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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 vs.

18 ROBERT HUNTER BIDEN,

19 Defendant.

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

Hon. Mark C. Scarsi

**DEFENDANT’S NOTICE OF MOTION
AND MOTION TO DISMISS THE
INDICTMENT BASED ON IMMUNITY
CONFERRED BY HIS DIVERSION
AGREEMENT**

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 because it
violates a Diversion Agreement that is in effect between Mr. Biden and the prosecution.
The Diversion Agreement is unambiguous, binding, and enforceable and Paragraph 15 of
the Diversion Agreement provides Mr. Biden with “broad immunity.”

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.

Date: February 20, 2024

Respectfully submitted,
WINSTON & STRAWN LLP
By: /s/ Angela M. Machala
Angela M. Machala
Abbe David Lowell
Christopher D. Man
Attorneys for Robert Hunter Biden

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
FACTUAL BACKGROUND.....	1
I. The Diversion Agreement.....	2
II. The Execution Of The Diversion Agreement Concerning The Gun Charge Did Not Depend On The Plea Agreement Being Accepted By The Court On The Misdemeanor Tax Charges.....	4
ARGUMENT.....	7
I. THE DIVERSION AGREEMENT REMAINS IN FORCE.....	7
A. The Diversion Agreement Is An Unambiguous, Binding, And Enforceable Contract.....	7
B. To The Extent There Is Any Ambiguity In The Diversion Agreement, It Must Be Construed In Mr. Biden’s Favor.....	9
C. The Prosecution’s New Claim That The Diversion Agreement Is Not In Effect Conflicts With Its Prior Statements.....	11
D. It Makes No Difference That Probation Did Not Sign The Diversion Agreement.....	13
1. Probation was Not A Party To The Agreement.....	14
2. Probation, In Fact, Approved The Diversion Agreement.....	16
E. Judicial Estoppel Precludes The Prosecution From Denying The Validity Of The Diversion Agreement Or Probation’s Approval....	18
II. THE DIVERSION AGREEMENT’S IMMUNITY PROVISION REQUIRES DISMISSAL OF THE INDICTMENT.....	19
CONCLUSION.....	20

TABLE OF AUTHORITIES

Page(s)

Cases

Bordenkircher v. Hayes,
434 U.S. 357 (1978) 8, 19

Carroll v. Peake,
26 U.S. 18 (1828)..... 17

CKSJB Holdings LLC v. EPAM Sys., Inc.,
837 F. App’x 901 (3d Cir. 2020)9

Gen. Refractories Co. v. First State Ins. Co.,
500 F.3d 306 (3d Cir. 2007)..... 11

Harrison v. Dixon,
2013 WL 4759681 (Del. Ch. Sept. 5, 2013) 17

LPPR, Inc. v. Keller Crescent Corp.,
532 F. App’x 268 (3d Cir. 2013)9

MBIA Ins. Corp. v. Royal Indem. Co.,
426 F.3d 204 (3d Cir. 2005) (Alito, J.)8

New Hampshire v. Maine,
532 U.S. 742 (2001) 18

*Operating Eng’rs Local 139 Health Benefit Fund v. Gustafson Constr.
Corp.*,
258 F.3d 645 (7th Cir. 2001)..... 17

Prime Victor Int’l Ltd. v. Simulacra Corp.,
2023 WL 4546333 (D. Del. July 14, 2023)9

Roadway Express, Inc. v. Gen. Teamsters, Chauffeurs, and Helpers Union,
330 F.2d 859 (3d Cir. 1964)..... 17

Santobello v. New York,
404 U.S. 257 (1971) 1, 8, 19

United Rentals, Inc. v. RAM Holdings, Inc.,
937 A.2d 810 (Del. Ch. Dec. 21, 2007)9

1 *United States v. Biden,*
 2 No. 1:23-cr-00061-MN (D. Del.)..... 1

3 *United States v. Biden,*
 4 No. 1:23-mj-00274-MN (D. Del. 2023)..... 1

5 *United States v. De La Fuente,*
 6 8 F.3d 1333 (9th Cir. 1993) 10

7 *United States v. Fabian-Baltazar,*
 8 827 F. App’x 774 (9th Cir. 2020) 5

9 *United States v. Franco-Lopez,*
 10 312 F.3d 984 (9th Cir. 2002)..... 5, 10

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 12 519 F.2d 1343 (9th Cir. 1975)..... 8

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 14 457 F. Supp. 2d 411 (S.D.N.Y. 2006) 9

15 *United States v. Jackson,*
 16 21 F.4th 1205 (9th Cir. 2022)..... 10

17 *United States v. Lamanna,*
 18 2016 WL 616580 (W.D. Pa. Feb. 16, 2016)..... 19

19 *United States v. Molina,*
 20 2023 WL 8188598 (S.D.N.Y. Nov. 27, 2023) 8

21 *United States v. Plascencia-Orozco,*
 22 852 F.3d 910 (9th Cir. 2017)..... 8, 19

23 *United States v. Purcell Envelope Co.,*
 24 249 U.S. 313 (1919) 17

25 *United States v. Spear,*
 26 753 F.3d 964 (9th Cir. 2014)..... 10

27 *United States v. Wells,*
 28 124 F. App’x 735 (3d Cir. 2005) (Becker, J.) 8

United States v. Wingfield,
 401 F. App’x 235 (9th Cir. 2010) 10

1 *In re Wash. Mut., Inc.*,
2 421 B.R. 143 (Bankr. D. Del. 2009)..... 17

3 *Whittington v. Dragon Group LLC*,
4 2013 WL 1821615 (Del. Ch. May 1, 2013)..... 17

5 **Statutes**

6 18 U.S.C. § 922(g)(3)..... 1

7 26 U.S.C. § 7203 1

8 **Other Authorities**

9 U.S. Const., amend. II 4

10 U.S. Const., amend. V 1

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION¹

The Indictment against Mr. Biden must be dismissed because it violates a Diversion Agreement that is in effect between Mr. Biden and the prosecution. In exchange for Mr. Biden giving up various rights—including his Fifth Amendment right to remain silent by agreeing to the Statement of Facts drafted by the prosecution and numerous restrictions on his liberty—the prosecution agreed to provided him sweeping immunity. The prosecution agreed with the Delaware court that “the agreement not to prosecute . . . includes the time period from 2014 to 2019, it only includes tax charges in that time period.” (Ex. 1 at 58 (Mr. Wise).) Nevertheless, the prosecution brought this nine-count felony indictment concerning tax years 2016 through 2019 anyway. *See also* Diversion Agreement at II(15) (Ex. 2) (providing immunity for the statement of facts in the Plea Agreement); Memorandum of Plea Agreement at 7, No. 1:23-mj-00274-MN (D. Del. 2023), DE 28 (Ex. 3) (statement of facts addressing tax issues arising in 2016 through the filing of 2019 taxes in 2020). Because Mr. Biden gave up valuable rights as part of this contract, in exchange for the prosecution’s promise not to prosecute him, “such promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262 (1971).

FACTUAL BACKGROUND

The prosecution filed two separate Informations against Mr. Biden on June 20, 2023. One Information charged Mr. Biden with a single count of felony unlawful possession of a firearm as a user of a controlled substance under 18 U.S.C. § 922(g)(3). The other Information charged Mr. Biden with two misdemeanor tax offenses: (1) failure to timely pay taxes due April 17, 2018 under 26 U.S.C. § 7203, and (2) failure to timely pay taxes due April 15, 2019 under 26 U.S.C. § 7203.

¹ This motion was raised and is fully briefed in the gun-related felony prosecution the Special Counsel filed in Delaware. *United States v. Biden*, No. 1:23-cr-00061-MN (D. Del.) All docket entry (DE) citations in this motion refer to that matter, unless stated otherwise.

1 Mr. Biden and the prosecution resolved the Information with a gun charge on July
2 26, 2023 through a Diversion Agreement, although the prosecution is trying to renege on
3 that Agreement by indicting Mr. Biden on September 14, 2023 on three felony gun charges
4 related to the purchase of the same firearm that is addressed in the Diversion Agreement.
5 The Delaware court granted the prosecution's motion to dismiss the gun charge
6 Information on October 11, 2023, due to a subsequent Delaware felony gun Indictment.
7 Mr. Biden's filings in response to the prosecution's motion to dismiss, as well as his
8 Pretrial Service Report, make clear he has followed the terms of the in-force agreement.

9 The misdemeanor tax charges in Delaware preexisted the Diversion Agreement and
10 could have been prosecuted there under the Plea Agreement, but the prosecution motion
11 to dismiss the tax Information was granted on August 17, 2023. Months later, on
12 December 7, 2023, the prosecution filed this nine-count felony tax Indictment in
13 California, which is precluded by the Diversion Agreement. Mr. Biden now seeks to
14 dismiss the Indictment based on his Diversion Agreement with the prosecution.

15 I. The Diversion Agreement

16 Mr. Biden resolved the Information on the gun charge by entering into a Diversion
17 Agreement with the prosecution on July 26, 2023. The only parties to the Diversion
18 Agreement are Mr. Biden and the prosecution. (Ex. 2 at I; Ex. 1 at 83 (“Roman numeral
19 one, the parties to the Diversion Agreement are the United States of America by and
20 through the United States Attorney's Office for the District of Delaware and Robert
21 Hunter Biden.”) (Mr. Wise).) Every party to that Agreement signed it on or before July
22 26, 2023, and the court's approval was not needed for it to become effective.²

23 ² Negotiating this resolution with the prosecution was made difficult because the
24 prosecution could not make up its mind about what it wanted and repeatedly moved the
25 goal posts whenever a resolution was in reach. Christopher Clark, Mr. Biden's primary
26 lawyer who negotiated the agreement, describes those negotiations at length in his
27 declaration. (Ex. 4 [hereinafter “Clark Declaration”].) Initially, the prosecution required
28 only that the resolution (1) be public and (2) involve an agreed upon statement of facts,
and the parties were close to reaching some form of a non-charge, non-prosecution
agreement. (Ex. 4 ¶¶6, 12.) Throughout all negotiations, Mr. Biden's counsel *always*
made clear than any resolution reached must bring about the finality of the prosecution's
investigations of Mr. Biden. (*Id.* ¶¶6, 11, 27–28.) After the prosecution informed
defense counsel that was acceptable, and Mr. Biden agreed in principle, the prosecution

1 With the parties' approval of the Diversion Agreement on July 26, 2023, a twenty-
2 four-month diversion period began. (Ex. 2 at II(1).) If Mr. Biden complied with his
3 obligations under the Diversion Agreement, the prosecution would not bring new charges
4 against Mr. Biden for his past conduct and proceedings on the Information would not be
5 pursued. Within thirty days of the expiration of the diversion period, the prosecution
6 would dismiss the Information if Mr. Biden had satisfied his obligations under the
7 Diversion Agreement. (*Id.* at II(4) & (15).) The prosecution contends the diversion period
8 did not start until the Probation Office signed the agreement. As will be explained in this
9 motion, the Probation Office signature was not required, but it approved the agreement³
10 nevertheless. Moreover, the two parties had a binding agreement between themselves,
11 regardless of whether Probation chose to sign or approve the Agreement.

12 Ever since Mr. Biden entered into the Diversion Agreement more than six months
13 ago, he has complied with his obligations under that Agreement. Mr. Biden also agreed

14 then explained that U.S. Attorney David Weiss had changed his mind. (*Id.* ¶10.) He
15 then wanted a deferred prosecution agreement (DPA) on the gun charge. Later, the
16 prosecution suggested a diversion agreement in place of the DPA. (*Id.* ¶12.) Charges
17 would be filed on the gun charge and two misdemeanor tax charges, but no plea by Mr.
18 Biden would be required. After that agreement in principle was reached, Mr. Weiss
19 changed his mind yet again and insisted upon a guilty plea on two misdemeanor tax
20 charges along with the Diversion Agreement for the firearm offense. (*Id.* ¶15.) Defense
21 counsel continued to insist that any resolution resolve "any and all" investigations of Mr.
22 Biden completely, and the prosecution made clear that would be accomplished by
23 providing immunity for conduct described in broadly worded statements of fact. (*Id.*
24 ¶¶11, 21.) Ultimately, the prosecution drafted the Diversion Agreement conferring such
25 immunity that was signed by all parties, which would not require judicial approval, and
26 a separate Plea Agreement with respect to the misdemeanor tax charges, which would
27 require the Court's approval. As explained below, the Court can and should resolve this
28 motion based on the face of the Diversion Agreement itself. All parties agree that
consideration of parol evidence is inappropriate in construing the terms of the agreement.

³ Margaret Bray, Chief U.S. Probation Officer, sent a copy of Mr. Biden's Pretrial
Diversion Report to Mr. Biden's counsel on July 19, 2023. (Ex. 5.) The Report conveys
the following Recommendation: "The United States Probation Office recommends the
defendant as a candidate for a 24-month term of Pretrial Diversion." (*Id.* ¶37.) The
Report attaches the then-proposed Diversion Agreement, and notes that Mr. Biden agreed
with the factual statement. (*Id.* ¶35.) On July 20, 2023, the prosecution emailed the
Court, copying Ms. Bray and defense counsel, to report that "[t]he parties *and Probation*
have agreed to revisions to the diversion agreement to more closely match the conditions
of pretrial release that Probation recommended in the pretrial services report issued
yesterday." (7/20/23 Email from B. Wallace to M. Buckson (Ex. 4 at 160 (Clark Decl.,
Ex. T) (emphasis added).) The parties then signed the Diversion Agreement on July 26,
2023. Critically, this email makes clear that they are the Parties to the Agreement, and
then separately there is Probation, who is not a party.

1 not to exercise his Second Amendment right to possess a firearm during the diversion
2 period (which he could otherwise do because he has not used illicit substances in more
3 than four years). (Ex. 2 at II(9).) Mr. Biden is subject to a host of other conditions,
4 including agreeing to supervision by Probation and drug testing and treatment as directed
5 by Probation. (*Id.* at II(10).)

6 In return, as the prosecutor told the Delaware court on July 26, 2023, Mr. Biden is
7 entitled to immunity for any conduct described in the Statement of Facts in the Diversion
8 Agreement and the Statement of Facts in the Plea Agreement, discussed in more detail
9 below. (*Id.* at II(15).) Among other things, the prosecutor was explicit that “based on the
10 terms of the [Diversion] agreement, we cannot bring tax evasion charges for the years
11 described in the factual statement to the Plea Agreement.” (Ex. 1 at 54–55 (Mr. Wise).)
12 Similarly, Mr. Biden’s counsel told the court, without objection, that the parties agree this
13 provision “broadly relate[s] to gun possession, *tax issues*, and drug use.” (*Id.* at 57 (Mr.
14 Clark) (emphasis added).)

15 **II. The Execution Of The Diversion Agreement Concerning The Gun Charge Did**
16 **Not Depend On The Plea Agreement Being Accepted By The Court On The**
17 **Misdemeanor Tax Charges**

18 On July 26, 2023, the same day the parties signed the Diversion Agreement, Mr.
19 Biden also entered into a Plea Agreement with the prosecution to resolve the Information
20 with the misdemeanor tax charges. Unlike the Diversion Agreement, the Plea Agreement
21 required the judicial approval to become effective, and it did not become effective because
22 the Delaware court did not accept the Plea Agreement.⁴

23 _____
24 ⁴ The Delaware court deferred its ruling on whether to accept the plea agreement, without
25 deciding whether the Plea Agreement was appropriate. (Ex. 1 at 95 (Court stating, “I’m
26 not saying that it’s not [valid]”); 109 (Court clarifying it is not deciding whether or not to
27 accept the Plea Agreement).) The court questioned how the immunity provision of the
28 Diversion Agreement would work in the hypothetical situation where the prosecution
alleged a breach of the agreement, acknowledging that may never occur. (Ex. 1 at 95
(Court saying, “I’m not saying you are going to breach.”).) The court’s concern was that
the prosecution would need the court to decide there was a breach before bringing any
new charges, when the court is not a party to the Diversion Agreement. Following the
hearing, the prosecution withdrew its plea offer, so the issue of the validity of the Plea
Agreement was not briefed further. Had it been briefed, the court’s concern easily could

1 It is important to recognize that, by its terms and both parties in-court statements,
2 the Diversion Agreement and the Plea Agreement are separate, independent agreements.
3 By its own terms, the Diversion Agreement made clear that “[i]t constitutes the complete
4 and final agreement between the United States and Biden on this matter. There are no
5 other agreements, written or otherwise, modifying the terms, conditions, or obligations of
6 this Agreement.” (Ex. 2 at II(19).) The validity of the Diversion Agreement did not
7 depend on the Delaware court’s acceptance of the Plea Agreement in any respect. (See
8 Ex. 3 ¶38.)

9 With no hesitation or qualification, the prosecution agreed with the Delaware court
10 that the Agreements are “completely separate,” and added that “the plea agreement stands
11 on its own.” (Ex. 1 at 42 (Mr. Wise); *see also id.* at 52 (explaining the Plea Agreement
12 does not incorporate the Diversion Agreement).) Similarly, Mr. Biden’s counsel
13 explained: “The parties have taken the position that the Diversion Agreement is a separate
14 agreement from the Plea Agreement. The Diversion Agreement is a bilateral contract
15 between the parties.” (*Id.* at 57 (Mr. Clark).) The validity of the Diversion Agreement
16 was not an issue before the Delaware court on July 26. (Ex. 1 at 50 (Court explaining
17 “you are not asking me to sign off on” the Diversion Agreement), 92 (Court explaining
18 the Diversion Agreement is “a separate agreement, there’s no place for me to sign off on
19

20
21 have been addressed. First, the court’s concern was entirely hypothetical as Mr. Biden
22 had no intention of breaching the agreement and, even if it were breached, he and the
23 prosecution could very well resolve any issue without turning to the court. Other remedies
24 are available under the Agreement. (Ex. 2 at II(14)(a).) Thus, no actual issue was likely
25 to arise. Second, the provision merely reflects that the Diversion Agreement is a contract
26 entered into in Delaware, and any party alleging a breach of the contract could seek to
27 enforce the contract in that court, like any other contract. Third, even if that provision of
28 the Diversion Agreement could not be enforced, it would be severable and not render the
Agreement void. Mr. Biden sacrificed numerous rights by entering into the contract and
was abiding by its terms, so he would be entitled to the benefit of his bargain, including a
judicial determination of whether there had been a breach before he could be stripped of
the Agreement’s protections. *See United States v. Fabian-Baltazar*, 827 F. App’x 774,
775 (9th Cir. 2020) (“Our firm precedent holds that where the validity of a plea agreement
is in question, ‘we favor a construction under which the agreement is legally valid over an
interpretation that would require voiding the agreement.’”) (quoting *United States v.*
Franco-Lopez, 312 F.3d 984, 991 (9th Cir. 2002)).

1 it”); *see also id.* at 51 (“[W]e are not asking the Court to rule in any way on the Diversion
2 Agreement.”) (Mr. Wise.)

3 Even before the hearing, the prosecution expressed its agreement that the Diversion
4 Agreement resolved the charge in the firearm Information in emails with defense counsel
5 regarding a draft press statement by Mr. Biden’s counsel. (*See* Ex. 4 ¶¶35–36.) The
6 prosecution agreed that Mr. Biden’s counsel could say “the firearm charge [is] subject to
7 a diversion agreement and will not be subject to the plea agreement.” (Email from C.
8 Clark to S. Hanson (Ex. 4 at 143 (Clark Decl., Ex. P).) Moreover, Mr. Biden’s counsel
9 had proposed saying that this “concluded” the prosecution’s investigation (into whatever
10 the Agreement covered), but the prosecution preferred the word “resolved,” so the draft
11 was changed to “it is my understanding that the five-year investigation into Hunter is
12 resolved.” (*Id.*) Those words are synonymous and reflect that the investigation is now
13 over. *Compare concluded*, Merriam-Webster Dictionary (2023), [https://www.merriam-](https://www.merriam-webster.com/dictionary/concluded)
14 [webster.com/dictionary/concluded](https://www.merriam-webster.com/dictionary/concluded) (defining “concluded” as “to bring to an end”), *with*
15 *resolved, id.*, <https://www.merriam-webster.com/dictionary/resolved> (defining “resolved”
16 as “to deal with successfully” or “to find an answer to” or “to reach a firm decision about”).
17 Plainly, with the prosecution telling Mr. Biden’s counsel that at least the tax issues
18 (through a misdemeanor plea) and firearm charges (to be diverted) have been “resolved”
19 by the Diversion Agreement, neither Mr. Biden nor his counsel would have thought
20 otherwise.⁵

21 Again at the July 26, 2023 hearing, all sides recognized that the Diversion
22 Agreement remains in effect. Using the present tense, the prosecution told the court:
23 “Your Honor, the Diversion Agreement is a contract between the parties so it’s in effect
24 until it’s either breached or a determination [of breach has been made], period.” (Ex. 1 at
25 91 (Mr. Wise).) Similarly, Mr. Biden’s counsel told the Court: “I want to be clear that it

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27 ⁵ This understanding is further supported by the clear fact that when Mr. Biden’s counsel
28 asked AUSA Shannon Hanson directly, on July 19, 2023, “whether there was any other
open or pending investigation of Mr. Biden overseen by the Delaware U.S. Attorney’s
Office . . . she responded there was not[.]” (Ex. 4 ¶36.)

1 is the parties’ position that there is a Diversion Agreement between the parties which is
2 binding.” (*Id.* at 44 (Mr. Clark).) Mr. Biden’s counsel also was clear that this was his
3 understanding from the prosecution: “our understanding of the Diversion Agreement,
4 which is a bilateral agreement between the Defendant and the government which the
5 government has reaffirmed to me it will stand by.” (*Id.*) Although the Prosecution now
6 reverses course and claims the Diversion Agreement never became effective (oddly
7 calling it and the accompanying Plea Agreement “drafts” (DE 32 at 1)), the prosecution
8 said the opposite at the hearing and never attempted to correct Mr. Biden’s counsel before
9 the Delaware court.

10 Even when pressed by the Delaware court as to whether Mr. Biden would challenge
11 the constitutionality of the gun charge, given a recent case finding it unconstitutional, Mr.
12 Biden’s counsel responded: “I can tell you our intention would be to abide by the
13 agreement and only raise such constitutional determining at such time that somebody tried
14 to bring any charges on this, otherwise it’s an agreement between the parties. We are
15 going to honor the agreement.” (Ex. 1 at 91 (Mr. Clark).) Nobody—including the
16 prosecution—ever suggested that the Diversion Agreement would become void if the Plea
17 Agreement was not accepted. Yet the prosecution now seeks to backtrack and renege on
18 its agreement. The plain language, and various representations made during and after the
19 agreement was entered into (evidenced by contemporaneous communications discussed
20 and referenced in the accompanying Declaration of Christopher Clark), forbid the
21 prosecution from doing so.

22 ARGUMENT

23 I. THE DIVERSION AGREEMENT REMAINS IN FORCE

24 A. The Diversion Agreement Is An Unambiguous, Binding, And 25 Enforceable Contract

26 The Supreme Court has authorized prosecutors to enter into contracts with
27 defendants to resolve potential criminal charges, as was done with the Diversion
28 Agreement, and it has made clear that due process principles require prosecutors to honor

1 their obligations under agreements they reach with defendants. *See Bordenkircher v.*
2 *Hayes*, 434 U.S. 357, 362 (1978); *Santobello*, 404 U.S. at 262. “If the government indicts
3 a defendant on charges that the defendant believes are barred by a preexisting plea
4 agreement, the defendant may move to dismiss those charges.” *United States v.*
5 *Plascencia-Orozco*, 852 F.3d 910, 920 (9th Cir. 2017). The parties agree that a Diversion
6 Agreement is legally analogous to a Plea Agreement. (DE 69 at 8 (citing *United States v.*
7 *Garcia*, 519 F.2d 1343, 1345 n.2 (9th Cir. 1975).)

8 The Diversion Agreement was validly executed and, therefore, is a binding and
9 enforceable contract. The fact that the Diversion Agreement has been approved and
10 executed by the parties is clear on the face of the Agreement itself. The Diversion
11 Agreement is explicit that the only parties to the Agreement are Mr. Biden and the
12 prosecution (Ex. 2 at I), and both signed the Agreement on July 26, 2023. Neither the
13 Court nor anyone else is a party to the Agreement. The Agreement need only be approved
14 and executed by the parties to become effective, and that has occurred. (*Id.* at II(18).) The
15 Agreement also is explicit that there are no requirements for the Agreement to become
16 effective that are not stated in the Agreement itself. (*Id.* at II(19); *see United States v.*
17 *Wells*, 124 F. App’x 735, 737 (3d Cir. 2005) (Becker, J.) (explaining that such a clause
18 precludes the court from finding a party “breached an ‘implicit’ understanding in a plea
19 agreement”) (citation omitted); *see also MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d
20 204, 215 (3d Cir. 2005) (Alito, J.) (holding Delaware law prevents looking beyond the
21 “four corners” of a contract with such a clause). The prosecution acknowledges that
22 Delaware law applies to the construction of the agreement and precludes construing the
23 terms of an agreement through parol evidence. (DE 69 at 8-10.) Because Mr. Biden
24 accepted the Diversion Agreement, “the Government may not now revoke it.” *United*
25 *States v. Molina*, No. 7:19-CR-449-3 (NSR), 2023 WL 8188598, at *3 (S.D.N.Y. Nov.
26 27, 2023) (refusing to allow the prosecution to withdraw a plea agreement after it was
27 accepted because the agreement was not explicitly “contingent” upon anything beyond the
28 parties’ signatures, noting “[c]ourts are required to hold the Government to the most

1 meticulous standards of both promise and performance”) (quoting *United States v. Gotti*,
2 457 F. Supp. 2d 411, 424 (S.D.N.Y. 2006)).

3 The parties agree that the Diversion Agreement, like any unambiguous contract, is
4 interpreted solely by its plain language. (DE 69 at 8-10.) Under Delaware law, courts
5 interpret contracts based on their plain language alone, absent some ambiguity. *See, e.g.*,
6 *CKSJB Holdings LLC v. EPAM Sys., Inc.*, 837 F. App’x 901, 904-05 (3d Cir. 2020) (citing
7 Delaware law); *Prime Victor Int’l Ltd. v. Simulacra Corp.*, 2023 WL 4546333, at *6 (D.
8 Del. July 14, 2023). “Ambiguity does not exist simply because the parties disagree about
9 what the contract means. Moreover, extrinsic, parol evidence cannot be used to
10 manufacture an ambiguity in a contract that facially has only one reasonable meaning.”
11 *LPPR, Inc. v. Keller Crescent Corp.*, 532 F. App’x 268, 275 (3d Cir. 2013) (quoting
12 *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. Dec. 21, 2007)).

13 Because the Diversion Agreement does not make the effectiveness of the
14 Agreement contingent on anything beyond the approval and execution by all parties to the
15 Agreement, the Agreement was unambiguously executed when it was signed by all parties
16 on July 26, 2023. No matter how much external criticism the prosecution may face for
17 proposing, drafting and signing this Agreement, it is too late for it to now disclaim its
18 commitments under the Agreement that it struck.

19 **B. To The Extent There Is Any Ambiguity In The Diversion Agreement, It**
20 **Must Be Construed In Mr. Biden’s Favor**

21 Not only is it clear from the face of the Diversion Agreement signed by all parties
22 that it is in effect—as all parties told the Delaware court at the July 26, 2023 hearing—
23 any effort by the prosecution to search out some ambiguity in the contract in an effort to
24 manufacture an excuse to renege on the deal it struck would fail. There is no explicit
25 language in the Diversion Agreement that would allow the prosecution to nullify the
26 Agreement, and nothing less will do.

27 If the prosecution must search out some ambiguity in the Diversion Agreement to
28 exploit in support of its argument, the prosecution has already lost. Like the Third Circuit,

1 the Ninth Circuit explains: “Courts construe ambiguities in the plea agreement against the
2 government and will use the defendant’s reasonable beliefs at the time of pleading to
3 construe the agreement.” *United States v. Wingfield*, 401 F. App’x 235, 236 (9th Cir.
4 2010); *see United States v. Jackson*, 21 F.4th 1205, 1213 (9th Cir. 2022) (“Our task is to
5 determine what the defendant reasonably believed to be the terms of the plea agreement
6 at the time of his plea.”); *Franco-Lopez*, 312 F.3d at 989 (explaining the court “construe[s]
7 ambiguities in favor of the defendant” (citation omitted) and that, “[i]n construing the
8 agreement we must determine what Franco-Lopez reasonably believed to be the terms of
9 the plea agreement at the time of the plea.”). Indeed, the Ninth Circuit has “steadfastly
10 applied the rule that any lack of clarity in a plea agreement should be construed against
11 the government as drafter.” *United States v. Spear*, 753 F.3d 964, 968 (9th Cir. 2014)
12 (citations omitted). “Construing ambiguities in favor of the defendant makes sense in light
13 of the parties’ respective bargaining power and expertise.” *United States v. De La Fuente*,
14 8 F.3d 1333, 1338 (9th Cir. 1993). The prosecution does not dispute that this is the law;
15 it claims the contract unambiguously gave Probation veto power over the Agreement
16 between the parties despite being unable to point to any provision of the Agreement that
17 says so. (DE 69 at 8-10.)

18 Here, it was the prosecution that pushed Mr. Biden to adopt what the Delaware
19 court found to be a rather unusual sort of Diversion Agreement. (Ex. 1 at 10 (Court
20 explaining that some provisions are “not standard and different from what I normally
21 see”); 41 (Court noting the immunity provision in the Diversion Agreement “is normally
22 in a plea agreement”); 45 (Court explaining it reviewed several diversion agreements “and
23 couldn’t find anything that had anything similar to that”).) The prosecution acknowledged
24 that this Diversion Agreement is without precedent and that it “was crafted to suit the facts
25 and circumstances” of this case. (*See* Ex. 1 at 95; *see id.* at 94 (“No, I don’t have
26 precedent.”) (Mr. Wise); 103 (Court acknowledging no precedent).) To be clear, after the
27 prosecution insisted on structuring the Diversion Agreement and the Plea Agreement in
28 this non-traditional manner, Mr. Biden and his counsel agreed to this approach because

1 they were assured it would protect Mr. Biden’s rights. (Ex. 4 ¶25 (the prosecution “had
2 proposed a bifurcated set of agreements and told defense counsel that it had to work within
3 this bifurcated agreement structure”).)

4 Mr. Biden gave up rights and agreed to the prosecution’s rendition of facts. It is
5 fundamentally unfair for the prosecution to extract these concession and statements from
6 a defendant based on a promise that the prosecution later chooses not to honor, no matter
7 how great the political pressure exerted upon the prosecution. As the drafter of this
8 proposal, and the beneficiary of Mr. Biden’s concessions under the Diversion Agreement,
9 the Diversion Agreement should be construed against the prosecution to provide Mr.
10 Biden the benefit of his bargain.

11 **C. The Prosecution’s New Claim That The Diversion Agreement Is Not In**
12 **Effect Conflicts With Its Prior Statements**

13 In asking the court to vacate the briefing it had requested on the validity of the Plea
14 Agreement (not the Diversion Agreement), the prosecution began swimming through
15 excuses for why the Diversion Agreement was not valid. After telling the court that the
16 Diversion Agreement had been executed by the parties and is in force—and further
17 conveying that impression by not correcting Mr. Biden’s counsel when they made the
18 same representations to the court—the prosecution reversed course after the hearing when
19 Mr. Weiss came under blistering attack for making the deal. Although the facts that had
20 been determined through a five-year investigation had not changed, several Republican
21 Members of Congress and several right-wing media pundits criticized the prosecution, and
22 suddenly the prosecution decided that it no longer wanted the court to approve the Plea
23 Agreement that it had negotiated and that easily could have been modified to address the
24 court’s concerns.⁶ More remarkably, the prosecution decided that it no longer wanted to

25 _____
26 ⁶ For example, the Plea Agreement could have explicitly stated that the prosecution could
27 bring a declaratory judgment action alleging that Mr. Biden had breached the Diversion
28 Agreement, and then brought new charges if the Court agreed that a breach had occurred.
Because this remedy is available as a matter of contract law, it could be used by the
prosecution to enforce the Agreement even without any modification of the Diversion
Agreement’s language. *See, e.g., Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d
306 (3d Cir. 2007) (allowing declaratory judgment claim for alleged breach of contract).

1 be bound by the Diversion Agreement that already was in effect, going so far as to
2 mischaracterize the signed Agreement filed with the court as a “draft.” (DE 32 at 1.)

3 The prosecution pretends that it did not represent to the court that the Diversion
4 Agreement was in effect (DE 32 at 1), but the transcript of the hearing proves otherwise.
5 Again, Mr. Wise told the court, using the *present tense*: “Your Honor, the Diversion
6 Agreement *is* a contract between the parties so it’s in effect until it’s either breached or a
7 determination [of breach has been made], period.” (Ex. 1 at 91 (Mr. Wise) (emphasis
8 added).) Nevertheless, the prosecution has not alleged that Mr. Biden has breached the
9 Diversion Agreement. To the contrary, Mr. Biden agreed to its terms on July 26, 2023,
10 sacrificed his constitutional rights, and has complied with all requests from Probation
11 since then.

12 The prosecution now refers to the Diversion Agreement as a “withdrawn proposed
13 diversion agreement” (DE 69 at 1), but Paragraph 19 of the Diversion Agreement does not
14 allow the prosecution to unilaterally “withdraw” from the Agreement after it has been
15 agreed to and signed by the parties. Rather, Paragraph 19 directs that “no future
16 modifications . . . shall be valid unless they are set forth in writing and signed by” the
17 prosecution, Mr. Biden, and Mr. Biden’s counsel. No such written modification has been
18 made or signed by Mr. Biden or his counsel.

19 Most bizarrely, the prosecution initially pointed to a line in the hearing transcripts
20 that it italicizes for emphasis in which Mr. Wise said, “if your honor takes the plea *and*
21 *signs the Diversion Agreement which is what puts it into force as of today,*” claiming this
22 shows the Diversion Agreement was not in effect. (DE 32 at 5 (quoting Ex. 1 at 53).) To
23 put it bluntly, that is ridiculous. Mr. Wise obviously misspoke in court in saying
24 “Diversion Agreement,” rather than “Plea Agreement.” The whole discussion was about
25 the consequences of the court accepting the Plea Agreement, which would have made the
26 Plea Agreement effective that day. Mr. Wise cannot invoke his own misstatement to
27 overrule his repeated statements that the Diversion Agreement was between the parties
28 and only the Plea Agreement needed the Delaware court’s approval. Subsequently, in

1 defending against a motion to dismiss in Delaware based on the Diversion Agreement, the
2 prosecution abandoned this initial excuse in search of another.

3 At the hearing, the Delaware court was clear that there was no place for it to sign
4 the Agreement, which the prosecution acknowledged. (Ex. 1 at 50 (Court explaining “you
5 are not asking me to sign off on” the Diversion Agreement), 92 (Court explaining the
6 Diversion Agreement is “a separate agreement, there’s no place for me to sign off on it”).
7 Mr. Wise may want to use his slip of the tongue confusing the Plea Agreement with the
8 Diversion Agreement now, but at the time he explicitly told the court: “[W]e are not asking
9 the Court to rule in any way on the Diversion Agreement.” (*Id.* at 51.) Only the Plea
10 Agreement required a signature from the court. Consequently, no rational observer of the
11 hearing would have understood that the prosecution expected the court to rule on the
12 Diversion Agreement and “sign off on it.” It is just as the prosecution told Mr. Biden’s
13 counsel before the hearing; the Diversion Agreement “resolved” the gun charges. (Ex. 4
14 ¶36) and resulted in the only the possibility of misdemeanor tax charges in Delaware.

15 **D. It Makes No Difference That Probation Did Not Sign The Diversion**
16 **Agreement**

17 After extracting the bulk of the benefit of the bargain from Mr. Biden signing the
18 Diversion Agreement, attesting to the accuracy of the Statement of Facts alleged by the
19 prosecution, the prosecution now suggests that its extraction of Mr. Biden’s rights was
20 some sort of gotcha-moment. (DE 32 at 1.) The prosecution now claims that although
21 *every* party to the Diversion Agreement, including the prosecution, signed the Diversion
22 Agreement, it never became effective because Probation, a non-party, did not sign the
23 Agreement. In the Prosecution’s mind, that means that it was able to extract Mr. Biden’s
24 obligations and waivers by making an illusory promise of immunity. The prosecution’s
25 theory would truly shock the conscience and violate the Due Process Clause if it were
26 correct, but Probation’s recommendation and approval were given, and even that was not
27 necessary to create a binding contract among the parties in any event.

1 **1. Probation Was Not A Party To The Agreement**

2 No signature from Probation was required because Probation is expressly *not* a
3 party to the Diversion Agreement. (Ex. 2 at I.) The Diversion Agreement became
4 effective once it was approved and executed by *the parties* to the Agreement. No
5 provision of the Diversion Agreement states otherwise; nor did the prosecution say
6 otherwise at the hearing.

7 The prosecution highlights that the diversion period under the Diversion Agreement
8 does not begin until the date of execution and “approval” of the Diversion Agreement (Ex.
9 2 at II(2)) and claims the Agreement was never approved by Probation (DE 32 at 6), but
10 the Diversion Agreement required execution and approval from the parties—not by
11 Probation. Again, the Diversion Agreement is explicit that only Mr. Biden and the
12 prosecution are parties to the Diversion Agreement, and there is no provision that says
13 Probation must sign the Diversion Agreement for it to be effective.

14 The Diversion Agreement would have stated that a signature from Probation was
15 necessary to make it effective if that was what the parties intended. Paragraph 19, for
16 example, which addresses modifications to the Diversion Agreement, states that such
17 changes must be “in writing and *signed by the United States, Biden, and Biden’s counsel.*”
18 (Ex. 2 at II(19) (emphasis added).) Thus, the Diversion Agreement plainly contemplates
19 when a signature is needed, and yet there is no provision requiring that the Diversion
20 Agreement be “signed” by Probation to be effective.

21 Even more tellingly, when a “signature” is required for changes to be effective, the
22 Diversion Agreement specifies that *only* the signatures of the parties and Mr. Biden’s
23 counsel are necessary. Probation’s signature is not. It makes no sense to view Probation’s
24 signature as necessary to make the Diversion Agreement effective between the actual
25 parties, and for the Diversion Agreement to then give the parties the power to redraft the
26 entire Agreement (including expanding Probation’s authority or removing it all together)
27 without any sign-off from Probation. Probation’s approval is hardly critical to the
28 Agreement if it can so easily be dispensed with.

1 There is no riddle here to be solved though because, as Mr. Wise explained, the
2 Diversion Agreement is “a bilateral agreement between the parties” (Ex. 1 at 46), so
3 Probation’s signature was never needed to make the Diversion Agreement or any
4 modifications to it effective. “Bi-lateral” means two and “parties” was defined to mean
5 the prosecution and Mr. Biden. That makes sense because Probation is *not* a party to the
6 Agreement and Probation is *not* required to do anything under this Agreement. To be
7 sure, Probation is empowered by the Diversion Agreement to supervise Mr. Biden “as
8 directed” by Probation. (Ex. 2 at II(10)(a).) Probation also could require Mr. Biden to
9 submit to substance-abuse testing and treatment “as directed” by Probation. (*Id.* at
10 II(10)(e).) And Mr. Biden must communicate his travel plans to Probation and, if
11 requested by Probation, provide supporting documentation. (*Id.* at II(10)(g).) But
12 Probation is not required to do any of these things, or anything at all, under this Diversion
13 Agreement; it merely has the parties’ consent to do so. Mr. Biden has agreed to give
14 Probation that power over him, and it is hardly a breach of the Agreement by him if
15 Probation chooses not to exercise that power.

16 At the hearing, the prosecution acknowledge that Probation had no role in
17 determining whether the Diversion Agreement struck a fair bargain for the government.
18 Mr. Wise told the court: “I believe that this is a bilateral agreement between the parties
19 that the parties view in their best interest. I don’t believe that the role of probation would
20 include weighing whether the benefit of the bargain is valid or not from the perspective of
21 the United States or the Defendant.” (Ex. 1 at 46 (Mr. Wise).) The only role for Probation
22 is to supervise Mr. Biden, if it chooses to do so, but the Diversion Agreement between the
23 parties remains valid even if Probation decided not to supervise Mr. Biden at all.
24 Nevertheless, Probation officers based in the Central District of California have continued
25 to supervise Mr. Biden since July 26, including, for example, making home visits and
26 having him submit to drug tests.

27 The signature line for Probation reflecting its approval would indicate only that
28 Probation approved being given this supervisory responsibility, which even then it would

1 not have to exercise. Because Probation was not a party to the Agreement, its approval
2 was not necessary for the Agreement to be effective. With the Diversion Agreement in
3 effect, Probation could always decide to exercise its supervisory authority over Mr. Biden
4 under that Agreement at a later time, even if it had not previously signed the Diversion
5 Agreement or never did so.

6 Importantly, Mr. Biden has satisfied his obligations under the Diversion Agreement
7 by agreeing to be subject to these oversight provisions by Probation and he has done
8 everything Probation has asked of him. If Probation had never chosen to exercise any of
9 its rights under the Agreement, that would not diminish the fact that Mr. Biden agreed to
10 be subject to oversight by Probation. That is all the Diversion Agreement required of him.

11 **2. Probation, In Fact, Approved The Diversion Agreement**

12 Having argued that Probation had to approve the agreement, its subsequent
13 suggesting that Probation did not approve the Diversion Agreement is farcical because
14 both Probation and the prosecution told the Delaware court that it did. As noted above,
15 Probation sent the court a copy of Mr. Biden’s Pretrial Diversion Report on July 19, 2023.
16 (Ex. 5.) The Report conveys the following Recommendation: “The United States
17 Probation Office *recommends* the defendant as a candidate for a 24-month term of Pretrial
18 Diversion.” (*Id.* ¶37 (emphasis added).) The Report attaches the then-proposed Diversion
19 Agreement, and notes that Mr. Biden agreed with the factual statement. (*Id.* ¶35.)
20 However the prosecution may try to spin this, it is not possible that Probation was not
21 “agreeing” with something it was “recommending.” A recommendation reflects more
22 than passive agreement.

23 Were Probation’s approval needing any more evidence, on July 20, 2023, the
24 prosecution emailed the court to report that “[t]he parties *and Probation have agreed* to
25 revisions to the diversion agreement to more closely match the conditions of pretrial
26 release that Probation recommended in the pretrial services report issued yesterday.” (Ex.
27 4 at 160 (Clark Decl., Ex. T) (emphasis added).) Plainly then, the parties understood that
28

1 Probation had *agreed* to the Diversion Agreement, and the prosecution advised both the
2 court and Mr. Biden’s counsel of that fact.

3 The prosecution emphasizes that Probation did not sign the Diversion Agreement
4 but, again, no provision of the Diversion Agreement requires anything more than the
5 approval and execution of the Agreement by the parties for it to be effective. To the extent
6 that Probation’s approval was necessary, it was conveyed by Probation’s recommendation
7 of the Diversion Agreement to the court and its assurance to the prosecution, which it
8 conveyed to the court by email and in signing the letter recommending the Agreement.

9 “Nothing in the law of contracts requires that a contract be signed to be
10 enforceable.” *Whittington v. Dragon Group LLC*, 2013 WL 1821615, at *3 (Del. Ch. May
11 1, 2013) (citing Delaware authority); *see Harrison v. Dixon*, 2013 WL 4759681, at *3
12 (Del. Ch. Sept. 5, 2013). Not only is that true in Delaware, it is black-letter law. *See, e.g.*,
13 *United States v. Purcell Envelope Co.*, 249 U.S. 313, 319 (1919) (explaining “[i]t makes
14 no difference that the contract was not formally signed” because the intent to be bound
15 was manifested by making the offer of a contract); *Carroll v. Peake*, 26 U.S. 18, 22 (1828)
16 (finding a contract although it had not been signed); *Operating Eng’s Local 139 Health*
17 *Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 649 (7th Cir. 2001) (“Nothing in
18 the law of contracts requires that a contract, whether original or modified, must be signed
19 to be enforceable. The contract needn’t be in writing; if it is in writing, it needn’t be
20 signed, provided there’s other evidence of acceptance.”); *Roadway Express, Inc. v. Gen.*
21 *Teamsters, Chauffeurs, and Helpers Union*, 330 F.2d 859, 863 (3d Cir. 1964) (“So the fact
22 that the proposed written agreement was not signed did not demonstrate as a matter of law
23 that was no contract.”). To be sure, a signature on a contract is a common and strong
24 indication that a party has agreed to a contract, but it is not the only way that assent to be
25 bound by a contract is manifested. *See, e.g., In re Wash. Mut., Inc.*, 421 B.R. 143, 148
26 (Bankr. D. Del. 2009). The fact that Probation sent its written recommendation in favor
27 of the Diversion Agreement to the parties and the court and told the parties that it *agreed*
28

1 with the Diversion Agreement, is sufficient to the extent a manifestation of Probation
2 taking on its supervisory responsibility was needed.

3 Also, to the extent a signature from Probation was needed for its non-party role, that
4 exists too on Ms. Bray’s signed July 19, 2023 letter to counsel for the parties enclosing
5 her recommendation in favor of the Diversion Agreement and copy of the Agreement.
6 The fact that Ms. Bray signed her letter recommending the Diversion Agreement, and
7 enclosed a copy of it, is a powerful indicator that she gave her approval.

8 **E. Judicial Estoppel Precludes The Prosecution From Denying The**
9 **Validity Of The Diversion Agreement Or Probation’s Approval**

10 The doctrine of judicial estoppel prevents the prosecution from denying that the
11 Diversion Agreement is valid or that Probation has agreed to the Diversion Agreement
12 because it told the Delaware court otherwise. *See, e.g., New Hampshire v. Maine*, 532
13 U.S. 742, 749 (2001). When it suited the prosecution’s interests, and it wanted the court
14 to accept the Plea Agreement on the misdemeanor tax charge information, the prosecution
15 told the court that the Diversion Agreement was in effect and had the support of Probation.
16 Now that the prosecution has backtracked from the settlement framework embodied in the
17 Plea Agreement, the prosecution no longer wants to be bound by its Diversion Agreement
18 either, so now it claims the Diversion Agreement is not in effect and that actual approval
19 was needed and not given by Probation. Judicial estoppel prevents a party from playing
20 fast and loose with the facts, particularly when the facts have not changed, only the
21 prosecution’s political appetite has changed. *Id.*

22 Moreover, judicial estoppel is particularly warranted when “the party seeking to
23 assert an inconsistent position would derive an unfair advantage or impose an unfair
24 detriment on the opposing party if not estopped.” *Id.* at 751. That is the case here. The
25 prosecution used the immunity promised by the Diversion Agreement to elicit Mr. Biden’s
26 agreement with the facts it wrote and waiver of rights with respect to gun (and tax and
27 drug) charges, which Mr. Biden then elaborated upon in response to extensive questioning
28 from the Court. (Ex. 1 at 61–80.) Defense counsel would not have allowed Mr. Biden to

1 waive his rights and discuss these issues absent the prosecution’s acknowledgment that
 2 the Diversion Agreement was in effect, such that Mr. Biden could provide such testimony
 3 under the immunity provided by the Diversion Agreement. Accordingly, fairness dictates
 4 that the prosecution be held to its promise.

5 **II. THE DIVERSION AGREEMENT’S IMMUNITY PROVISION REQUIRES**
 6 **DISMISSAL OF THE INDICTMENT**

7 Paragraph 15 of the Diversion Agreement provides “broad immunity,” as the
 8 Delaware court recognized. (Ex. 1 at 83; *see id.* at 46 (“so broad that it encompasses
 9 crimes in another case”).) The Paragraph precludes prosecution “for any federal crimes
 10 encompassed” by the Statement of Facts attached to the Diversion Agreement and the Plea
 11 Agreement (with no requirement that the court adopt the Plea Agreement; the Plea
 12 Agreement’s Statement of Facts is incorporated directly into this provision of the
 13 Diversion Agreement).

14 Even the prosecution seems to agree that, if the Diversion Agreement is valid, the
 15 Indictment it has filed in this Court is prohibited by that Agreement. As the prosecution
 16 told the Delaware court, thus immunity “includes tax charges in that [2014-2019] time
 17 period” (Ex. 1 at 58 (Mr. Wise); *id.* at 57 (Mr. Biden’s counsel agreeing with the
 18 prosecution that the immunity “broadly relate[s] to gun possession, *tax issues*, and drug
 19 use”) (emphasis added).) Obviously, all three charges in the Indictment concern taxes in
 20 the time period addressed by the Agreement. Therefore, the Indictment must be dismissed.

21 Given the prosecution’s promise of immunity in exchange for Mr. Biden giving up
 22 so many of his rights as part of the Diversion Agreement, “such promise must be fulfilled.”
 23 *Santobello*, 404 U.S. at 261; *see also Bordenkircher*, 434 U.S. at 362. That necessitates
 24 the dismissal of the Indictment.⁷ *See, e.g., Plascencia-Orozco*, 852 F.3d at 920; *United*
 25

26 ⁷ The extensive negotiations between U.S. Attorney Weiss, AUSAs Lesley Wolf and Carly
 27 Hudson, and Mr. Biden’s counsel regarding the prosecution’s immunity promise and the
 28 crafting of that provision in the Diversion Agreement is discussed in detail in the Clark
 Declaration. (*See* Ex. 4 ¶¶20–23, 27–30.) As noted above, the terms of the agreement
 themselves support dismissal of the Indictment. Contemporaneous communications by
 the USAO to Mr. Clark confirm this required result.

1 *States v. Lamanna*, 2016 WL 616580, at *1 (W.D. Pa. Feb. 16, 2016) (“dismiss[ing] the
2 Indictment . . . on due process grounds” where government obtained indictment, in breach
3 of an existing agreement between government and defendant).

4 **CONCLUSION**

5 Mr. Biden, one party, struck a deal with the prosecution, the other party, through
6 the Diversion Agreement. As part of that Agreement, he sacrificed valuable rights in
7 exchange for the prosecution’s agreement not to prosecute the very sort of Indictment that
8 it has brought here. The prosecution’s desire to take political cover from the criticism
9 leveled against it does not provide a legal basis for them to renege on the Diversion
10 Agreement it explained to the Delaware court it had made. This Court should require the
11 prosecution honor its agreement and dismiss the Indictment.

12 Dated: February 20, 2024

Respectfully submitted,

13
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