President Biden’s Decline, Its Cover-up, and His Disastrous Choice to Run Again* on May 20, 2025. *See* Jake Tapper & Alex Thompson, ORIGINAL SIN: PRESIDENT BIDEN’S DECLINE, ITS COVER-UP, AND HIS DISASTROUS CHOICE TO RUN AGAIN (May 20, 2025). *Original Sin* summarizes President Biden’s debate performance; “A president’s ability to communicate is a vital part of the job. Beyond that failure, Biden had projected such weakness it raised questions about his ability to even serve as president.” *Id.* at 195 (emphasis added). Per *Original Sin*, Biden’s deteriorated condition was apparent to close advisors early in his term. In 2023, President Biden’s limited public events—chiefly occurring between 10:00 a.m. and 4:00 p.m.—led one aide to conclude, “[h]e just had to win, and then he could disappear for four years—he’d only have to show proof of life every once in a while.” *Id.* at 85. Another senior official “conceded that a quick fifteen-minute interview [in October 2022] would’ve been impossible for the president to pull off just one year later.” *Id.* at 55. Concerns about President Biden’s age were not limited to close staff. George Clooney told Messrs. Tapper and Thompson that Biden did not appear to recognize him at a June 13, 2024 fundraiser. *Id.* at 174.

Original Sin suggests that President Biden’s withdrawal from the 2024 Presidential Race was the result of sustained pressure by **Democratic** Leadership. Tapper and Thompson recount a July 13, 2024 meeting between then-Senate Majority Leader Schumer and President Biden. Schumer made it clear that President Biden’s support was ebbing in the Senate and that President Biden’s pollsters were concealing dire polling numbers. *Original Sin* at 272–73. President Biden responded to the release of *Original Sin* with defiance. When asked for a response, “‘You can see that I’m mentally incompetent, I can’t walk—and I can beat the hell out of both of them,’ Biden said with a smirk while speaking with reporters.” 5th Dewey Decl. Ex. 14.

22. On July 7, 2025, DOJ released additional material from Special Counsel Hur’s interviews with President Biden’s ghostwriter Mark Zwonitzer. See Joint Status Report, *Heritage Found. v. DOJ*, 24-cv-952-ACR (Aug. 29, 2025) (ECF No. 32). The released material reflected a Department by that point faithfully adhering to balancing the compelling public interest with the miniscule (if any) privacy interest retained by President Biden rather than the initial, nearly entirely redacted release. See 5th Dewey Decl. Exs. 15 & 16.

The release also revealed that the Biden DOJ redacted information going directly to President Biden’s motives and credibility. See *id.* For example, the release laid bare a pecuniary motive for President Biden to leak classified information to Zwonitzer in return for *at least* \$8 million. Again, all that information goes to evaluating who was correct, Special Counsel Hur or his boss’s boss, Joe Biden.

23. When the Hur Report came out, then-Vice President Harris vigorously defended President Biden’s mental capacity and savaged Special Counsel Hur, saying that as a former prosecutor she found Hur’s comments on President Biden’s mental capacity “gratuitous, inaccurate, and inappropriate.” See 5th Dewey Decl. Ex. 17. She added, “The way that the president’s demeanor in that report was characterized could not be more wrong on the facts and clearly politically motivated, gratuitous. And so I will say when it comes to the role and responsibility of a prosecutor in a situation like that, we should expect that there would be a higher level of integrity than what we saw.” *Id.* But incredibly, in her September 2025 political memoir,

107 Days, Vice President Harris noted how the Hur Report “fueled” “doubts about Biden’s age and capacity” and she admitted, “[t]he report had detailed concerning lapses. I knew very well that when he was tired, his age showed, and I also knew that depositions could be grueling.” *See*, Kamala Harris, *107 DAYS* 6 (2025).

24. Dr. Jill Biden recently released her memoir, *A View from the East Wing*, on June 2, 2026. While promoting the book on CBS News Sunday Morning, Dr. Biden said of the debate, “I was frightened, because I had never seen Joe like that before or since. Never, I don’t know what happened. As I watched it, I thought, ‘oh, my god, he’s having a stroke.’” 5th Dewey Decl. Ex. 18. Amazingly, Jill Biden’s double down on the notion that President Biden had no cognitive issues and was fit for purpose and Special Counsel Hur was wrong. *See, e.g.*, Jill Biden, *A VIEW FROM THE EAST WING* 161, 211, 245 (2026).

25. President Biden announced on June 2, 2026 that yet another memoir will be released in September 2026. *See* 5th Dewey Decl. Ex. 19. President Biden announced his new memoir at the debut talk for Jill Biden’s memoir in New York shortly after the former President interrupted the talk in a highly awkward fashion to ask his wife “who do you love most in the whole world?” 5th Dewey Decl. Ex. 20.

I. RELEASE OF THE AUDIO RECORDINGS CORRESPONDING TO TEXT IN THE HUR REPORT WOULD NOT RESULT IN AN UNWARRANTED INVASION OF PRIVACY.

President Biden’s merits argument seeks to elide the fact that for some of the audio files in issue here the corresponding text *has already been made public*. *See, e.g.*, Mot. at 17 (indirectly acknowledging this point). President Biden has zero privacy interests in the audio recording corresponding to *exact quotations from transcripts in the Hur Report*, and the American people have an overwhelming public interest in judging for themselves Special Counsel Hur’s determinations that: (1) there was a case for Biden to have to answer to in part because he disclosed classified information to Zwonitzer (*see* Hur Report at 4, 103–08, 108); and (2) not to prosecute the President because of his “diminished faculties and faulty memory.” Hur Report at

248. The American People also have an overwhelming interest in understanding whether other senior members of the Biden Administration publicly defended President Biden’s competence while knowing behind the scenes that his was in mental decline and not fit for Office. President Biden has no good answer to that reality.⁴

A. President Biden Has Little, If Any, Privacy Interest Here.

1. President Biden insists that disclosing the recording would result in an unwarranted invasion of President Biden’s privacy interests. *See Mot.* at 15–16. But the principal problem with that argument is that the corresponding transcript has already been released; *it was quoted in the Hur Report*. Broad citation to the putative privacy interests in 70 hours of tape simply is not apposite as to the six or so minutes at issue here. Indeed, President Biden *himself* effectively choose to release the quoted material because the Executive is unitary and President Biden’s Administration touted that he did not exert executive privilege over the Hur Report. Given that disclosure, it is hard to see what additional privacy interests withholding the audio recording would protect. It is not simply the President’s involvement in the investigation that is public; he has voluntarily released the content of the audio in question. *Cf. CREW III*, 746 F.3d at 1090 (noting separate privacy interest in “content”). Moreover, the President did so for political reasons; privacy interests cannot operate as both sword and shield. That release vitiates any privacy interest

⁴ Analysis under Exemption 7(C) occurs in three phases in which there is some shift in the usual burdens.

First, *the Government* must demonstrate that a privacy interest protected by a privacy exemption is “present.” *NARA v. Favish*, 541 U.S. 157, 172 (2004); *see also ACLU v. DOJ*, 655 F.3d 1, 6 (D.C. Cir. 2011).

Second, the “FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.” *Boyd v. Criminal Division*, 475 F.3d 381, 386–87 (D.C. Cir. 2007) (internal quotation marks and citations omitted). Here, the burden is on the requester. *See, e.g., Ctr. For Investigative Reporting v. USCIS*, No. 18-cv-1964 (CJN), 2019 WL 6498817, at *3 (D.D.C. Dec. 3, 2019).

Third, in the final analysis here, the *Government* bears the burden to show the privacy interests outweigh the public interests in the final balancing analysis. *Bartko v. DOJ*, 898 F.3d 51, 64 (D.C. Cir. 2018); *see CREW v. DOJ*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (“*CREW IIP*”).

here. *See, e.g., CREW III*, 746 F.3d at 1092; *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998); *Nation Mag. Washington Bureau v. U.S. Cust. Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995). A public figure has little if any privacy interest in that context. *Cf., e.g., CREW III*, 746 F.3d at 1092; *Nation Mag.*, 71 F.3d 885 at 894, n.9. And this was no mere public speaker. This was the President of the United States speaking not as an “uncharged individual” but as “the President of the United States, clothed with immense power.” Doris Keans Goodwin, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 687 (2005). He was Special Counsel Hur’s boss’s boss. He had absolute and unreviewable constitutional power to fire or control Special Counsel Hur at any time. President Biden stated Special Counsel Hur was wrong not as some “individual” from a stoop in S.W. D.C., but from the White House podium in the West Wing, with the Seal of the President of the United States before him, the flags of his Office and the Nation behind, him and surrounded by the full might and pomp of his power.

2. Moreover, President Biden’s argument omits the elephant in the room. The recordings in issue really are not all that private even in *his* own DOJ’s telling. Rather, they are the product of a commercial book deal. And that deal netted President Biden “an *advance* of \$8 million.” Hur Report. at 141 (emphasis added). In other words, he may have made even more than the \$8 million figure based on actual book sales and royalties. In fact, Biden and Zwonitzer may have shopped around Biden’s *actual diary entries* in an effort to obtain the maximum advance. *See* 5th Dewey Decl. at Ex. 15 at 91:11–92:23. Moreover, Zwonitzer testified that the supposedly “private” topic of the book was selected precisely to appeal to “what the American public [would] be interested in.” *Id.* at 59:6–7.

Zwonitzer also testified that President Biden was “very upfront with me and with other folks” about financial goals such as paying of his house, paying for kids college loans and funds, and ensuring Jill would be provided for if “anything happened” to Biden. *See id.* at 89:19–90:6. Zwonitzer also testified that Biden did not want to make money by lobbying or making speeches because “want[ed] to make sure [he was] . . . in a position where . . . [he] c[ould] still run for

president if . . . [he] decide[d] to do that. So he was careful about the way he made money.” *Id.* at 91: 2–5.

Finally, Zwonitzer never alluded to any sort of NDA, including an oral agreement to keep the audio private, or requirement to destroy or return the material to Biden. In fact, he testified he routinely retains audio and transcripts from closed projects and does not have any policy regarding retention, return, or destruction. *Id.* at 22:12–21. The closest Zwonitzer came was stating in carefully parsed language:

ZWONITZER: But, you know, these audio recordings, *to me*, are they are personal and they are private, and they were never *meant* to be heard by anybody but him and me. And nobody had ever heard them before, and nobody ever would have heard them before but for this. Until and unless he wanted to. But no, the—you know, *to me*, they were personal and private.

5th Dewey Decl. at Ex. 15 at 68:2–8 (emphases added). The implication is clear—there were zero privacy protections actually in place. And the “sensitive” “personally painful” topics of the Book—including “Beau’s illness and eventual passing” (Mot. at 3–4) *were selected precisely because they would sell to the tune of \$8 million dollars.*

3. President Biden cannot bring himself to directly defend the Biden DOJ’s fanciful theory that President Biden has a distinct privacy interest in the manner in which he answered the Special Counsel’s questions—*i.e.*, the “pauses, hesitations, mannerisms, and intonations” (despite having plenty of unused pages to do so). ECF No. 33-1 at 16. Instead, President Biden rather simply “adopts and incorporates) many pages of DOJ briefing from the Biden era to do so, which puts this Court in an awkward position of having to respond to argument that is not on all fours and is no longer the Department’s position. In any event, as to the merits of that submission, the *en banc* D.C. Circuit has made clear that “when the government asserts that only the non-lexical aspect is exempt from disclosure, the court must consider whether the information that would be *newly revealed* by that disclosure is or is not exempt.” *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (*en banc*) (emphasis added); *see also id.* (“The information recorded through the capture of a person’s voice is distinct and in addition to the information contained in the words

themselves.”). Put differently, the only privacy interest President Biden can legitimately assert here is the interest in President Biden voices against the backdrop that significant portions of transcript were already released. And here, releasing the recording would reveal little new private information about either President Biden’s “pauses, hesitations, mannerisms, and intonations.” ECF No. 33-1 at 16. The public is already quite familiar with how President Biden speaks. But the audio here would provide significant value—by either supporting or undercutting Special Counsel Hur’s non-charging decisions—to the public debate.

In arguing otherwise, the President Biden’s DOJ relied heavily on *NASA*, but that case is not remotely on point. There, the Court declined to order the disclosure of a recording that revealed sensitive voice communications of NASA astronauts on board the *Challenger* in the final moments before the space shuttle exploded when a transcript of those communications was already public. *N.Y. Times Co. v. NASA*, 782 F. Supp. 628, 633 (D.D.C. 1991). President Biden’s DOJ asserted that “[i]f released to the public, these private conversations—and all the ‘intimate details’ they contain—would likely be broadcast to the world and become universally available on the Internet. ECF No. 33-1 35 (quoting *N.Y. Times*, 782 F. Supp. at 632). (And recall even President Biden has tacitly admitted that the conversations at issue were pointedly not “intimate.”). It goes without saying that revealing a recording of the panicked communications of private individuals moments before their death is not remotely comparable to interviews conducted for a lucrative commercial and political purpose that were so significant to Special Counsel Hur’s non-charging decision *that he quoted them in the Hur Report*. The same is true of *Pike v. DOJ*, 306 F.Supp.3d 400 (D.D.C. 2016). Withholding a recording where the “voice inflection” would reveal the identity of an undercover source is not remotely comparable. *Pike*, 306 F.Supp.3d 400 at 412.

4. Biden has little if any privacy interest that extends beyond the transcript and in any event the point is when the his own DOJ already (as applicable here) revealed the *substance* of his communications and his manner of speaking would inform the public of his demeanor during the interview to help the American people ascertain whether and how the Government is administering substantive law enforcement policy.

And the privacy interests in issue in this case are not remotely comparable to the interests at stake in *NASA*. Instead, they are far more comparable to the privacy interests at stake in *Dow Jones & Co. v. DOJ*, 880 F. Supp. 145, 152–53 (S.D.N.Y. 1995), where then-Judge Sotomayor ordered the release of Vince Foster’s suicide note and rejected the Government’s reliance on *NASA* on the ground that “the Foster family’s privacy interest in the Note is weaker than the deceased Challenger astronauts’ families’ interest in the audiotape, and because the public interest in disclosure of the Note is stronger than it was in the audiotape.” *Id.* at 153.

B. There Is Overwhelming Public Interest in Disclosure.

On the other side of the scale, the public interest in the recording is overwhelming.

1. President Biden does not dispute that there is a compelling public interest in assessing his DOJ’s exercise of prosecutorial discretion. *See* Def. Mot. at 19 (quoting *CREW III*, 746 F.3d at 1092). Of course he cannot. The D.C. Circuit has “repeatedly recognized a public interest in the manner in which the DOJ carries out substantive law enforcement policy.” *CREW III*, 746 F.3d at 1093. As the D.C. Circuit has explained, relevant to that interest (in the context of a specific criminal investigation) is “the diligence of the FBI’s investigation and the DOJ’s exercise of its prosecutorial discretion: whether the government had the evidence but nevertheless pulled its punches.” *Id.*; *accord id.* at 1093–94 (collecting authorities); *CREW v. DOJ*, 854 F.3d 675, 682 (D.C. Cir. 2017) (“*CREW IV*”) (same).⁵ That interest may be amplified by “[w]idespread media attention, an ongoing public policy discussion, and the public profile of the subject of the investigation[.]” *CREW II*, 978 F.Supp.2d at 13. And here, the recording is critical in two respects to assessing Special Counsel Hur’s decision not to recommend prosecuting the President for alleged crimes.

a. As the Special Counsel explained in both the Hur Report and his testimony to Congress, his decision not to recommend prosecution was based in part on his conclusion that “at

⁵ Necessarily, that interest is applicable even to a specific case, especially a high-profile one. *See, e.g., CREW III*, 746 F.3d at 1094; *CREW IV*, 854 F.3d at 679; *CREW v. DOJ*, 978 F. Supp. 2d 1, 13 (D.D.C. 2013) (“*CREW I*”).

trial, Mr. Biden would likely present himself to a jury, as he did during our interview of him, as a sympathetic, well-meaning, elderly man with a poor memory.” Hur Report at 6. It would therefore “be difficult to convince a jury that they should convict him—by then a former president well into his eighties—of a serious felony that requires a mental state of willfulness.” *Id.* Of course, President Biden, senior Member of the Biden Harris-Administration, and their political allies have all vigorously attacked this conclusion.

The audio in issue here is a critical piece of evidence supporting that finding. First, the Biden-Zwonitzer recording serves as direct evidence that seven years ago “Biden’s memory also appeared to have significant limitations . . . as evidenced by their recorded conversations.” Special Counsel Hur specifically recounted that, “Mr. Biden’s recorded conversations with Zwonitzer from 2017 are often painfully slow, with Mr. Biden struggling to remember events and straining at times to read and relay his own notebook entries.” Hur Report at 207. But second, and more critically, Special Counsel Hur testified he also relied upon President Biden’s and Zwonitzer’s conversations from February and April of 2017 (at issue here) as a critical comparative reference point for assessing President Biden’s diminished faculties and faulty memory. *See* Hur Hearing at 72; Hur Report at 248.

The public has an overwhelming interest in the recording so that it can assess the Special Counsel’s conclusions for itself and resolve the controversy between the Special Counsel on the one hand and the President and the rest of the Biden-Harris Administration on the other.

b. The Hur Report is clear that despite its conclusion to recommend declining prosecution, there is evidence that the President willfully retained and disclosed classified information. In particular, the Hur Report was unequivocal that President Biden shared classified information with Zwonitzer. *See* Hur Report at 103–106, 108. Indeed, Hur testified ***there was a case to answer***. *See supra* at 9–10. President Biden stridently denied providing classified information to Zwonitzer and Special Counsel Hur stood by his conclusion in his Congressional testimony. Again, the American People are allowed to judge this dispute themselves.

c. While the two foregoing interests are more than sufficient, their power is increased by the fact that in at least one key instance, the Special Counsel was not entirely sure what President Biden said. *See* Weinsheimer Decl. at ¶ 19 bullet 4; Hur Report at 104 n.431. Production of the recordings would both allow the American People to judge the matter for themselves and would allow experts to explore audio enhancement to provide clarity on this issue. *See* Declaration of Jerry Hatchet at ¶ 6, *Judicial Watch et al. v. DOJ*, No. 24-cv-700 (TJK) (D.D.C. filed June 21, 2024) (ECF No. 40-4).

2. President Biden also entirely ignores another separate and salient interest. Did the Biden-Harris Administration cover up the fact that President Biden was unfit for Office? To be sure, the D.C. Circuit has held that “the only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would ‘she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens know ‘what their government is up to.’” *CREW III*, 746 F.3d at 1093 (citations omitted). And the public interest does not extend to what an official was up to in terms of their private putative criminal misconduct. *Id.*

But those cases were carefully cabined and must be distorted beyond all recognition to support the Biden DOJ’s proposition that the only permissible public interest is “an explanation of how release of the audio recordings and transcripts would inform the public about the activities of Special Counsel Hur, not about the conduct or characteristics of President Biden or Mr. Zwonitzer.” ECF No. 33-1. at 12. No one disputes that the President’s fitness for Office is plainly implicated by the Special Counsel’s investigation itself. (That is the entire point of the disagreement between the Biden-Harris Administration and Special Counsel Hur regarding the President’s “diminished faculties and faulty memory.” Hur Report at 248). The President *is* the Executive Branch. He is the living breathing embodiment of a unitary Executive, “the only person who alone composes a branch of government.” *See, e.g., Trump*, 603 U.S. at 610 (internal citation and quotation omitted)). Thus, the President’s fitness for office is a sufficient FOIA interest because, by definition, it “she[d][s] light on . . . [The Executive Branch’s] performance of its statutory duties.” *CREW III*, 746 F.3d at 1093 (first alternation in original; citation omitted).

Whether the man always accompanied by the nuclear football is fit for Office cannot be any more fundamental to the people’s right to know ““what their government is up to.”” *CREW III*, 746 F.3d at 1093 (citations omitted). Moreover, that interest is not confined to the President *quo* the President. If Special Counsel Hur is correct and President Biden showed clear evidence of impairment outside of carefully scripted public appearances seven years ago, and that impairment continued, Vice President Harris and other senior Administration officials would have undoubtedly encountered President Biden’s “diminished faculties and faulty memory” (Hur Report at 248) *every day from January 20, 2021 to present*. Indeed, the senior-most Executive Branch officials are charged by Section 4 of the Twenty-Fifth Amendment to ensure the President is fit for duty.⁶

Again, the public has a powerful interest in assessing the Special Counsel’s conclusions *because those conclusions are sharply contested*. Did Vice President Harris and other senior Administration officials cover for President Biden when they viciously attacked Special Counsel Hur for his conclusion—relying specifically on the audio at issue here—that the President had a “poor memory” and “diminished faculties”? Hur Report at 2, 248. Or were they right and Special Counsel Hur wrong? *To this day*, senior Biden Administration officials deny any sort of impairment. Incredibly, President Biden *admits that this controversy is on-going* by citing, in detail, the compelling evidence of Biden’s decline and the fact that the Biden-Harris Administration covered it up. *See* Mot. at 9–10. He then has the gall to submit that somehow the fact that Plaintiffs have “engaged in repeated public attacks focused on the diary-writer’s mental competency” supports finding a privacy interest. *Id.* at 33. FOIA is antithetical to this paternalistic

⁶ A contrary position would lead to absurd results. There would be no public interest in whether the President was virtually completely incapacitated, and his closest associates covered it up. 5th Dewey Decl. Ex. 21. (recounting Edith Wilson’s usurpation of President Woodrow Wilson’s power and dysfunction of the Presidency after his stroke; efforts by President Grover Cleveland’s Administration to strong arm press to cover up his cancer surgery; use of even the FBI to suppress reporting that President Franklin D. Roosevelt was dying as he ran for re-election in 1944; and President John F. Kennedy’s potential cognitive impairment due to habitual use of potent pharmaceuticals). That cannot be right.

view that some information must be taken for granted and President Biden’s side of the story cannot be challenged.⁷ The American People are entitled to decide for themselves who is right by listening to the recordings. That interest is quintessentially about what the American People’s “government is up to.” *CREW III*, 746 F.3d at 1093 (citations omitted).

3. President Biden’s contrary arguments are unavailing. President Biden does not dispute that Special Counsel Hur relied upon the recordings here. But it insists that the recordings are not all that important because “[t]he Department already has released the portions of the transcripts of President Biden and Zwonitzer’s conversations that Special Counsel Hur cited in his report” (Mot. at 17), made public the “345 page report” (*id.*), and “the Department has released additional materials related to the Special Counsel’s investigation” (*id.* at 24) and thus there is already “‘voluminous information’ about the Special Counsel investigation already in the public domain.” *Id.* at 6 (internal citation omitted). Thus, the recordings’ value is “tenuous at best” *Id.* Hardly.

⁷ To be sure, the best evidence rule does not apply strictly in FOIA, but its principle does. Justice Sotomayor’s opinion in *Dow Jones*, is instructive. There, the content of Vince Foster’s “suicide” note had been made available, but the note itself had not. *Dow Jones*, 880 F. Supp. at 152. Justice Sotomayor found:

The public has a substantial interest in viewing the Note. . . . [T]he public not only has an interest in the contents of the Note but also in viewing a photocopy of the actual document. According to statements made at the Press Conference, the Note was torn up by someone, and some of the pieces are missing. Stip. Facts ¶ 54. The missing pieces, the “look” of the handwriting, and the significance to be drawn therefrom, are, as plaintiffs note, matters of public concern. DOJ itself has implicitly recognized the public interest by making a photocopy of the Note available for viewing.

Id. at 152. To be sure, there was some measure of controversy over the authenticity of the note, given that it was torn up and reconstructed (although it was generally agreed all text was present), and the circumstances under which the White House handled it. See *Special Comm. to Investigate Whitewater Development Corporation and Related Matters, Final Report* at 84–85, 104 Cong. 2d Sess. (1996). But there is controversy here over how to read nuances in testimony. And the audio may shed some light on that. Of course, there may be little the public can pull from audio intonation, pauses, etc., but so too the appearance of a note or the “look” of Vince Foster’s handwriting. The American people are entitled to review the evidence on a such a controversial matter and judge it for themselves.

a. Special Counsel Hur repeatedly testified that President Biden’s “diminished faculties and faulty memory” was an important component of his decision not to charge the President because a jury would see him as “a sympathetic well-meaning elderly man with a poor memory.” Hur Report at 248, 6; *see supra* pp. 10–11. Special Counsel Hur also repeated testified that President Biden disclosed classified information to Zwonitzer. *See supra* pp. 11–12. Those findings are immensely controversial, and the American people have the right to judge them for themselves. The recordings—by revealing the pauses, hesitations, mannerisms, and intonations that are not obvious from a cold transcript—will shed light on whether the Special Counsel (or his detractors) got it right.

Again, it is the height of hubris for President Biden to claim the matter is effectively explained and settled because the Hur Report is public when the Biden White House *itself* (and through its numerous proxies and political allies) have vigorously attacked that “determination” as to the President’s “diminished faculties and faulty memory” since before the Hur Report was made public. *See supra* pp. 8–12. President Biden himself felt so strongly about both matters that he disputed those findings from the podium the day the Hur Report was released. *See supra* pp. 2, 14. The precise reason the American People cannot rest on Special Counsel Hur’s word as to what is on the recording is that President Biden has stated in dramatic fashion that Special Counsel Hur is wrong. How can resolving that controversy, which is emphatically about Special Counsel Hur’s Report and the functioning of the Government, *possibly* not be of overwhelmingly public interest when the Biden White House and its allies fanned—and incredibly *still fan*—the controversy at every turn? It cannot.

On the issue of “diminished faculties and faulty memory,” the audio recordings cannot possibly be cumulative. Special Counsel Hur’s contested conclusion was based on demeanor evidence. *See supra* pp. 10–12. It is the very type of evidence that even President Biden’s preferred narrator *admits* is captured by audio recordings. *See Weinsheimer Decl.* at ¶¶ 16–17, 23. And as Special Counsel Hur explained in his testimony, a cold transcript is no substitute for live audio. That is particularly so because the critical point was how, in Special Counsel Hur’s prosecutorial

judgment, the President’s “diminished faculties and faulty memory” (Hur Report at 248) would cause a jury to see the President as “a sympathetic well-meaning elderly man with a poor memory.” *Id.* at 6.

Even President Biden’s DOJ stated that the *only* contemporaneous evidence of demeanor are the audio recordings. 3d Dewey Decl. at Ex. 2 at 3:2–4. Special Counsel Hur himself testified he relied upon the recordings for demeanor evidence. *See supra* pp. 10-12. The Government does not dispute these facts—it cannot—and that concession is fatal. *See Elec. Priv. Info. Ctr. v. DOJ*, 18 F.4th 712, 721 (D.C. Cir. 2021) (“*EPIC*”) (rejecting similar argument that disclosure was cumulative as to Special Counsel Robert Mueller’s Report because the relevant records went to an issue on which information had not been released); *see also Dow Jones*, 880 F.Supp. at 152–53 (ordering disclosure of Vince Foster’s suicide note despite prior release of transcript of that note and rejecting DOJ’s analogy to *NASA* because “the public not only has an interest in the contents of the Note but also in viewing a photocopy of the actual document. According to statements made at the Press Conference, the Note was torn up by someone, and some of the pieces are missing. . . . The missing pieces, the ‘look’ of the handwriting, and the significance to be drawn therefrom, are, as plaintiffs note, matters of public concern. DOJ itself has implicitly recognized the public interest by making a photocopy of the Note available for viewing.”).⁸

As to the question of whether classified information was disclosed to Zwonitzer, tone matters. A cold transcript is no substitute for live testimony when evaluating a witness’s demeanor and credibility. *See, e.g., Coy v. Iowa*, 487 U.S. 1012, 1015–20 (1988); *United States v. Burden*, 934 F.3d 675, 685 (D.C. Cir. 2019). The public is entitled to any significant piece of evidence and many members of the public may well find the audio significant to *their* view of the matter (pro-

⁸ President Biden’s reliance on his DOJ’s extensive analogy to *Judicial Watch v. NARA*, 876 F.3d 346 (D.C. Cir. 2017), is flawed. There, the record sought did not even concern a decision of the Independent Counsel; it was an internal draft. *Id.* at 350. Judicial Watch only asserted a general interest in the “operations” of the Independent Counsel’s Office, and accordingly an internal draft was held cumulative of the voluminous information already disclosed. That is a world removed from a *key finding* by Special Counsel Hur that remains the subject of immense controversy and on which the key piece of evidence has not been released.

or con-Biden). President Biden has pointedly *not* provided sworn testimony that *nothing* in the audio provides important demeanor evidence that would confirm or refute Special Counsel Hur’s conclusions or President Biden’s disputation thereof; to the contrary he simply pronounced that Special Hur was—and is—wrong as a matter of *ipse dixit*.

Again, at the end of the day, the public’s need to evaluate the audio recordings to decide for themselves whether President Biden disclosed classified information to Zwonitzer is not cumulative precisely because Biden himself denied doing so, contrary to Hur’s conclusions.

b. President Biden next appears to insist that the Special Counsel may have *other reasons* for declining to prosecute the President resting on his DOJ’s prior briefing and the nebulous categorization that “no charges” were filed. Mot. at 1. But President Biden nowhere denies that one of the Special Counsel’s *primary* reasons for declining to prosecute the President was his determination that a jury would likely view him as a well-meaning, elderly man with a poor memory who likely did not have the requisite mental state of willfulness when he opted to retain classified documents. Moreover, the recordings are one of the key pieces of evidence that the Special Counsel expressly relied on in refusing to recommend charging *the sitting President of the United States* with a serious federal crime. Cf. *Judicial Watch*, 876 F.3d at 349–50 (little public interest in disclosure of “staff proposed” draft indictment never acted upon).

c. Finally, President Biden asserts that all of the foregoing interests are attenuated because Biden is no longer in Office. See Mot. at 24. But that gets President Biden nowhere. The notion that the “facts militating against disclosure are even stronger now that President Biden has returned to life as a private citizen” (ECF No. 51 at 13) completely ignores an immutable fact. President Biden *chose* to run for President, *chose* to take the oath, and *chose* to serve as the President. That choice—which President Biden coveted and which was a major motive for the book—carries with it the consequence that retirement does not somehow restore a cloak of privacy.

Moreover, while President Biden is out of Office, his decisions in Office live on and may well have impact on future elections like the upcoming 2026 Midterm elections. Indeed, many in the Biden-Harris Administration remain in the public sphere. Whether President Biden or Special

Counsel Hur are correct could well play in those electoral contests. One may think that is why President Biden has adopted a litigation strategy of injecting maximum delay here. More broadly, whether the Biden-Harris Administration covered up the existence of an impaired President is still very much an electoral topic and will undoubtedly play in the upcoming elections. After all, the sitting President has forcefully asserted that the Nation is still suffering from immense damage from decisions potentially made by the senior-most Members of the Biden-Harris Administration without his knowledge of an incapacitated President that should have been removed under the Twenty-Fifth Amendment.

II. RELEASE OF THE OTHER AUDIO AND TRANSCRIPTS WOULD NOT RESULT IN AN UNWARRANTED INVASION OF PRIVACY.

President Biden has a vastly diminished privacy interest in the transcripts because not only the fact of the Special Counsel’s investigation, but many of its details—including relative to the transcripts—are also already public.⁹ Conversely, the American people have an overwhelming public interest in access to the set of materials curated by Special Counsel Hur constituting a specific body of evidence undergirding his investigation and Report, so as to judge for themselves if Special Counsel Hur was correct as whether: (1) there was a case for President Biden to answer, in part because he disclosed classified information to Zwonitzer, *see* Hur Report at 4, 103–08, 108); or instead (2) a basis, on the flip side, not to recommend prosecuting the President because of his “diminished faculties and faulty memory,” Hur Report at 248; and (3) President Biden was actually impaired in Office and the Biden-Harris Administration covered that fact up.

A. President Biden Has Little, If Any, Privacy Interest Here.

1. To start President Biden blithely ignores what is *actually in issue*. This is not about the full 70-hour set of recordings, but the few hours of recordings that Special Counsel Hur curated because they were so important to his investigation and decision making that he had them

⁹ That this Court found sufficient privacy interests for the purposes of standing to intervene has no relevance here. *Contra* Mot. at 32–33. That was a proceeding evaluated at the level of whether President Biden had *pleaded* he had the privacy interests asserted and Plaintiffs did not contest that such points were properly pleaded. That analysis is entirely different than that in issue here.

transcribed. Moreover, this is not about simply dumping conversations that are “deeply sensitive and personal in nature” without any redactions. Mot. at 32 The record reflects not only did the Department make redactions for privacy to that curated subset of materials, but they made even more redactions in response to objections and requests from President Biden. *See* Jeffress Decl. at Ex. 2 at 2. (“Thank you for your email of March 31, and for your helpful comments on our proposed redactions to the audio files and transcript. Based on your comments, we have expanded our redactions both to the audio files as well as the transcript, providing greater privacy protection to President Biden’s family and correcting inadvertent errors on our part.”). And even by ***President Biden’s*** telling, the materials in question are not actually private—President Biden’s “intimate reflections on his decision making . . . as a public servant” are quintessentially public. Mot at 33. Why the President takes official action is always a public matter. Privileges over that information do not sound in privacy and President Biden pointedly has not asserted Executive Privilege here.

Contrary to President Biden’s attempts to smear the Department as partisan, the proof is in the pudding. Other Hur-related disclosures clearly demonstrate that the Department has been faithful in applying FOIA. Review of the Zwonitzer-Hur transcripts shows a great number of redactions for privacy that remain. Nothing was “dumped”. *See* 5th Dewey Decl. Exs. 15 & 16.¹⁰

2. President Biden continues his parade of willful blindness in that he also completely ignores as noted above that the recordings were made entirely for monetary, media and political purposes.

3. President Biden asserts he maintains a “tremendous” (Mot. at 15) privacy interest, even though the whole world knows he was subject to an investigation because “while Special Counsel Hur’s final report has become public, President Biden retains a ‘distinct privacy interest in the contents of the investigative files.’” Mot. at 16 (quoting *CREW III*, 746 F.3d at 1092). That is correct but does little work for the Biden here. The operative facts are also known to the entire

¹⁰ Plaintiffs have no objection to this Court conducting *in camera* review of the proposed production set ***now***, given the tight timeframe necessitated by President Biden’s litigation choices.

world. After all, that is the entire point of the dispute between Special Counsel Hur, President Biden, and his Administration. All that remains is evaluating the specifics of the transcripts to determine whether Special Counsel Hur or the President is correct. In one sense, that revelation is “an array of new information;” in another, it is carefully targeted details about already public content necessary to resolve a raging dispute between the former-President and the man appointed by the President’s handpicked Attorney General to investigate the President for major felonies. In those circumstances both President Biden has a vastly diminished privacy interest. *See, e.g., CREW III*, 746 F.3d at 1092; *Kimberlin*, 139 F.3d at 949; *Nation Mag.*, 71 F.3d 885 at 896.

4. Further, as President Biden *himself* acknowledges, his privacy interests are diminished by his decades of service as a Senator, Vice President, and then President. *See* Mot. at 16.

5. President Biden’s assertion that the privacy interest is far stronger based on reliance on *Judicial Watch*, 876 F.3d at 346, and *EPIC*, 18 F.4th at 712, is wrong. *See* Jeffress Decl. at Ex. 2 at 4–6. In *Judicial Watch*, the D.C. Circuit allowed the Government to withhold a draft indictment accusing Hillary Clinton of various crimes because the contents of the draft indictment—“*a staff-proposed formal government accusation of criminal conduct*”—were never adopted by the Independent Counsel let alone released to the public. 876 F.3d at 349–350 (emphasis added). In that circumstance, publicizing the decades-old draft indictment would have obviously impaired Mrs. Clinton’s privacy interests by “produc[ing] the unwarranted result of placing Mrs. Clinton in the position of having to defend her conduct in the public forum outside of the procedural protections normally afforded the accused in a criminal proceeding.” *Id.* at 350. Here, by contrast, the public is already aware of the alleged crimes that spawned the investigation of President Biden as well as much the content of that investigation.

In *EPIC*, the D.C. Circuit allowed the Government to withhold “the names and personally identifiable information of individuals investigated but not charged by the Special Counsel” (18 F.4th at 716) with making “false statements” (*id.* at 720) because disclosure of the records at issue would have revealed “additional facts about individuals that are not disclosed or even intimated

elsewhere in the report.” *Id.* at 720. That is not remotely the case here. The public is well aware of both of what President Biden and was investigated for and the details of that investigation.

B. There Is Overwhelming Public Interest in Disclosure of the Audio and Transcripts.

The public interests in disclosure are both clear and precise. First, was Special Counsel Hur correct when he found that President Biden disclosed classified information to Zwonitzer? Or President Biden when he denied doing so? By the Biden’s DOJ’s own admission, the transcripts go directly to that question. *See* Weinsheimer Decl. at ¶¶ 14–15. Allowing the American People to judge such disputes for themselves goes to the very essence of FOIA. Second, was Special Counsel Hur correct when he found President Biden had “diminished faculties and faulty memory” or was President Biden correct in his strident denials. Hur Report at 248. Third, did the Biden-Harris Administration cover up the fact that President Biden was unfit for Office?

President Biden’s only new retort is rehashing and repackaging his assertion that the information is cumulative. *See* Mot. at 6, 17, 24. But again, whether information is cumulative does not turn on the relative volume of information, but whether the information in question has been released. *See, e.g., EPIC*, 18 F.4th at 721 (rejecting similar argument that disclosure was cumulative as to Special Counsel Robert Mueller’s Report because the relevant records went to an issue on which information had not been released); *Dow Jones*, 880 F. Supp. at 152–53. Here, the issue is whether Special Counsel Hur—or the President—was correct. And by President Biden’s DOJ’s own admission, the best evidence to assess that proposition is the audio and transcripts. Resolution of those issues goes directly to whether the senior-most members of the Biden-Harris Administration covered for a cognitively impaired President. Thus, the audio and transcripts cannot be cumulative, and it is rich in the extreme for the President Biden to argue otherwise when *he* stoked the controversy.

To be sure, no one knows what the public will draw from the additional audio transcripts in determining whether President Biden or Special Counsel Hur is correct, but that does not render Plaintiffs’ submission speculative. Some may find the transcripts informative; some not so.

Anyone who has tried a white-collar case to a jury knows the confounding nature of nuanced words and proof. But that is okay precisely because FOIA presupposes many known unknowns. What matters here is that there is a great and open question, and it is admitted by the Government that the transcript at issue is highly relative evidence to allowing the American People to judge the matter for themselves. That direct link distinguishes President Biden’s authority, which turned on the relevance of the records *at all* being speculative. *Cf., e.g., U.S. Dep’t of State v. Ray*, 502 U.S. 164, 178–79 (1991) (FOIA interest speculative because it is unknown if any public interest would in fact be developed by the intended derivative use of records); *Proj. on Gov. Oversight, Inc. v. U.S. Off. Of Special Counsel*, No. 22-cv-3381 (DLF), 2024 WL 1213324, at *5 (D.D.C. Mar. 19, 2024) (finding interest in whether senior Trump Administration officials were investigated differently was speculative where there was no evidence of special treatment).

III. PRESIDENT BIDEN CANNOT SHOW IRREPARABLE HARM.

To establish irreparable harm, “the injury ‘must be both certain and great; it must be actual and not theoretical.’” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). The burden of showing such irreparable harm sits squarely on **President Biden**. *See, e.g., Winter v. NRDC*, 555 U.S. 7, 22 (2008) (“Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction”); *Friends of Animals v. U.S. Bureau of Land Mangt.*, 548 F.Supp.3d 39, 69 (D.D.C. July 12, 2021) (denying preliminary injunction because “at best this brings the question of irreparable harm into equipoise, and FOA, not the BLM, bears the burden of proof” and noting that Plaintiff declined to present live testimony).

One would expect a submission that begins and ends with the supposed devastating harm from disclosure would be accompanied by direct testimony from President Biden. Not so. *See* Mot. at 1 (*ipse dixit*); *id.* at 2 (citing to Biden DOJ’s arguments); *id.* at 3 (*ipse dixit*); *id.* at 4 (misrepresenting Weinsheimer’s as stating the recordings were for Zwonitzer’s “personal use” (*id.*) when Weinsheimer wrote only “use” (Weinsheimer Decl. at ¶ 10); Mot. at 4

(mischaracterizing quoted portion of paragraph 13 of the Weinsheimer Declaration); *id.* at 15 (opinion and hearsay from Weinsheimer); *id.* at 16 (*ipse dixit*); *id.* at 23 (*ipse dixit*); *id.* at 32 (*ipse dixit*); *id.* at 33 (*ipse dixit*); *id.* (Weinsheimer’s opinion); *id.* at 35 (*ipse dixit*).

Mere words are not at all **proof** of “great” or “certain” injury from actual intrusion on privacy. Competent evidence is required to discharge Biden’s burden of showing the materials in question are actually that private. Moreover, the lower evidentiary standard applicable in the preliminary injunction posture cannot save Biden.

“While a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits,” and courts often rely on affidavits “for the limited purpose of determining whether to award a preliminary injunction,” stretching these exceptions to hearsay-within-hearsay strikes the Court as a step too far. *Coalition for Human Imm. Rights v. DHS*, 780 F.Supp.3d 79, 91–92 (D.D.C. 2025) (citation omitted). Courts routinely reject hearsay-within-hearsay. *See, e.g., Advance Am. v. FDIC*, No. 14-cv-953, 2017 WL 2672741, at *8 (D.D.C. Feb. 23, 2017). So too material without attribution. *See, e.g., Coalition for Human Imm. Rights*, 780 Supp.3d at 92; *Advance Am.*, 2017 WL 2672741, at *8. And at least one Court has strongly implied that an attorney’s declaration “filled with hearsay statements” from the client is inadequate where the client has a history of confabulation. *Montgomery v. Barr*, 502 F.Supp.3d 165, 175–76 (D.D.C. 2020). That logic applies *perforce* here; Biden is a serial confabulator; and the attorney declarations here rely on hearsay accounts of vague unspecified opinion and uncited other sources.

Given the complete lack of evidence that President Biden’s privacy interests actually face concrete, “great” and “certain” harm, the Motion should be denied. At a minimum, Plaintiffs should be entitled to test vague assertions of opinion via hearsay and hearsay without attribution via cross examination of President Biden in open Court.

IV. THE EQUITIES FAVOR DISCLOSURE.

1. There is a strong public interest in disclosure in any FOIA case because “[D]isclosure, not secrecy, is the dominant objective” of FOIA (*U.S. Dep’t of Air Force v. Rose*,

425 U.S. 352, 360–61 (1976)) and “There is a national interest in transparency of government operations.” *Az. Fam. Health Part. v. HHS*, No. 18-cv-2581 (TNM), 2019 WL 130578, at *3 (Jan. 8, 2019). Moreover, FOIA mandates not only production of records, but the **prompt** production of records. *See, e.g., Judicial Watch v. DHS*, 895 F.3d 770, 774 (D.C. Cir. 2018) (“federal agencies, ‘upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . shall make the records **promptly available**.’” (quoting 5 U.S.C. § 552(a)(3)(A) (emphasis added)); *Payne Enter., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (“stale information is of little value”). “Congress reasoned that prompt adjudication of FOIA cases (a) foster the important goal of creating an informed citizenry; (b) involve remedies of a ‘transitory’ nature, *i.e.*, that delay could render an information request ‘of no value at all;’” *Ontario Forest Indus. Assoc. v. United States*, 444 F. Supp. 2d 1309, 1319 (C.I.T. 2006) (quoting H. Rep. No. 98-985, at 5–6 (1984)). That is why FOIA statutorily eliminates normal barriers to equitable relief. *See, e.g., Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (“Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here.”); *accord Wash. Post v. Dep’t of State*, 685 F.2d 698, 704 (D.C. Cir. 1982), *vacated as moot*, 464 U.S. 979 (1983) (mem.).

2. Moving on, the Department has acted lawfully (*contra* Mot. at 35) and thus, “[i]n a reverse-FOIA case such as this one, the Court will defer to an agency” own determination that disclosure is in its interest.” *Az. Fam. Health*, 2019 WL 130758, at *3.

3. As to Heritage and the Public’s broader interests, the public interest is severely harmed when delay “would deprive the public of information critical to an ongoing national debate of considerable importance, as well as basic details surrounding an unprecedented [action by the Federal Government].” *WP Co. LLC v. U.S. Small Bus. Admin.*, Nos. 20-1240, 20-1614 (JEB), 2020 WL 6887623, at *5 (D.D.C. Nov. 24, 2020); *accord id.* at *4 (collecting cases); *Az. Fam. Health*, 2019 WL 130578, at *3. Biden’s claim that Plaintiffs “have identified no time-sensitive need for President Biden’s private conversations from 2016 and 2017” is dead wrong. Mot. at 35. The information is obviously relevant simply as to whether non-delegable Presidential

actions were actually authorized or auto-penned in the President's name by the senior-most Members of the Biden-Harris Administration. Whether a pardon or a veto is valid is no small matter. Moreover, whether President Biden did, in fact, leak classified information, whether President Biden was in fact impaired, and whether senior Members of the Biden-Harris Administration covered up Biden's apparent cognitive decline is and will continue to be a salient issues in the upcoming 2026 Election. Indeed, the timing of President Biden's decision to resort to litigation at the last possible second and interject delay is pregnant with critical political implications: The goal is to delay any disclosure until *after* the fast approaching Midterm Elections. It is also nonsensical to claim that there has been delay in litigation that steadily worked to settle the case well prior to the Midterm elections. *Cf.* Mot at 36.

Courts have routinely found a clear public interest in disclosure in such circumstances. *See, e.g., Am. Immigr. Council v. DHS*, 470 F.Supp.3d 32, 38 (D.D.C. 2020) ("Plaintiff seeks the requested information to inform the public about ICE's response to the COVID-19 pandemic and the impact of that response on the thousands of immigrant detainees who are presently in ICE custody. A delay in the release of the requested information would cause irreparable harm."); *Wash. Post v. Dep't Homeland Sec.*, 459 F.Supp.2d 61 (D.D.C. 2006) (granting preliminary injunction holding U.S. Secret Service visitor logs for visits to the Vice President and his senior staff were agency records and must be produced due to the public interest in them prior to the 2006 mid-term elections); *Leadership Conf. on Civil Rights v. Gonzales*, 421 F.Supp.2d 104, 110 (D.D.C. 2006) ("plaintiff and the public likely will suffer significant harm if the Court grants a stay. The upcoming 2006 federal elections and congressional hearings regarding the re-authorization of provisions of the Voting Rights Act make plaintiffs' information requests time sensitive").

V. THE COURT SHOULD ORDER A SUBSTANTIAL BOND IN THE AMOUNT OF AT LEAST \$8 MILLION.

Plaintiff seeks to vindicate a fundamental public right to government information. By contrast, Biden made *\$8 million or even more* and garnered extensive earned and unearned media

to advance his political agenda by sitting down with a ghostwriter to profit from his vice presidency and his time in the Senate. A substantial bond should accordingly be set to safeguard the combined interests of the Plaintiffs and the American People to gain access to their own information as currently held by the Department. Joe Biden's profits are plainly a conservative estimate of how much he profited from *selective disclosure* of classified information to Zwonitzer his ghostwriter. It does not even account for his political gain. Plaintiffs submit that they are entitled to see the Court require Intervenor to post at least an \$8 million bond. If President Biden's actions brought in that much money, the information sought here is worth at least that much to a waiting public in the midst of a heated Midterm election season.

Intervenor's request to impose no bond or a nominal bond under Fed. R. Civ. P. 65(c) is legally unsupported and contrary to the purposes of Rule 65(c). Just recently the D.C. Circuit admonished judges in this District for routinely requiring nominal bond. *See, e.g., Nat. Treasury Empl. Union v. Trump*, No. 25-5127, 2025 WL 1441563, at *3 (D.C. Cir. May 15, 2025) ("injunction bonds are generally required. Fed. R. Civ. P. 65(c) ('The court may issue a preliminary injunction . . . **only if** the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.' (emphasis added))"); *see also Edgar v. Mite Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring) (an injunction bond "is the moving party's warranty that the law will uphold the issuance of the injunction"). Biden claims that the Department is not harmed by a delay in release of the documents. *See* Mot at 37. This ignores that the **real irreparable harm here** is to the American People and Plaintiffs and that the Court defers to the Department's view that its interest is in disclosure. *See, e.g., Az. Fam. Health*, 2019 WL 130578, at *3.

Under Rule 65(c), the bond must serve as a meaningful guarantee that Intervenor will not be permitted to inflict irreparable harm on the public's right to know without consequence. The Court should deny the request for a nominal bond and instead require at least an \$8 million bond.

CONCLUSION

President Biden's Motion should be denied.

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Respectfully submitted,

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