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12  
13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**  
15

16 UNITED STATES OF AMERICA,  
17 Plaintiff,  
18 vs.  
19 ROBERT HUNTER BIDEN  
20 Defendant.

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

*Hon. Mark C. Scarsi*

**DEFENDANT’S NOTICE OF MOTION  
AND MOTION TO DISMISS FOR  
SELECTIVE AND VINDICTIVE  
PROSECUTION AND BREACH OF  
SEPARATION OF POWERS**

Hearing Date: March 27, 2024  
Time: 1:00 PM  
Place: Courtroom 7C

**NOTICE OF MOTION AND MOTION TO DISMISS**

TO: SPECIAL COUNSEL DAVID WEISS, PRINCIPAL SENIOR ASSISTANT  
SPECIAL COUNSEL LEO J. WISE, SENIOR ASSISTANT SPECIAL COUNSEL  
DEREK E. HINES

PLEASE TAKE NOTICE that on March 27, 2024, at 1:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of Honorable Mark C. Scarsi, Defendant Robert Hunter Biden, by and through his attorneys of record, will, and hereby does, respectfully move this Court for an order dismissing the Indictment for selective and vindictive prosecution as the prosecution is motivated by discriminatory intent and animus, has discriminatory effects, violates separation of powers principles, and because the record establishes a presumption of vindictiveness. In the alternative, this Court should order discovery and a hearing so that Mr. Biden may provide further support for his claims.

Mr. Biden's motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the pleadings, papers, and documents on file with the Court, the oral arguments of counsel, and such other matters as the Court may deem proper to consider.

Dated: February 20, 2024

Respectfully submitted,  
WINSTON & STRAWN LLP

By: /s/ Angela M. Machala  
Angela Machala  
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*Attorneys for Robert Hunter Biden*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Mr. Biden moves to dismiss the Indictment for selective and vindictive  
4 prosecution. Since its inception in 2018, the investigation of Mr. Biden has been  
5 compromised by politics. This case follows a nearly six-year record of DOJ changing its  
6 charging decisions and upping the ante on Mr. Biden in direct response to political  
7 pressure and its own self-interests. When the prosecution brings charges for purposes  
8 unrelated to legitimate prosecutorial considerations, it violates due process and equal  
9 protection rights. The appropriate remedy is dismissal, or, if the Court harbors any  
10 doubts, targeted discovery and a hearing to investigate whether these charges were  
11 brought for improper purposes.

12 As the Court knows, Mr. Biden filed a similar motion in the District of Delaware  
13 related to federal gun charges also brought for improper purposes. *United States v. Biden*,  
14 No. 23-cr-00061-MN (D. Del. Dec. 11, 2023), DE 63 (“Del. Mot.”). DOJ, in opposition,  
15 did not deny that politicians have been pushing the agency to target Mr. Biden for political  
16 reasons since 2018. *See id.*, DE 68 (“Del. Opp.”). Nor did the agency deny that it has  
17 been subjected to condemnation, accusations, burdensome inquiries, and other political  
18 consequences related to its handling of this investigation. (*Id.*) The remaining question  
19 is whether it is more likely than not DOJ was influenced by that pressure or its own  
20 improper motives in deciding to bring these charges. The record responds with a  
21 resounding “yes.”

22 In support of his motion in Delaware, Mr. Biden explained that, after opening an  
23 investigation at former President Trump’s behest in 2018, DOJ and IRS did nothing until  
24 2021, when Congressmen demanded investigative records.<sup>1</sup> DOJ then proposed deferred  
25 charges (after initially suggesting a non-prosecution agreement), only to change its tune

26  
27 <sup>1</sup> Press Release, Chuck Grassley, *Grassley, Johnson Seek Information About Feds’*  
28 *Involvement In Hunter Biden Firearm Incident* (Mar. 26, 2021),  
<https://www.grassley.senate.gov/news/news-releases/grassley-johnson-seek-information-about-secret-service-involvement-in-hunter-biden-firearm-incident>.

1 and demand Mr. Biden plead guilty to misdemeanor tax charges when IRS  
2 whistleblowers went public with accusations of misconduct. This led to a carefully  
3 negotiated Plea Agreement and Diversion Agreement that would have resolved all the  
4 charges in this case, but when that deal went public, was widely condemned by extremist  
5 Republicans as too lenient, and Congress decided to open an inquiry, DOJ tried to back  
6 out (even of the validly executed Diversion Agreement)<sup>2</sup> and indicted Mr. Biden on the  
7 gun charges.<sup>3</sup> This chronology of events—itsself sufficient to support an inference of  
8 selective and vindictive prosecution—is confirmed by additional significant evidence,  
9 including expert opinions, DOJ’s charging policies and practices, admissions and  
10 statements by DOJ, IRS, and public officials, and valid threats of future consequences for  
11 the agency if it does not continue targeting Mr. Biden. (*See Del. Mot.*) And to put this  
12 evidence in perspective, Mr. Biden cited *many* cases where courts dismissed charges  
13 because of selective or vindictive prosecution with a fraction of this evidence. *Id.*

14 But there is more. After Special Counsel Weiss caved to outside pressure and  
15 brought the three felony gun charges, he was summoned to testify before Congress and  
16 berated for not being even more punitive. A month later, he responded by indicting Mr.  
17 Biden on the tax charges in this Court, including felonies, when just weeks earlier he had  
18 deemed two misdemeanor charges sufficient.

19 DOJ cannot escape the inferences raised by its conduct. DOJ discussed these  
20 charges with Mr. Biden for a year between spring 2022 and spring 2023, and Mr. Biden  
21 gave presentations regarding the very allegations and evidence cited in the Indictment.

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22 <sup>2</sup> After the court in Delaware raised questions about non-substantive aspects of the plea  
23 deal, DOJ—facing significant backlash—used the excuse to renege. Rather than  
24 negotiate in good faith, DOJ inexplicably demanded Mr. Biden plead guilty to felonies  
25 with jail time. The Delaware court had no concerns with the substance of the deal. And  
26 it is telling that, in a 51-page opposition in Delaware, DOJ offers *no explanation* for its  
change of heart beyond the assertion that the parties had not agreed on the non-  
substantive provisions still being negotiated, which is of course no explanation at all for  
DOJ’s sudden and unreasonable demands. (*See Del. Opp.*)

27 <sup>3</sup> The extensive back-and-forth negotiation between the U.S. Attorney’s Office and Mr.  
28 Biden’s counsel regarding the prosecution’s decision to resolve all investigations of him  
is discussed in the declaration of Christopher Clark filed currently with Mr. Biden’s  
Motion to Dismiss for Immunity Conferred by His Diversion Agreement. (“Clark Decl.”)



1 DOJ proposed misdemeanor and deferred charges.<sup>4</sup> DOJ then leapt from a two-count  
2 misdemeanor Information to a nine-count Indictment with felonies directly following (1)  
3 accusations that DOJ made a sweetheart deal and brought gun charges to “protect” Mr.  
4 Biden, (2) Congress, *for the first time in history*, interrogated a Special Counsel for seven  
5 hours about a pending matter,<sup>5</sup> and (3) Mr. Biden, in DOJ’s words, “insist[ing] that the  
6 proposed Diversion Agreement bound both parties,” which DOJ says caused it to refuse  
7 “any further plea negotiations.” (Del. Opp. at 15.) Just as the events in early 2023  
8 confirm DOJ’s determination that prosecution was *not* warranted on these facts, the  
9 events preceding these charges confirm DOJ changed its mind for improper purposes.

10 When the evidence indicates discriminatory prosecution, the burden is on the  
11 prosecution to rebut it by proving the charges were brought on some valid basis. The  
12 prosecution proved in Delaware that it cannot do this. DOJ barely engaged these facts at  
13 all beyond denying it succumbed to undeniable political pressure. Instead, DOJ defended  
14 its decision to bring the gun charges based on what it calls “overwhelming evidence” of  
15 Mr. Biden’s guilt, although it had no new evidence to warrant a change in its charging  
16 decision. (Del. Opp. at 2, 24.) Who knows what the prosecution will invent to justify  
17 the tax charges? But like the gun charges, DOJ has known the facts underlying the tax  
18 charges for years and even discussed the allegations with Mr. Biden before deciding *not*  
19 to charge him. This record demands dismissal of these charges.<sup>6</sup>

---

23 <sup>4</sup> If DOJ half-believed the allegations of willful misconduct, evasion, and fraud alleged  
24 in the Indictment after Mr. Biden gave presentations on those topics, it would not have  
proposed misdemeanor and deferred charges.

25 <sup>5</sup> As AP News observed, Mr. Weiss “agreed to the unusual appearance under heavy  
26 pressure from House Republicans, who are looking to ramp up their impeachment  
27 inquiry into President Joe Biden and his family.” Farnoush Amiri & Lindsay Whitehurst,  
*Special Counsel In The Hunter Biden Case Insists He Was The ‘Decision-Maker’ In Rare*  
*Testimony*, Associated Press (Nov. 7, 2023), <https://apnews.com/>.

28 <sup>6</sup> Indeed, if this case is not the one to dismiss for selective and vindictive prosecution and  
breach of separation of powers, it is unclear what is left of those doctrines.

## FACTUAL BACKGROUND

1  
2 In 2018, President Trump began levying accusations at Mr. Biden and calling on  
3 Attorney General (“AG”) Barr to investigate.<sup>7</sup> Mr. Barr secretly assigned U.S. Attorney  
4 David Weiss to investigate Mr. Biden, which Mr. Biden announced on December 10,  
5 2020. And while Mr. Trump’s accusations were hollow, they set political forces in  
6 motion that DOJ was neither equipped nor motivated to resist.

### I. The Tax Investigation, The Gun, And DOJ’s Initial Charging Decision

7  
8 In connection with a series of personal hardships, Mr. Biden struggled with  
9 addiction, which took a turn for the worse on the one-year anniversary of his brother’s  
10 death in 2016. As a result, Mr. Biden paid some of his income taxes for 2016, but he did  
11 not fully pay or file by the 2017 deadline. Mr. Biden was similarly late the following  
12 years until he engaged new accountants in 2019, who prepared and filed his late returns  
13 and helped him pay all his taxes and penalties in 2021. DOJ and IRS were aware of these  
14 facts from their investigation, and in 2019, DOJ obtained warrants to search Mr. Biden’s  
15 electronic data for evidence related to his taxes. (Del. Opp. at 7.) These devices are the  
16 source of the correspondence between Mr. Biden, his staff, and his accountants that DOJ  
17 cites in the Indictment, (DE 1 ¶¶ 54, 56, 72, 74–83), and based on this evidence, DOJ  
18 determined no felony charges were warranted.

### II. Mounting Political Pressure And DOJ’s Second Charging Decision

19  
20 While DOJ continued to weather increasing political pressure, Mr. Trump and his  
21 supporters used Mr. Biden’s personal history as both a means of demeaning the Bidens  
22 and leveraging DOJ.<sup>8</sup> DOJ finally buckled under the pressure and contacted Mr. Biden’s  
23

24  
25 <sup>7</sup> Kathryn Watson et al., *Investigation Into Hunter Biden’s “Tax Affairs” Began In 2018*,  
CBS News (Feb. 10, 2020), <https://www.cbsnews.com/>. This same year, Mr. Biden  
26 purchased a small firearm that he owned for 11 days, never loaded, and never fired—the  
basis of the gun charges in Delaware.

27  
28 <sup>8</sup> President Trump, for example, used Mr. Biden’s struggle with addiction to attack  
President Biden in a presidential debate in 2020. Michael Collins, *Hunter Biden’s Drug  
Use Back In Public Eye As Criminal Charges Could Be Around The Corner*, USA Today  
(June 12, 2023), <https://www.usatoday.com/>.

1 counsel on May 15, 2023 to propose a non-prosecution agreement for the gun and tax  
2 charges, even though DOJ had already determined the charges should not be brought.<sup>9</sup>

3 **III. IRS Whistleblowers And DOJ’s Third Charging Decision**

4 Between January 2022 and May 2023, Mr. Biden discussed the alleged tax  
5 violations with DOJ and gave several presentations on subjects including the conduct and  
6 evidence that DOJ now cites in the Indictment as evidence of willful misconduct. DOJ  
7 once again decided prosecution was unnecessary, and even provided a framework for the  
8 deal (a DPA) used in another recent case where DOJ deferred charges.<sup>10</sup> But politics  
9 again intervened when the IRS agents Gary Shapley and Joseph Ziegler went public with  
10 claims that DOJ and the Administration were interfering with the tax investigation.<sup>11</sup> A  
11 few weeks later, the House Ways and Means Committee voted to release, in violation of  
12 numerous federal laws, hundreds of confidential documents including the IRS case files  
13 on Mr. Biden. This prompted further congressional inquiry, and Mr. Weiss responded  
14 by demanding Mr. Biden plead guilty to two misdemeanor tax charges.<sup>12</sup>

15 **IV. Congressional Intervention And DOJ’s Fourth Charging Decision**

16 Mr. Biden agreed to plead guilty to the tax misdemeanors, but when the plea deal  
17 was made public, the political backlash was forceful and immediate. Even before the  
18 Delaware court considered the plea deal on July 26, 2023, extremist Republicans were  
19 denouncing it as a “sweetheart deal,” accusing DOJ of misconduct, and using the excuse  
20  
21

22 <sup>9</sup> See Clark Decl. ¶¶6, 10.

23 <sup>10</sup> Clark Decl. ¶¶13–14 (discussing AUSA Wolf’s May 19, 2023 email to Chris Clark).

24 <sup>11</sup> See Catherine Herridge et al., *IRS Whistleblower In Hunter Biden Case Says He ‘Felt*  
25 *Handcuffed’ During 5-Year Investigation*, CBS (July 19, 2023),  
<https://www.cbsnews.com/>.

26 <sup>12</sup> Clark Decl. ¶12 (discussing AUSA Wolf’s May 18, 2023, email to Chris Clark listing  
27 12 “key terms” for a resolution). As The New York Times explained, “Weiss was willing  
28 to conclude the investigation without even as much as a plea deal before the [IRS] agents  
accused the Justice Department of interfering.” Michael Schmidt et al., *Inside The*  
*Collapse Of Hunter Biden’s Plea Deal*, N.Y. Times (Aug. 19, 2023),  
<https://www.nytimes.com/>.

1 to interfere with the investigation.<sup>13</sup> Leaders of the House Judiciary, Oversight and  
2 Accountability, and Ways and Means Committees (“HJC,” “HOAC,” and “HWMC,”  
3 respectively) opened a joint investigation, and on June 23, HWMC Republicans publicly  
4 released closed-door testimony from the whistleblowers, who, in the words of Chairman  
5 Smith, “describe how the Biden Justice Department intervened and overstepped in a  
6 campaign to protect the son of Joe Biden by delaying, divulging and denying an ongoing  
7 investigation into Hunter Biden’s alleged tax crimes.”<sup>14</sup> Then, one day before Mr.  
8 Biden’s plea hearing, Mr. Smith tried to *intervene* to file an amicus brief “in Aid of Plea  
9 Hearing,” in which he asked the court to “consider” the whistleblower testimony.<sup>15</sup>

10 At the July hearing, Judge Noreika questioned specific non-substantive provisions  
11 of the agreement and deferred ruling so the parties could propose revisions.<sup>16</sup> Instead,  
12 Mr. Weiss demanded felonies and jail time, declared an “impasse” when Mr. Biden  
13 refused, and brought three felony gun charges. Members of Congress then publicly  
14 admitted they forced DOJ to do this. Chairman Comer declared outside the Capitol that  
15 “our investigation that’s shined a light on the many wrongdoings of the Biden family has  
16 picked up a lot of credibility today, because now we see that there are a lot of crimes that  
17 this family’s committed and that played out in court today.”<sup>17</sup> Chairman Smith told Fox  
18  
19

20 <sup>13</sup> Phillip Bailey, ‘Slap On The Wrist’: Donald Trump, Congressional Republicans Call  
21 Out Hunter Biden Plea Deal, USA Today (June 20, 2023), <https://www.usatoday.com/>.

22 <sup>14</sup> Farnoush Amiri, *GOP Releases Testimony Alleging DOJ Interference In Hunter Biden  
Tax Case*, PBS (June 23, 2023), <https://www.pbs.org/>.

23 <sup>15</sup> *United States v. Biden*, No. 23-mj-00274-MN (D. Del. 2023), DE 7.

24 <sup>16</sup> Hr’g Tr. at 104:12-16, *Biden*, No. 23-cr-00061-MN (D. Del. July 26, 2023) (“These  
25 agreements are not straightforward and they contain some atypical provisions. I am not  
26 criticizing you for coming up with those, I think that you have worked hard to come up  
with creative ways to deal with this.”); *id.* at 105: 6-15 (“So I would like some briefing,  
additional briefing . . . on what it is that makes this plea acceptable, because I’m not  
saying that it is not, but nobody seems to really have given me [] what I would need . . .  
to determine that . . .”).

27 <sup>17</sup> Kyle Morris et al., *Comer Says House Investigations Into Hunter Biden Given A ‘Lot  
Of Credibility’ After Plea Deal Crumbles*, Fox News (July 26, 2023),  
28 <https://www.foxnews.com/>.

1 News, “justice has been served,”<sup>18</sup> and later tweeted: “Announcement of a special counsel  
2 *only happened because congressional GOP exposed* the two-tiered judicial system by  
3 shining light onto the investigation into Hunter Biden’s alleged financial crimes & the  
4 political interference that shielded both him & POTUS from scrutiny.”<sup>19</sup> Yet, the  
5 prosecution’s critics were still not satisfied.

6 **V. Aftermath And DOJ’s Fifth Charging Decision**

7 Neither the proposed deal nor the three felony gun charges were sufficient for  
8 extremist Republicans. Mr. Biden enforced the Diversion Agreement in response to the  
9 gun charges, at the same time Congress was dragging Mr. Weiss before the HJC over the  
10 decision not to bring additional charges.<sup>20</sup> Mr. Trump joined the fray, vowing that if DOJ  
11 does not prosecute Mr. Biden for more, he will “appoint a real special prosecutor to go  
12 after” the “Biden crime family,” “defund DOJ,” and revive an executive order allowing  
13 him to fire Executive Branch employees at will.<sup>21</sup> As a result, Mr. Weiss reported he and  
14 others in his office faced death threats and feared for the “safety” of his team and family.<sup>22</sup>  
15 This *fifty-six page, nine count* tax indictment followed, and sure enough, Republican  
16 Congressmen claimed credit for that too.<sup>23</sup>

17  
18  
19  
20 <sup>18</sup> Jason Smith *On Hunter Biden Plea Deal Collapse: Justice Is Being Served*, Fox News  
(July 26, 2023), <https://www.foxnews.com/video/6331889313112>.

21 <sup>19</sup> @RepJasonSmith, X (Aug. 11, 2023), <https://twitter.com/RepJasonSmith/status/1690065476838105088> (emphasis added).

22 <sup>20</sup> Now those same Congressmen are trying to force Assistant U.S. Attorney Lesley Wolf,  
23 who negotiated the Diversion Agreement and Plea Agreement, to provide further  
testimony about the investigation.

24 <sup>21</sup> See Kristen Holmes, *Trump’s Radical Second-Term Agenda Would Wield Executive*  
25 *Power In Unprecedented Ways*, CNN (Nov. 16, 2023), <https://www.cnn.com/>. Bolton,  
*Trump’s Call To Defund DOJ, FBI Puts Senate, House GOP At Odds*, The Hill (Apr. 6,  
2023), <https://thehill.com/>.

26 <sup>22</sup> Betsy Woodruff Swan, *What Hunter Biden’s Prosecutor Told Congress: Takeaways*  
27 *From Closed-Door Testimony Of David Weiss*, Politico (Nov. 10, 2023),  
<https://www.politico.com/>.

28 <sup>23</sup> Chris Stein, *Top House Republican Takes Credit For New Charges Against Hunter*  
*Biden*, The Guardian (Dec. 8, 2023), <https://www.theguardian.com/>.

## 1 VI. DOJ Policy Against Congressional Interference

2 DOJ has a long history of condemning interference by Congress. In 1982, AG  
 3 William Smith expressed the “longstanding position of the Executive Branch” that DOJ  
 4 generally “decline[s] to provide committees of Congress with access to or copies of law  
 5 enforcement files except in the most extraordinary circumstances.”<sup>24</sup> Deputy Assistant  
 6 AG Robert Shanks elaborated that DOJ “has an obligation to ensure that . . . its  
 7 prosecutorial function is not compromised by excessive congressional pressures, [which]  
 8 . . . offends not only the rights of the accused, but also . . . the integrity of the judicial  
 9 process and, ultimately, the obligation of the Executive faithfully to execute the laws.”<sup>25</sup>  
 10 More recently, AG John Ashcroft explained that if criminal investigations “are subject to  
 11 congressional scrutiny, we will face the grave danger that prosecutors will be chilled from  
 12 . . . the sound exercise of prosecutorial discretion . . . [and might] err on the side of  
 13 investigation or prosecution simply to avoid public second guessing . . . .”<sup>26</sup>

14 Failure to adhere to these policies is a recent trend, and this is not the first time Mr.  
 15 Trump and his supporters played a role. Deputy AG Rod Rosenstein yielded to politics  
 16 when investigating Russian interference with the 2016 election, drawing criticism from  
 17 DOJ and Congress alike. As Deputy Assistant AG Harry Litman explained: “Rosenstein  
 18 has capitulated to political pressure from the president and his allies in Congress . . . in a  
 19

20 <sup>24</sup> H. Rep. 99-435 at 1168-69. The letter quotes former Deputy AG Thomas Kauper: “If  
 21 a congressional committee is fully apprised of details of an investigation as [it] proceeds,  
 22 there is a substantial danger that congressional pressure will influence the course of the  
 23 investigation.” *Id.* at 1170; *see also* 40 U.S. Opp. Atty. Gen. 45, 1941 WL 1875 (Apr.  
 24 30, 1941 AG Robert Jackson) (“Disclosure of information contained in [investigative]  
 25 reports might [] be the grossest kind of injustice,” as they “include leads and suspicions”  
 26 and “[e]ven though later and more complete reports exonerate the individuals, . . . we  
 27 know that a correction never catches up with an accusation.”).

28 <sup>25</sup> 8 U.S. Opinions of Off. of Legal Counsel 252 (O.L.C.), 1984 WL 178369,  
*Congressional Subpoenas of Department of Justice Investigative Files* (Oct. 17, 1984  
 Deputy Assistant AG Robert Shanks).

<sup>26</sup> 25 Opinions of the Off. of Legal Counsel at 2 (Jan. 10, 2012 AG Ashcroft); Elena  
 Kagan, *Presidential Administration*, 114 Harv. L. Rev. 245, 2357–58 (2001)  
 (“Resolution of prosecutorial questions . . . [is where] the crassest forms of politics . . .  
 pose the greatest danger of displacing professionalism and thereby undermining  
 confidence in legal decision making.”).

1 way that harms the long-term interests of the Justice Department and likely does little to  
2 protect the probe or Rosenstein’s own job.”<sup>27</sup>

3 There is no doubt that DOJ is in an unenviable political position with respect to  
4 this case. But as DOJ itself has long believed, Mr. Biden’s rights must come first. Politics  
5 have tainted this prosecution, and there is no constitutional option but to dismiss this case.

### 6 LEGAL STANDARD

7 “For almost one hundred years, the federal courts have recognized that it is  
8 unconstitutional to administer the law with an evil eye and an unequal hand so as  
9 practically to make unjust and illegal discrimination between persons in similar  
10 circumstances.” *United States v. Napper*, 574 F. Supp. 1521, 1523 (D.D.C. 1983)  
11 (citations omitted). Thus, “although prosecutorial discretion is broad, it is not unfettered”  
12 and “the decision to prosecute may not be deliberately based upon an unjustifiable  
13 standard such as race, religion, or other arbitrary classification.” *Wayte v. United States*,  
14 470 U.S. 598, 608 (1985) (citations omitted).<sup>28</sup> If charges are brought for an improper  
15 purpose, the prosecution is selective and violates due process and equal protection rights.  
16 *Id.* “In deciding if a defendant has established selective prosecution, a court must  
17 undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may  
18 be available.” *United States v. Bradley*, 880 F. Supp. 271, 280 (M.D. Pa. 1994) (citations  
19 omitted). The evidence must support inferences that the prosecution exercised its  
20 discretion with (1) “discriminatory purpose” and (2) “discriminatory effect.” *United*  
21 *States v. Armstrong*, 517 U.S. 456, 465 (1996). When a defendant alleges such evidence,

22 <sup>27</sup> Harry Litman, *Rod Rosenstein Has Made Two Critical Missteps*, Wash. Post (Apr. 23,  
23 2018), <https://www.washingtonpost.com/>; see also Former Sen. Carl Levin (D-Mich),  
24 *Congress Dangerously Wields Its Oversight Power In Russia Probe*, The Hill (May 15,  
25 2018) (“Should [Congress] seek to try to influence the discretionary authority of the  
executive branch in a prosecutorial matter, the third branch of government, the judiciary,  
could throw out the prosecution based on political influence.”), <https://thehill.com/>.

26 <sup>28</sup> See also *United States v. Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974) (“Nothing can  
27 corrode respect for a rule of law more than the knowledge that the government looks  
beyond the law itself to arbitrary considerations . . . . Selective prosecution then can  
28 become a weapon used to discipline political foe[s].”); *United States v. Judd*, 579 F. Supp.  
3d 1, 4 (D.D.C. 2021) (“[T]he Government cannot base its decision to prosecute on . . . a  
defendant’s political beliefs.” (citation omitted)).

1 the burden shifts to the prosecution to “show[] the selection process actually rested upon  
2 some valid ground.” *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972).

3 Vindictive prosecution is a species of selective prosecution where the prosecution  
4 is or objectively appears to be driven by “genuine animus.” *United States v. Monsoor*,  
5 77 F.3d 1031, 1034 (7th Cir. 1996). Dismissal requires a defendant to show by a  
6 preponderance of the evidence either that (1) the prosecution was vindictive in fact (with  
7 evidence of “actual vindictiveness”) or (2) facts that indicate a “realistic likelihood”<sup>29</sup> of  
8 vindictiveness and thus create an objective “apprehension or appearance of prosecutorial  
9 vindictiveness.” *United States v. Velsicol Chem. Corp.*, 498 F. Supp. 1255, 1263–65  
10 (D.D.C. 1980) (citing Ninth Circuit cases). The “mere appearance of vindictiveness is  
11 enough to place the burden on the prosecution” to show a legitimate motive. *Ruesga-*  
12 *Martinez*, 534 F.2d at 1369. Notably, the animus element is essentially the same as the  
13 discriminatory intent element of selective prosecution: both require evidence the  
14 prosecution was brought for arbitrary or improper purposes. The key difference is that a  
15 defendant can show vindictive prosecution with facts establishing an objective  
16 appearance of vindictiveness, *even where there is no actual vindictiveness*, and need not  
17 show discriminatory effect. *Id.* Finally, dismissal of a selective and/or vindictive  
18 prosecution is required whether the intent or animus belongs to the prosecutors *or*  
19 *someone else with influence* over the prosecution. *See Monsoor*, 77 F.3d at 1035 (where  
20 a party “prevail[s] upon the prosecutor in making the decision to seek an indictment,” the  
21 “ill will, whoever its bearer,” may be “imputed to federal prosecutors”).<sup>30</sup>

22  
23 <sup>29</sup> A realistic likelihood is a “significant possibility that such discretion may have been  
24 exercised with a vindictive motive or purpose” which creates “a heavy burden of proving  
25 that any increase in the severity of the alleged charges was not motivated by a vindictive  
26 motive.” *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976).

27 <sup>30</sup> *See also United States v. Koh*, 199 F.3d 632, 640 (2d Cir. 1999) (prosecution is  
28 vindictive when the prosecutor “was prevailed upon to bring the charges by another with  
animus”); *United States v. Adams*, 870 F.2d 1140, 1144–46 (6th Cir. 1989) (evidence that  
a party had “instigated and pushed” the prosecution justified discovery to see if the party  
“was able to prevail upon the Department of Justice to institute a prosecution that  
[otherwise] would not have been undertaken”).



## ARGUMENT

This case follows years of public officials targeting Mr. Biden because of his political and familial affiliations and DOJ yielding to their pressure. This record should raise more than judicial misgivings. Politicians are not just wooing and wheedling, but openly interfering with this case. It is incumbent on the Court to intercede. *United States v. Falk*, 479 F.2d 616, 624 (7th Cir. 1973) (“[T]he judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government.”) (citations omitted).<sup>31</sup>

### I. This Prosecution Is Motivated By Discriminatory Intent And Animus

Proving animus and discriminatory intent in the minds of prosecutors (or those who influence them) typically is exceedingly difficult, but the fingerprints of discriminatory intent are all over this case. The timing of events; statements and admissions by DOJ, public officials, and others; opinions of experts; charging data; and other circumstantial and direct evidence all support a strong inference of improper and vindictive motive. Mr. Biden includes much of this evidence in his DE Motion, but DOJ does not contest the animus of those targeting Mr. Biden, just whether DOJ succumbed to this pressure. (Del. Opp. at 37–39.) Mr. Biden therefore provides only a broad overview of the animus and improper purposes driving this case.

**Donald J. Trump.** Mr. Trump is ground zero for improper motive.<sup>32</sup> During his term in office, President Trump incessantly called on DOJ, the media, the public, and

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<sup>31</sup> The Court’s supervisory powers provide an alternate basis to dismiss the indictment. *Dixon v. D.C.*, 394 F.2d 966, 970 (D.C. Cir. 1968) (“I conclude that in this case our supervisory power must be used to protect the purity of the government and its processes.”); *United States v. Banks*, 383 F. Supp. 389, 397 (D.S.D. 1974) (similar). Importantly, the prosecution’s “conduct need not be so unfair or imprudent as to offend due process before exercise of this supervisory power is appropriate.” *Banks*, 383 F. Supp. at 392.

<sup>32</sup> President Trump initiated the investigation of Mr. Biden illegally. 26 U.S.C. § 7217 provides: “It shall be unlawful for any person [including the President] to request, directly or indirectly, any officer or employee of the [IRS] to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer.” Mr. Trump also violated 26 U.S.C. § 7212 by interfering with that investigation.

1 even foreign governments to target and investigate Mr. Biden.<sup>33</sup> Countless statements  
 2 from Mr. Trump when he was President accuse both Mr. Biden *and* DOJ of corruption  
 3 and misconduct and call on supporters to take action.<sup>34</sup> Since leaving office, Mr. Trump  
 4 has continued to flex his considerable influence to drive the prosecution of Mr. Biden.  
 5 On June 20, 2023, Mr. Trump posted repeatedly about the “Hunter/Joe Biden settlement,”  
 6 which he describes as a “traffic ticket” and a “massive coverup and full-scale election  
 7 interference ‘scam’ the likes of which has never been seen in our country before.”<sup>35</sup> He  
 8 blames this on Mr. Weiss, calling him “a coward” and “a smaller version of Bill Barr,  
 9 who never had the courage to do what everyone knows should have been done” because  
 10 he “gave out a traffic ticket instead of a death sentence.”<sup>36</sup> And Mr. Trump’s outrage has  
 11 grown since he was indicted. At a recent rally, he swore “retribution” on his rivals and  
 12 the agencies he believes helped them.<sup>37</sup> He promises to “defund the DOJ” until it  
 13 “come[s] to [its] senses,” appoint a “real special prosecutor” to “go after” the Bidens and  
 14 revive an executive order that lets him fire executive branch employees without cause.<sup>38</sup>

15 \_\_\_\_\_  
 16 <sup>33</sup> Many examples are cited in Mr. Biden’s Del. Mot. (Del. Mot. at 28–33.) Out of public  
 17 view, Mr. Trump also improperly pressured DOJ to target and investigate Mr. Biden,  
 18 including instructing the AG and Deputy AG Donoghue to “figure out what to do with  
 19 H[unter] Biden.” Devlin Barrett & Josh Dawsey, *Trump To Acting AG, According To*  
 20 *Aide’s Notes: ‘Just Say The Election Was Corrupt + Leave The Rest To Me’*, Wash. Post  
 21 (July 31, 2021), [www.washingtonpost.com/](http://www.washingtonpost.com/).

19 <sup>34</sup> Separately, Mr. Trump’s personal attorney, Rudy Giuliani, searched for “dirt” on Mr.  
 20 Biden, convinced DOJ to open dedicated channels to receive this information, and  
 21 disseminated stolen electronic data (after manipulating some of it) to create a media  
 22 spectacle right before the 2020 election. Mr. Giuliani even made presentations to  
 23 multiple U.S. Attorney’s Offices regarding Mr. Biden. *See, e.g.*, Ltr. from Asst. Att’y  
 24 Gen. Boyd to Hon. Jerrold Nadler (Feb. 18, 2020).

22 <sup>35</sup> Brett Samuels, *Trump Compares Hunter Biden Charges To ‘Traffic Ticket’*, The Hill  
 23 (June 20, 2023), <https://thehill.com/>.

23 <sup>36</sup> Ryan Bort, *Trump Blasts Prosecutor He Appointed for Not Giving Hunter Biden ‘Death*  
 24 *Sentence’*, Rolling Stone (July 11, 2023), <https://www.rollingstone.com/>.

24 <sup>37</sup> Maggie Haberman & Shane Goldmacher, *Trump, Vowing ‘Retribution,’ Foretells A*  
 25 *Second Term Of Spite*, N.Y. Times (Mar. 7, 2023), <https://www.nytimes.com/>.

26 <sup>38</sup> Rami Ayyub, *Trump, Newly Charged, Urges Defunding Justice Department And FBI*,  
 27 Reuters (Apr. 6, 2023), <https://www.reuters.com/>; Brett Samuels, *Trump Vows To*  
 28 *Appoint Special Prosecutor To ‘Go After’ Biden If Former President Wins In 2024*, The  
 Hill (June 12, 2023), <https://thehill.com/>; Tal Axelrod, *Trump’s Unprecedented*  
*Campaign Pitch: Elect Me To Get Revenge On The Government*, ABC News (July 14,  
 2023), <https://abcnews.go.com/>.

1           **Republicans In Congress.** After President Biden assumed office, Senators Chuck  
 2 Grassley and Ron Johnson publicly announced their demand for investigative records  
 3 related to Mr. Biden.<sup>39</sup> Since then, congressional Republicans have used the authority of  
 4 three House committees to target Mr. Biden and influence DOJ.<sup>40</sup> Rep. Comer, who  
 5 regularly brags about (mis)using congressional authority, recently vowed in a committee  
 6 release titled “Justice Department Attempting a Biden Family Coverup” that the “[HOC]  
 7 will continue to follow the Biden family’s money trail . . . [and] [w]e will also continue  
 8 to work with the [HJC] and HWMC] to root out misconduct at the Justice Department  
 9 and hold bad actors accountable for weaponizing law enforcement powers.”<sup>41</sup> In other  
 10 words, three Republican-led committees have taken it upon themselves to investigate a  
 11 private citizen while sidelining DOJ with brickbats and burdensome inquiries. And  
 12 unlike DOJ, Congress does not even pretend to offer a presumption of innocence.

13           **The Department of Justice.** DOJ confirmed its own improper motive when,  
 14 under fire from Congress and the public, it resorted to charges that reports indicate Mr.  
 15 Weiss himself admitted would not have been brought against the average American.<sup>42</sup>  
 16 *See Bradley*, 880 F. Supp. at 280–81 (“Circumstantial evidence of invidious intent may  
 17 include proof of disproportionate impact.”).<sup>43</sup> Appropriate factors considered when  
 18 making charging decisions include “the strength of the case, the prosecution’s general  
 19

20 <sup>39</sup> Press Release, Sen. Chuck Grassley, *Grassley, Johnson Seek Information About Feds’*  
 21 *Involvement In Hunter Biden Firearm Incident* (Mar. 26, 2021),  
<https://www.grassley.senate.gov/>.

22 <sup>40</sup> The HOAC’s “mission statement is to ensure the efficiency, effectiveness, and  
 23 accountability of the federal government and all its agencies,” not to investigate a private  
 citizen. H. Comm. on Oversight and Accountability, *About – Mission* (last accessed Dec.  
 7, 2023), <https://oversight.house.gov/>.

24 <sup>41</sup> Press Release, H. Comm. on Oversight and Accountability, *Comer: Justice Department*  
 25 *Attempting A Biden Family Coverup* (Aug. 11, 2023), <https://oversight.house.gov/>.

26 <sup>42</sup> Michael Schmidt et al., *Inside The Collapse Of Hunter Biden’s Plea Deal*, N.Y. Times  
 27 (Aug. 19, 2023), <https://www.nytimes.com/>. The article does not disclose the source, and  
 DOJ points out that an unidentified law enforcement official denied the report, but DOJ  
 has stopped short of expressly denying the account. (*See Del. Opp.* at 39–40.)

28 <sup>43</sup> *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1046, n.6 (N.D. Cal. 2016)  
 (“[E]vidence of differential treatment is also probative of discriminatory intent.”).

1 deterrence value, the Government’s enforcement priorities, and the case’s relationship to  
 2 the Government’s overall enforcement plan . . . .” *Wayte*, 470 U.S. at 607. If DOJ had  
 3 wanted to bring these charges based on any of these legitimate considerations, it would  
 4 have done so years ago when it first obtained the evidence it relies on. *See Falk*, 479  
 5 F.2d at 622 (selective prosecution where government “had notice of [the] violations . . .  
 6 [y]et the indictment . . . was not returned until almost three years had passed . . .”).

7         Instead, even when DOJ did cave to pressure, it was willing to resolve the whole  
 8 matter without a guilty plea before IRS whistleblowers went public. And if DOJ’s  
 9 motives remained in doubt, its efforts to torpedo even that deal puts the matter to rest. If  
 10 DOJ agreed to a deal based on legitimate considerations, nothing about the Court asking  
 11 the parties to address specific, procedural concerns should have impacted that analysis.  
 12 Moreover, as Congress prepared to rake Mr. Weiss (who had started to fear for the safety  
 13 of his staff and family) over the coals for being too lenient, despite felony gun charges,  
 14 and DOJ was scrambling to pile on charges, Mr. Biden was enforcing the Diversion  
 15 Agreement. This was widely publicized<sup>44</sup> and led to further criticism of DOJ, which did  
 16 not disguise its outrage.<sup>45</sup> DOJ then refused to entertain further plea negotiations (Del.  
 17 Opp. at 15), and vaulted from two tax misdemeanors to nine misdemeanors and felonies.

18         Rather than rebut these facts, the prosecution argued in Delaware that the  
 19 discriminatory intent driving this case is really directed at Mr. Biden’s father. (Del. Opp.  
 20 at 1, 4, 20.) *First*, the caselaw is clear that, while it is worse when a prosecution is brought  
 21 based on protected activity, defendant rights are violated whenever charges are brought  
 22 for arbitrary or improper purposes. *See Wayte*, 470 U.S. at 608 (improper purpose is any  
 23 “unjustifiable standard” or “arbitrary classification”); *Velsicol*, 498 F. Supp. at 1265

24 <sup>44</sup> *See e.g.*, Michael Schmidt et al., *Hunter Biden Says Prosecutors Reneged on Major*  
 25 *Part of Plea Deal*, N.Y. Times (Aug. 14, 2023), <https://www.nytimes.com/>.

26 <sup>45</sup> The prosecution penned an angry reply in support of its motion to vacate the court’s  
 27 briefing order in Delaware accusing Mr. Biden of “inaccurate” assertions, “misstat[ing]  
 28 the record,” and of being “misleading” by claiming the Diversion Agreement is binding.  
*See Biden*, No. 23-cr-00061-MN (D. Del.), DE 32 (filed Aug. 15, 2023). These  
 accusations are ironic considering DOJ demanded, without explanation, that Mr. Biden  
 change the bargain by pleading guilty to felonies with jail time to continue negotiations.

1 (dismissing a vindictive prosecution based on “institutional stake” in discouraging third-  
 2 party conduct and avoiding “contempt for federal law enforcement”); *Collins v. Jones*,  
 3 2015 WL 790055, at \*11 (E.D. Pa. Feb. 24, 2015) (vindictive prosecution includes  
 4 charges “motivated by the prosecutor’s personal stake in the outcome of a case . . .”).<sup>46</sup>  
 5 *Second*, Mr. Biden is being targeted because of *his* political and familial affiliations, both  
 6 of which are constitutionally protected, as well as for trying to enforce his legal rights.<sup>47</sup>  
 7 When the prosecution purports to act in accordance with legitimate enforcement priorities  
 8 and reverses course in response to congressional ire or a defendant’s defense of his rights,  
 9 discriminatory intent and animus are evident. *See Dixon*, 394 F.2d at 968 (prosecution  
 10 improper if “the Government had legitimately determined not to prosecute appellant and  
 11 had then reversed its position solely because he filed a complaint”); *id.* at 970 (“The  
 12 Government did not change its view of the merits; it merely sought to avert the risk of  
 13 rebuke.”). The Court must intervene and protect Mr. Biden’s rights.

## 14 **II. The Record Establishes A Presumption Of Vindictiveness**

15 Even were there no actual vindictiveness, dismissal is required because the record  
 16 creates “the apprehension or appearance of prosecutorial vindictiveness.” *Velsicol*, 498  
 17 F. Supp. at 1264. This presumption arises when the prosecution makes a charging  
 18 decision and then brings or increases charges (“ups the ante”) when (1) it could have done  
 19 so earlier and (2) there are no “intervening events or [] new evidence of which the  
 20 government was excusably unaware at the time of the first” decision to justify the change.  
 21 *United States v. Jamison*, 505 F.2d 407, 417 (D.C. Cir. 1974); *United States v. Gerard*,  
 22 491 F.2d 1300, 1304–07 (9th Cir. 1974).<sup>48</sup> The focus is on whether the prosecution’s

23 \_\_\_\_\_  
 24 <sup>46</sup> *See also Steele*, 461 F.2d at 1152 (prosecution must rest “upon some valid ground”).  
 DOJ has no legitimate interest in charging Mr. Biden based on animus towards his father.

25 <sup>47</sup> *See Alito, Samuel A., Equal Protection and Classifications Based on Family*  
*Membership*, 80 Dick. L. Rev. 410 (1976).

26 <sup>48</sup> The prototypical example is when the prosecution seeks to punish or discourage a  
 27 defendant’s lawful conduct, but the presumption applies whenever the prosecution  
 28 appears to up the ante for improper purpose. *See United States v. Alvarado-Sandoval*,  
 557 F.2d 645, 645–46 (9th Cir. 1977) (rejecting argument that the presumption was not  
 raised because “the appellant in this case did not affirmatively assert a right which then

1 conduct might cause other defendants to fear unjust prosecution. *United States v.*  
2 *DeMarco*, 550 F.2d 1224, 1227 (9th Cir. 1977) (“The prophylactic rule is designed not  
3 only to relieve the defendant . . . but also to prevent chilling the exercise of such rights  
4 by other defendants who must make their choices under similar circumstances in the  
5 future.”).<sup>49</sup>

6 Given these standards, this case reaches the very heart of the doctrine. Mr. Biden  
7 described a nearly six-year record replete with examples of DOJ upping the ante right  
8 after being pressured to do so or Mr. Biden trying to enforce his rights. The prosecution  
9 could have brought these charges years ago and then agreed not to multiple times, only  
10 to pull the deal, deny it was made, and pile on felony indictments. This would raise an  
11 apprehension of vindictiveness in any defendant who believed DOJ was facing pressure  
12 to charge or who was considering a plea agreement. This is exactly the kind of chilling  
13 effect the doctrine is designed to combat. *Gerard*, 491 F.2d 1300, 1304–05 (“fear of  
14 vindictiveness might discourage meritorious” legal challenges); *see United States v.*  
15 *Groves*, 571 F.2d 450, 453–54 (9th Cir. 1978) (the “coincidence of events presents  
16 overwhelming circumstantial evidence” that charges were “in retaliation for appellant’s  
17 suggestion that the Speedy Trial Act barred prosecution on the cocaine complaint”  
18 because “[w]ith full knowledge of the appellant’s violation” “the government did not see  
19 fit to seek the indictment until shortly after the [assertion of] statutory rights”).<sup>50</sup>

20  
21  
22 precipitated a ‘raising of the ante’” because facts still created appearance prosecution  
23 upped the ante for improper purposes). *Velsicol*, 498 F. Supp. at 1265 (presumption  
24 created where charges appeared to be based on “institutional stake” in discouraging third-  
25 party conduct and avoiding “contempt for federal law enforcement”); *supra* Section I.

26 <sup>49</sup> *See United States v. Korey*, 614 F. Supp. 2d 573, 584–86 (W.D. Pa. 2009) (“The  
27 government has identified no new evidence, no new witnesses, and no change in the law  
28 to support this charge . . . .”). The Fifth, Tenth, and D.C. Circuits have issued similar  
29 rulings. *Miracle v. Estelle*, 592 F.2d 1269, 1277 (5th Cir. 1979); *United States v. Wood*,  
30 36 F.3d 945, 947 (10th Cir. 1994); *Jamison* 505 F.2d 407.

31 <sup>50</sup> *See Ruesga-Martinez*, 534 F.2d at 1369; *Alvarado-Sandoval*, 557 F.2d at 645–46;  
32 *United States v. DeMarco*, 550 F.2d 1224, 1226 (9th Cir. 1977); *Velsicol*, 498 F. Supp.  
33 at 1265.

1           It is apparent the prosecution cannot rebut this presumption. The prosecution  
 2 suggests that it was justified in bringing charges because plea negotiations fell through,  
 3 but the parties had already reached a substantive agreement. *See Groves*, 571 F.2d at 455  
 4 (distinguishing cases where an agreement was not reached and dismissing because “both  
 5 the government and the appellant had long since completed negotiations on the plea  
 6 agreement”). And any claim about the strength of the evidence should fall on deaf ears  
 7 in this Circuit. *See Ruesga-Martinez*, 534 F.2d at 1370 (“The prosecution [argues] . . .  
 8 there was more than ample evidence . . . [but] [t]his does not in itself justify an increase  
 9 in the severity of the charges . . . because that evidence was known to the prosecution  
 10 before it brought the original lesser charge.”); *Gerard*, 491 F.2d at 1306–07 (rejecting  
 11 strength of case justification because the prosecution “knew all the facts from the outset,”  
 12 yet “did not think [the charge was] worth bringing in the first place.”).<sup>51</sup>

### 13 **III. DOJ’s Prosecution Of Mr. Biden Has Discriminatory Effects**

14           “[T]o establish discriminatory effect,” the second element of a selective  
 15 prosecution claim, a defendant must show that “similarly situated individuals . . . were  
 16 not similarly prosecuted.” *Jones*, 159 F.3d at 977. It is hard to imagine better evidence  
 17 than Mr. Weiss’s reported admission that DOJ would not charge others on the same  
 18 facts.<sup>52</sup> Mr. Weiss’s initial view that tax charges should not be brought against Mr. Biden  
 19 was confirmed by C.D.C.A. U.S. Attorney Martin Estrada and D.C. U.S. Attorney  
 20 Matthew Graves, who both testified to Congress that their Offices declined to partner  
 21 with Mr. Weiss on the case or pursue separate charges after performing their own  
 22 assessments of the charges.<sup>53</sup> Experienced legal experts agree, including former Attorney

23 \_\_\_\_\_  
 24 <sup>51</sup> *See also id.* at 1304–05 (any justification “must be restricted to demonstrated events  
 occurring subsequently to the first” charging decision).

25 <sup>52</sup> *See supra* n.12.

26 <sup>53</sup> Estrada testified that he and Mr. Weiss “discussed [Estrada’s office’s] analysis of facts  
 and law to explain to him why we would not be co-counseling on the case.” *US Attorney*  
 27 *For California Says He Declined To Partner With Weiss On Hunter Biden Charges In*  
*His District*, Fox News (Oct. 26, 2023), <https://www.foxnews.com/>. “Weiss  
 28 reportedly considered not charging Hunter Biden, now 53, at all after Graves and Estrada  
 turned down his requests, then changed his mind when IRS supervisory agent Gary

1 General Eric Holder who stated publicly that he had spoken to both Republican and  
 2 Democratic U.S. attorneys who all agreed that these tax charges would not have been  
 3 brought but for political pressure.<sup>54</sup> This supports an inference of discriminatory effect.  
 4 *See Adams*, 870 F.2d at 1146 (“Mr. Gipson, drawing on his lengthy experience as an  
 5 employee of the IRS, states in his affidavit that he does not believe that criminal  
 6 proceedings would ‘ordinarily’ be instituted in tax cases of the sort presented here,”  
 7 which “raises a significant question as to why this particular prosecution was  
 8 undertaken.”).<sup>55</sup>

9 Where a defendant is negligent or shows “careless disregard” for tax obligations,  
 10 willfulness cannot be established, and criminal penalties are inappropriate, and this is  
 11 really what the Indictment reflects. *See United States v. Eilertson*, 707 F.2d 108–09 (4th  
 12 Cir. 1983). Regardless, it is no secret that DOJ does not prosecute everyone who fails to  
 13 file or pay taxes on time.<sup>56</sup> Instead, DOJ lists over 30 factors in its Criminal Tax Manual  
 14 (CTM) that it considers indicative of willfulness and evasion, and only those relating to  
 15 history of payment and repeated violations apply to Mr. Biden. *See* DOJ CTM 8.08[3],

16 \_\_\_\_\_  
 17 Shapley and case agent Joseph Ziegler came forward this year to allege irregularities in  
 the investigation.” *Biden-Picked LA US Attorney Claimed He Was Too ‘Resource-*  
*Strapped’ To Charge Hunter*, N.Y. Post (Oct. 26, 2023), <https://nypost.com/>.

18 <sup>54</sup>Mr. Holder went on to say that he believes Mr. Biden is “being treated perhaps a little  
 19 differently because of who he is” and that “[t]here’s a political component to this case . .  
 .” *Eric Holder: Hunter Biden Charges Wouldn’t Have Been Brought In Normal*  
*Scenario*, CNN (Dec. 8, 2023), <https://www.cnn.com/>.

20 <sup>55</sup> *See Falk*, 479 F.2d at 623 (evidence “including the admission of the Assistant United  
 21 States Attorney and the two published statements by the Selective Service officials that  
 22 contradict the propriety of the action taken in this case, made out at least a prima facie  
 case of improper discrimination”).

23 <sup>56</sup> The government does not generally bring criminal charges for failing to file or pay  
 24 taxes, especially if the individual paid the taxes, interest, and penalty afterwards, as Mr.  
 Biden did in October 2021. According to the IRS Data Book for 2021, 2,600,000  
 25 taxpayer returns were not timely filed. Many, if not the vast majority, of those cases were  
 resolved with *civil* resolutions, even in the most high-profile cases. For example, in  
 26 *United States v. Shaughnessy*, a DC law partner and his wife failed to file and pay their  
 taxes for 11 years with nearly \$7.2 million owed. DOJ ultimately resolved this civilly  
 27 with tax, penalties and interest only. *See* Joint Motion for Entry of Consent Judgment,  
 No. 22-cv-02811-CRC (D.D.C. 2023), DE 9. In *United States v. Stone*, where former  
 28 Trump adviser Roger Stone and his wife owed nearly \$2 million in unpaid taxes for 4  
 years, DOJ again resolved the matter civilly. No. 21-cv-60825-RAR (S.D. Fla. 2022),  
 DE 64.



1 10.05[5][a] (2024). DOJ’s charges boil down to the claim Mr. Biden knew he had to file  
2 returns and pay taxes and failed to do so on time—allegations present in any case charging  
3 these offenses and that cannot therefore distinguish Mr. Biden from the countless others  
4 DOJ does not prosecute. *See United States v. Lewis*, 517 F.3d 20, 27–28 (1st Cir. 2008)  
5 (discriminatory effect exists where there are “no distinguishable legitimate prosecutorial  
6 factors that might justify making different prosecutorial decisions” with respect to the  
7 defendant and those who are not charged).<sup>57</sup> And any remaining doubt is resolved by the  
8 record of DOJ determining repeatedly that charges were not warranted on these facts.  
9 Mr. Biden has established a prima facie case for selective prosecution that DOJ cannot  
10 rebut, and dismissal is required.

#### 11 **IV. The Prosecution Of Mr. Biden Violates Separation of Powers**

12 When prosecutors bring charges because of political pressure, it not only violates  
13 due process and equal protection, but separation of powers as well. *United States v.*  
14 *Mardis*, 670 F. Supp. 2d 696, 701 (W.D. Tenn. 2009) (discussing “whether a decision to  
15 prosecute was tainted by a violation of the separation of powers”). As Mr. Biden argued  
16 in his DE Motion, courts have recognized that while public officials “may cajole, and  
17 exhort with respect to the administration of a federal statute,” separation of powers are  
18 violated when those efforts “result in an[] assumption of executive power or in legislative  
19 domination of the executive.” *Id.*; (*see also* Del. Mot. at 57.) For the many reasons  
20 discussed, Congress has done far more than cajole and exhort—it has influenced DOJ’s  
21 charging decisions, and it is the role of this Court to intercede. *Falk*, 479 F.2d at 624.

22  
23  
24  
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26 <sup>57</sup> *See also Duncan v. Perez*, 445 F.2d 557, 560 (5th Cir. 1971) (“De minimus [violations]  
27 of this kind. . . do not become the subject of criminal proceedings.”); *Medrano v. Allee*,  
28 347 F. Supp. 605, 614 (S.D. Tex. 1972) (defendant’s violation “was treated differently  
from other [violations] which were more [serious],” which “can only be characterized as  
‘biased’ or ‘selective’”).

**V. If The Court Does Not Dismiss, It Should Permit Discovery And A Hearing**

Mr. Biden also argued in Delaware<sup>58</sup> that even if he has not presented sufficient evidence for dismissal, “[t]he standard for obtaining an evidentiary hearing on the matter is somewhat lower . . . .” *Bradley*, 880 F. Supp. at 279.<sup>59</sup> A hearing is necessary where “the motion alleges sufficient facts to take the question past the frivolous state . . . and raises a reasonable doubt as to the prosecutor’s purpose.” *Id.*

The standard for discovery is even lower. The defendant must merely make out a colorable entitlement to the defense of discriminatory prosecutions, . . . or come forward with some evidence tending to show the existence of the essential elements of the defense.

*Id.* (citations omitted); *see Adams*, 870 F.2d at 1146 (“It may well be that no fire will be discovered under all the smoke, but there is enough smoke here, in our view, to warrant the unusual step of letting the defendants find out how this unusual prosecution came about.”). Mr. Biden has easily met these lower standards, so if the Court declines to dismiss, it should order discovery and a hearing so that Mr. Biden may provide further support for his claims.

**CONCLUSION**

“[O]ur society is not bettered by law enforcement that . . . is not conducted in a spirit of fairness or good faith.” *Banks*, 383 F. Supp. at 397. This prosecution falls in that category, and the Court should dismiss the indictment, or order discovery and a hearing to ensure Mr. Biden’s rights are protected.

<sup>58</sup> *See Biden*, No. 23-cr-00061-MN (D. Del. 2023), DE 64 (Mr. Biden’s motion for discovery and evidentiary hearing).

<sup>59</sup> “[T]he decision whether or not to order discovery, or an evidentiary hearing, lies substantially within the trial court’s discretion.” *Bradley*, 880 F. Supp. at 280.

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