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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.
20

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

Hon. Mark C. Scarsi

**DEFENDANT’S NOTICE OF MOTION
AND MOTION TO DISMISS THE
INDICTMENT BECAUSE SPECIAL
COUNSEL WEISS WAS
UNLAWFULLY APPOINTED AND
THIS PROSECUTION VIOLATES THE
APPROPRIATIONS CLAUSE**

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

1 **NOTICE OF MOTION AND MOTION TO DISMISS**

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

5 PLEASE TAKE NOTICE that on March 27, 2024, at 1:00 p.m., or as soon
6 thereafter as the matter may be heard, in the courtroom of Honorable Mark C. Scarsi,
7 Defendant Robert Hunter Biden, by and through his attorneys of record, will, and hereby
8 does, respectfully move this Court for an order dismissing the Indictment as it was brought
9 by an unauthorized Special Counsel in violation of 28 C.F.R. § 600.3 and because
10 Congress has not appropriated funds for this investigation and prosecution in violation of
11 the Appropriations Clause.

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

16
17
18 Dated: February 20, 2024

Respectfully submitted,
WINSTON & STRAWN LLP

19
20
21 By: /s/ Angela M. Machala
22 Angela Machala
Abbe David Lowell
Christopher D. Man

23 *Attorneys for Robert Hunter Biden*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION¹**

3 This prosecution is not legally authorized because David Weiss was unlawfully
4 appointed as Special Counsel and Congress has not appropriated funds for this
5 investigation and prosecution. In appointing Mr. Weiss as Special Counsel, Attorney
6 General Merrick Garland explained: “Mr. Weiss will also continue to serve as U.S.
7 Attorney for the District of Delaware,” and Mr. Weiss has done so.² That appointment is
8 flatly precluded by the Department of Justice’s own regulations setting the “Qualifications
9 of the Special Counsel,” which provide: “The Special Counsel *shall* be selected from
10 *outside* the United States Government.” 28 C.F.R. § 600.3 (emphasis added).

11 In addition to not being qualified to serve as Special Counsel, the Special Counsel’s
12 funding for this investigation and prosecution was not approved by Congress, which
13 violates the Appropriations Clause. *See* U.S. Const. art. I, § 9, cl. 7 (“No money shall be
14 drawn from the Treasury, but in Consequences of Appropriations made by Law.”). This
15 Special Counsel’s Office was not funded by monies approved by Congress; rather, DOJ
16 is admittedly funding the investigation from an unlimited account established in 1987 to
17 pay for *independent* counsels. *See Biden*, No. 1:23-cr-00061-MN (DE 72 at 2). Mr.
18 Weiss, however, is not an Independent Counsel, he is a Special Counsel, and that
19 difference in authority alone is a major difference in terms of his independence.
20 Compounding the problem, the Attorney General appointed one of his own subordinates
21 to the Special Counsel position in violation of DOJ’s own regulations requiring that the
22 Special Counsel be selected from *outside* the government. The whole point of that
23 regulation is to provide for the Special Counsel’s independence from the federal
24 government. Special Counsel Weiss is not an independent counsel subject to any valid

25 _____
26 ¹ This motion was raised and has been fully briefed in the gun-related felony prosecution
the Special Counsel filed in Delaware. *See United States v. Biden*, No. 1:23-cr-00061-
MN (D. Del.) (DE 62, 72, 80.).

27 ²Attorney General Merrick B. Garland Delivers A Statement (Aug. 11, 2023),
28 [https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-
statement](https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-statement).

1 appropriation by Congress. Accordingly, the Indictment should be dismissed as Special
2 Counsel Weiss was not authorized to obtain the Indictment or prosecute this case. *See*,
3 *e.g.*, *United States v. Pisarski*, 965 F.3d 738, 743 (9th Cir. 2020) (affirming injunction
4 against further prosecution because the prosecution violated the Appropriations Clause);
5 *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (“[I]f DOJ were . . .
6 drawing funds from the Treasury without authorization by statute[, it would thus be]
7 violating the Appropriations Clause. That Clause constitutes a separation-of-powers
8 limitation that Appellants can invoke to challenge their prosecutions.”).

9 ARGUMENT

10 I. MR. WEISS WAS UNLAWFULLY APPOINTED SPECIAL COUNSEL

11 A. Mr. Weiss Is Ineligible To Be Appointed Special Counsel

12 DOJ’s regulations setting the qualifications for a Special Counsel are explicit, and
13 they have been violated here. The regulation is not ambiguous: “The Special Counsel
14 *shall* be selected from *outside* the United States Government.” 28 C.F.R. § 600.3
15 (emphasis added). That plainly—even admittedly—has not been met. *See supra* n.2.

16 Attorney General Garland’s appointment of Special Counsel Weiss highlights the
17 irregularity. Attorney General Garland’s appointment explicitly stated: “Sections 600.4
18 to 600.10 of Title 28 of the Code of Federal Regulations are applicable to the Special
19 Counsel.” DOJ Order 5730-2023 (Aug. 11, 2023). These are the provisions of the Special
20 Counsel regulations governing the scope of the authority and responsibilities of a Special
21 Counsel. It is striking that Attorney General Garland recognizes the applicability of these
22 parts of the regulations that apply to the Special Counsel’s actions, but not the very
23 preceding section of the *same* regulations that restricts the Attorney General’s authority to
24 select who may be a Special Counsel. In this regard, the Attorney General had no lawful
25 basis to pick and choose what parts of an integrated regulation to apply.

26 The regulatory requirement specifying that the Special Counsel be someone chosen
27 from *outside* the United States government also is an important provision, one imposed
28 after careful deliberation. After the Independent Counsel Reauthorization Act of 1994

1 expired in 1999, then-Attorney General Janet Reno replaced the procedures for appointing
2 Independent Counsel with these new regulations for selecting a Special Counsel.

3 In crafting the role of both the Independent Counsel and Special Counsel, the central
4 struggle was to strike the right balance between independence and accountability. Where
5 there is a conflict of interest within DOJ or a concern with political pressure within the
6 government, independence is important, on the one hand. On the other hand, there was a
7 concern that too much independence could lead to a lack of supervision and accountability.

8 Congress and DOJ abandoned the Independent Counsel regime precisely because it
9 afforded Independent Counsel too much independence. Then-Deputy Attorney General
10 Eric Holder testified before Congress that “nearly every living former attorney general”
11 opposed reauthorizing the Independent Counsel statute, and he explained:

12 [The Act] vests this immense prosecutorial power in an inferior officer who
13 is not subject to the ordinary controls of any branch of government; and this
14 officer is someone who has not been confirmed by the Senate and who, as
15 former Attorney General Barr stated, is not subject to the same sort of
16 oversight or budgetary constraints that the publicly accountable Department
17 of Justice faces day in and day out. . . . Independent counsel are largely
18 insulated from any meaningful budget process, competing public duties, time
19 limits, accountability to superiors and identification with the traditional long-
20 term interests of the Department of Justice. This insulation contributes greatly
21 to the independence of these prosecutors, but it also eliminates the incentive
22 to show restraint in the exercise of prosecutorial power. [These factors]
23 provide an impetus to investigate the most trivial matter to an unwarranted
24 extreme. . . . An independent counsel who does not indict faces criticism for
25 wasting both his time and the taxpayers’ good money. As the old adage,
26 adapted from Mark Twain, goes: To a man with a hammer, a lot of things look
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1 like nails that need pounding.”³

2 DOJ explained its regulations for the newly created Special Counsel position would
3 strip the former Independent Counsel role of its independence where it mattered. Despite
4 providing limited discretion, DOJ explained: “Nevertheless, it is intended that ultimate
5 responsibility for the matter and how it is handled will continue to rest with the Attorney
6 General (or the Acting Attorney General if the Attorney General is personally recused in
7 the matter); thus, the regulations explicitly acknowledge the possibility of review of
8 specific decisions reached by the Special Counsel.” 64 FR 37038-01 (July 9, 1999).

9 In creating a less independent Special Counsel role, DOJ’s regulations still
10 preserved the Independent Counsel Act’s exclusion for those U.S. government employees.
11 *Compare* 28 U.S.C. § 593(b)(2) (“[T]he court may not appoint as an independent counsel
12 any person who holds any office of profit or trust under the United States.”), *with* 28
13 C.F.R. § 600.3 (“The Special Counsel shall be selected from outside the United States
14 Government.”). It defies all notions of independence from the government to appoint
15 someone to either position who is not independent of the government, but a part of it.

16 **B. DOJ Is Bound By Its Own Regulations**

17 Although the Attorney General has broad statutory authority to appoint a Special
18 Counsel, the Attorney General is bound by DOJ’s own regulations as to who is qualified
19 to be a Special Counsel. An “agency must follow its own regulations; ‘it is a well-settled
20 rule that an agency’s failure to follow its own regulations is fatal to the deviant act.’” *Mine*
21 *Reclamation Corp. v. FERC*, 30 F.3d 1519, 1524 (D.C. Cir. 1994) (citation omitted). Even

22
23 ³ *The Independent Counsel Act, Hearing Before the Subcomm. on Commercial and*
24 *Administrative Law, on the Judiciary*, 106th Cong. (Mar. 2, 1999) (Holder remarks),
25 <https://www.justice.gov/archive/dag/testimony/ictestimonydag.htm>. Mr. Weiss’s
26 appointment as Special Counsel, rather than Independent Counsel, has not remedied these
27 deficiencies. After a five-year investigation, an agreement to resolve this dispute (after
28 extensive negotiations where Mr. Weiss repeatedly moved the goal post at the last minute),
Special Counsel Weiss buckled to political pressure critical of the deal that he struck and
now he is attempting to renege on that deal. He filed felony gun charges in Delaware and
then, after being called before Congress where extremist Republicans berated him for not
being more punitive, he then indicted Mr. Biden here on felony tax charges when, weeks
earlier, he found two late payment misdemeanors sufficient. Special Counsel Weiss’s
handling of this investigation has been unlike any other and it is worthy of criticism.

1 where the Attorney General’s statutory authority is “relatively unconstrained,” the
2 government concedes when regulations have “constrained the Attorney General’s exercise
3 of discretion” due to the “well-known maxim that agencies must comply with their own
4 regulations.” *Andriasian v. INS*, 180 F.3d 1033, 1046 & n.22 (9th Cir. 1999)
5 (quoting *Ramon–Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984)).

6 In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court found the
7 Attorney General bound by his own regulations concerning his appointment of the
8 Watergate Special Prosecutor. President Nixon claimed the power as the head of the
9 Executive Branch to derail the investigation into him or to order his Attorney General to
10 do so, but the Court disagreed. The authority to represent the United States had been
11 conferred upon the Attorney General who had delegated that authority to the Special
12 Prosecutor, consistent with DOJ’s regulations at the time. The Supreme Court explained:

13 [I]t is theoretically possible for the Attorney General to amend or revoke the
14 regulation defining the Special Prosecutor’s authority. But he has not done
15 so. So long as this regulation remains in force the Executive Branch is bound
16 by it, and indeed the United States as the sovereign composed of the three
17 branches is bound to respect and to enforce it.

18 *Id.* at 696.

19 That outcome was dictated by *United States ex rel. Accardi v. Shaughnessy*, 347
20 U.S. 260 (1954), a habeas case, where the petitioner challenged the Attorney General’s
21 violation of his rights under DOJ regulations to seek a suspension of his deportation.
22 There, the Attorney General had—by regulation—delegated his authority on such matters
23 to the Board of Immigration Appeals to decide, but the Attorney General subsequently
24 expressed his view that petitioner’s application be denied. The Court reversed the
25 application’s denial because “as long as the regulations remain operative, the Attorney
26 General denies himself the right to sidestep the Board or dictate its decision in any
27 manner.” *Id.* at 267; *see also Nixon*, 418 U.S. at 696 (“The Court held [in *Accardi*] that
28 so long as the Attorney General’s regulations remained operative, he denied himself the

1 authority to exercise the discretion delegated to the Board even though the original
2 authority was his and he could reassert it by amending the regulations.”). *Nixon* also cited
3 *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (Secretary of the Interior could not discharge
4 employee without following his own procedural regulations), and *Service v. Dulles*, 354
5 U.S. 363 (1957) (same for Secretary of State), which echoed this principle.

6 The bottom line here is that DOJ’s regulations flatly precluded Attorney General
7 Garland from appointing Mr. Weiss as Special Counsel. If the Attorney General no longer
8 wishes to be bound by those regulations, he should look into having them changed. Until
9 then, however, the regulations remain binding and should be enforced. Because the
10 Indictment in this case was filed by an unauthorized Special Counsel, it must be dismissed.

11 **II. DOJ VIOLATES THE APPROPRIATIONS CLAUSE BY FUNDING THIS** 12 **SPECIAL COUNSEL’S INVESTIGATION AND PROSECUTIONS**

13 The funds spent on Special Counsel Weiss’s investigation and prosecution of Mr.
14 Biden have not been appropriated by Congress as required by the Appropriations Clause.
15 DOJ is funding Special Counsel Weiss’s investigation and prosecution through an
16 appropriation established in a Note to 28 U.S.C. § 591: “[A] permanent indefinite
17 appropriation is established within the Department of Justice to pay all necessary expenses
18 of investigations and prosecutions by *independent counsel* appointed pursuant to the
19 provisions of 28 U.S.C. 591 et seq. or other law.” *See* Pub. L. 100–202, § 101(a) [title II],
20 Dec. 22, 1987 (emphasis added). Section 591 and other Independent Counsel regulations
21 expired in 1999. 28 U.S.C. § 599. Attorney General Garland’s appointment of Special
22 Counsel Weiss relies on other law, 28 U.S.C. §§ 509, 510, 515 and 533, none of which
23 authorize the appointment of an independent counsel for purposes of the Section 591
24 independent counsel fund. Attorney General Garland, Order 5730-2023 (Aug. 11, 2023).

25 Special Counsel Weiss is not an *independent* counsel and that is by design. Again,
26 the word “independent” is used to create a structural prohibition by insisting that the
27 person not be a member of the federal government. This appropriation for “independent
28 counsel” was created in 1987, when everyone understood that “independent” referred to

1 the circumstances that then-existed concerning the role of an Independent Counsel and the
2 appropriation's reference to "other law" would mean a role close to it in terms of
3 independence. As noted above, the Special Counsel regulations adopted in 1999 were
4 designed to eliminate that sort of independence by creating the new role of Special
5 Counsel, which would not be independent. *See, e.g.,* Daniel Huff, *Robert Mueller Has A*
6 *Money Problem*, Wall St. J. (Mar. 24, 2019), [https://www.wsj.com/articles/robert-mueller-](https://www.wsj.com/articles/robert-mueller-has-a-money-problem-11553468712)
7 [has-a-money-problem-11553468712](https://www.wsj.com/articles/robert-mueller-has-a-money-problem-11553468712) (explaining that the limited independence of a
8 Special Counsel is not subject to the appropriation for independent counsel).

9 Not only did the Attorney General disregard the regulation requiring appointment
10 of a Special Counsel from outside of the government; the Attorney General did not even
11 select a Special Counsel from outside his own agency. Thus, Special Counsel Weiss has
12 less independence than even the Special Counsel regulations were meant to confer. By
13 choosing a subordinate from within DOJ, there is not even a veneer of independence. Mr.
14 Weiss cannot be both "independent" of DOJ and a part of DOJ.

15 The Appropriations Clause is strictly enforced. *See, e.g., U.S. Dept. of Navy v. Fed.*
16 *Labor Relations Auth.*, 665 F.3d 1339, 1342 (D.C. Cir. 2012) (Kavanaugh, J.) ("Decisions
17 of the Supreme Court and this Court have strictly enforced the constitutional requirement,
18 implemented by federal statutes, that uses of appropriated funds be authorized by
19 Congress."). The Clause conveys a "straightforward and explicit command": No money
20 "can be paid out of the Treasury unless it has been appropriated by an act of Congress."
21 *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (citations omitted). An
22 appropriation must be expressly stated; it cannot be inferred or implied. 31 U.S.C.
23 § 1301(d) ("A law may be construed to make an appropriation out of the Treasury . . . only
24 if the law specifically states that an appropriation is made."). A prosecution brought in
25 violation of the Appropriations Clause must be dismissed. *See, e.g., Pisarski*, 965 F.3d at
26 741; *McIntosh*, 833 F.3d at 1174; *see also Collins v. Yellin*, 141 S. Ct. 1761, 1781 (2021)
27 ("As we have explained on many prior occasions, the separation of powers is designed to
28 preserve the liberty of all the people... So whenever a separation-of-powers violation

1 occurs, any aggrieved party with standing may file a constitutional challenge”); *Sheila*
2 *Law LLC v. Consumer Fin. Protec. Bureau*, 140 S. Ct. 2183, 2196 (2020) (defendant could
3 challenge enforcement action where agency lacked authority under the Appointments
4 Clause); *Bond v. United States*, 564 U.S. 211, 220 (2011) (defendant could challenge
5 indictment on federalism grounds). As the subject of an unauthorized and improperly
6 funded prosecution, Mr. Biden surely has standing to challenge this ultra vires Indictment.

7 **CONCLUSION**

8 This Indictment was brought by an unauthorized Special Counsel with funds that
9 were not appropriated by Congress. The Court should dismiss the Indictment.

10
11 Date: February 20, 2024

Respectfully submitted,

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