

1 Angela M. Machala (SBN: 224496)
AMachala@winston.com
2 WINSTON & STRAWN LLP
333 S. Grand Avenue, 38th Fl.
3 Los Angeles, CA 90071
4 Telephone: (213) 615-1700
Facsimile: (213) 615-1750

5 Abbe David Lowell (*admitted pro hac vice*)
AbbeLowellPublicOutreach@winston.com
6 Christopher D. Man
CMan@winston.com
7 WINSTON & STRAWN LLP
1901 L Street NW
8 Washington, DC 20036
9 Telephone: (202) 282-5000
Facsimile: (202) 282-5100

10 Attorneys for Robert Hunter Biden

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 COUNT 9
OF THE INDICTMENT FOR
SPECIFIC SELECTIVE
PROSECUTION**

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 Count 9 because the
9 prosecution's charging decision is selective and vindictive.

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

14 Dated: February 20, 2024

15 Respectfully submitted,
16 WINSTON & STRAWN LLP

17
18 By: */s/ Angela M. Machala*
19 *Angela M. Machala*
20 *Abbe David Lowell*
21 *Christopher D. Man*

22
23
24
25
26
27
28
Attorneys for Robert Hunter Biden

TABLE OF CONTENTS

Page

1

2

3

4 INTRODUCTION1

5 FACTUAL BACKGROUND.....2

6 ARGUMENT6

7 I. COUNT 9 SHOULD BE DISMISSED AS SELECTIVE AND

8 VINDICTIVE.....6

9 CONCLUSION.....11

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

Page(s)

Cases

Neely v. United States,
300 F.2d 67 (9th Cir. 1962)7

Spies v. United States,
317 U.S. 492 (1943).....6, 7

United States v. Bishop,
412 U.S. 346 (1973).....6

United States v. Croessant,
178 F.2d 96 (3d Cir. 1949)7

United States v. Damra,
621 F.3d 474 (6th Cir. 2010)7

United States v. Laws,
No. 21-mj-00055-DSC (W.D.N.C. Feb. 2021)8

United States v. Madera,
No. 23-cr-00135-ZNQ (D.N.J. Feb. 2023)8

United States v. Morford,
No. 23-cr-00112-RGE-HCA (S.D. Iowa July 2023).....8

United States v. Peterson-Janovec,
No. 21-cr-00124-JRT-BRT (D. Minn. May 2021).....8

United States v. Walczak,
No. 23-cr-80024-KAM (S.D. Fl. Feb. 2023).....8

United States v. Xiong,
No. 22-cr-00189-PJS-JFD (D. Minn. Aug. 2022)8

Statutes

18 U.S.C. § 3717

18 U.S.C. § 10017

1 26 U.S.C. § 72032, 8, 9

2 26 U.S.C. § 529.....5, 6

3 42 U.S.C. § 5121.....3

4 **Other Authorities**

5
6 177 Tax Notes Federal (2022)4, 10

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Mr. Biden has sought to dismiss the Indictment as a whole for selective and
4 vindictive prosecution, *see* DE 27 (filed concurrently), but those claims are especially true
5 as to Count 9 of the Indictment. The final two pages of the Indictment tack on allegations
6 concerning a tax year that is sparsely discussed in the prosecution’s roving 56-page
7 Indictment: the 2019 tax year. Count 9 charges Mr. Biden with failure to pay his 2019
8 income tax of \$197,372 on time. The charge is remarkable because Mr. Biden did file an
9 individual tax return on time for the 2019 tax year and he *paid* his 2019 taxes with interest
10 and penalties in the amount of \$227,204, more than two years ago, on October 15, 2021.
11 Taxpayers often file timely returns, and then arrange to pay their taxes later with added
12 interest in penalties. When a taxpayer has paid all they owe under those circumstances,
13 as Mr. Biden has, criminal tax charges simply are not brought. The fact that they were
14 brought here highlights that Mr. Biden is being subject to a selective and vindictive
15 prosecution.

16 The emergence of the COVID-19 epidemic in 2019 brought physical, mental and
17 financial strain in its wake, and the government was determined not to have the tax burden
18 compound those problems. The IRS instituted several tax collection leniency programs
19 and other relief efforts to ease the burden on American taxpayers, which focused on
20 assisting those with tax debts resolve outstanding balances or enter into installment
21 agreements. In due course, millions of taxpayers entered payment plans, received refunds
22 or tax credits, or arranged an Installment Agreement without a notice of federal tax lien,
23 or, like Mr. Biden, they paid their taxes with interest and penalties. Unlike Mr. Biden,
24 *none* of these taxpayers—defense counsel cannot identify a single one—faced criminal
25 charges for failure to pay 2019 Form 1040, where the individual filed an individual tax
26 return as Mr. Biden did by October 15, 2020, and paid that tax obligation, with interests
27 and penalties, the following year.

1 As the statistics and cases demonstrate, there have been few, if any, DOJ criminal
2 prosecutions based on remotely similar circumstances. Not only does the evidence
3 demonstrate that people in Mr. Biden’s position have not been prosecuted under these
4 circumstances, the record also establishes that DOJ initially rejected bringing these
5 charges against Mr. Biden himself. Even when the prosecution reversed course and filed
6 its Information charging two tax misdemeanors, no charge involving 2019 was brought.
7 When extremist Republicans pressured the prosecution to be more punitive, it responded
8 with felony gun charges. Then, extremist House Republicans took the unprecedented step
9 of subpoenaing Special Counsel Weiss to testify about a pending prosecution and berated
10 him for not being more punitive. Following that further pressure, and Mr. Biden’s
11 assertion of his rights under a Diversion Agreement signed by the prosecution that the
12 prosecution no longer wanted to honor, only then did the prosecution bring these tax
13 charges. With respect to Count 9, in particular, the record is especially clear that the
14 prosecution’s charging decision is selective and vindictive, and it should be dismissed.

15 **FACTUAL BACKGROUND**

16 Count 9 charges Mr. Biden with failing to pay income tax due for tax year 2019, in
17 violation of 26 U.S.C. § 7203. The Indictment alleges that for tax year 2019, anyone under
18 65, filing individually, and who made more than \$12,200, was required by law to file a
19 federal tax return, and the deadline for doing so and paying 2019 taxes was July 15, 2020.
20 (Indict. ¶¶ 153–54.) The July deadline was because the IRS provided an automatic
21 extension in response to the COVID-19 pandemic, unless a taxpayer filed for a personal
22 extension, in which case the deadline for filing 2019 taxes was October 15, 2020. (Indict.
23 ¶ 154.)

24 Mr. Biden filed a 2019 Form 1040 on October 15, 2020, and self-reported that he
25 earned total gross income of \$1,045,850 and taxable income of \$843,577, and self-
26 assessed that he owed \$197,372 for the 2019 tax year. (Indict. ¶ 156.) The Indictment
27 alleges Mr. Biden failed to pay his outstanding tax debt for 2019 when he filed his return
28 on October 15, 2020, despite having “the funds available to pay his taxes” and spending

1 “more than \$600,000 on personal expenses” between January 2020 and October 15, 2020.
2 (Indict. ¶ 158–59.) Thus, the prosecution alleges he willfully failed on July 15, 2020 in
3 this judicial district to pay the income tax due. (Indict. ¶ 160.)

4 The Indictment omits a number of critical facts (of which the Court can take judicial
5 notice) with respect to Count 9 and the 2019 tax year, which demonstrate that criminal
6 prosecution was discouraged when someone ultimately paid their taxes, just as Mr. Biden
7 did. *First*, on March 13, 2020, the then-President of the United States issued an emergency
8 declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act,
9 42 U.S.C. §§ 5121 *et seq.* (“Emergency Declaration”). The Emergency Declaration
10 instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans
11 who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant
12 to 26 U.S.C. 7508A(a).” In response, the Department of the Treasury and the IRS issued
13 a series of notices and other guidance to provide relief to affected taxpayers. For example,
14 in a program announced on November 2, 2020, the IRS instituted several changes
15 designed to aid struggling taxpayers impacted by COVID-19 more easily resolve their tax
16 debts with the IRS. Among the collection procedures implemented, “[s]ome individual
17 taxpayers who only owe for the 2019 tax year and who owe *less than \$250,000* may
18 qualify to set up an Installment Agreement without a notice of federal tax lien filed by the
19 IRS.”¹ (Ex. A) Other terms included that the IRS would offer “flexibility for some
20 taxpayers who are temporarily unable to meet the payment terms of an accepted Offer in
21 Compromise.” For the 2019 tax year, Mr. Biden had a self-assessed tax due of only
22 \$197,372, so he was in the range of taxpayers who were not being targeted for criminal
23 enforcement.

24
25
26
27
28 ¹ Press Release, Internal Revenue Service, IRS Makes It Easier To Set Up Payment
Agreements; Offers Other Relief To Taxpayers Struggling With Tax Debts (Nov. 2,
2020) (emphasis added), *available at* <https://www.irs.gov/newsroom>.

1 Moreover, a records search indicates that, at the time, the IRS chose not to file a
2 notice of federal tax lien² regarding Mr. Biden’s 2019 taxes, even though Mr. Biden did
3 not formally seek such relief under the IRS’s COVID-19 program. That the IRS chose
4 not to take even this common civil protective measure demonstrates that it did not view
5 Mr. Biden of worthy of the more serious sanction of a criminal indictment.

6 *Second*, Count 9 of the Indictment also omits another uncontested fact that on
7 October 15, 2021—less than a year after the IRS announced these changes—Mr. Biden’s
8 2019 taxes were paid in full to the IRS, with interest and penalties, in the amount of
9 \$227,204.³ While the obligation to pay taxes owed arose in July 2020, the entire amount
10 (plus interest and penalties) was paid a year later in 2021 while IRS relief programs
11 provided leniency for taxpayers who owed less than \$250,000.

12 *Third*, the continuance for such relief lasted at least *until tax year 2022*. According
13 to one report, “[the] initiative that allows taxpayers to remain on installment agreements
14 despite filing later tax returns with balances due” lasted “[f]rom November 2020 through
15 October 2022,” during which time “nearly 1.07 million agreements that otherwise would
16 have entered default instead had the balances increased.”⁴ In such cases, those taxpayers
17 simply would have the new balances added to the existing installment agreements.
18 Similarly, IRS programs rolled out during the COVID-19 pandemic allowed taxpayers “to
19 spread installment agreements *below \$250,000* across the rest of the collection period
20 without submitting collection information statements[.]”⁵ As noted above, Mr. Biden’s
21 self-assessed tax due for 2019 was paid in October 2021, before the expiration of this tax

22
23 ² A lien in favor of the IRS immediately arises (the “secret lien”) on all of the taxpayer’s
24 property and remains there until the assessment is satisfied. If the IRS files a notice of
25 federal tax lien, that provides the IRS with first priority on all of the taxpayer’s real
26 property in the jurisdiction where the NFTL is filed.

27 ³ The October 15, 2021 payment also resolved and paid Mr. Biden’s past due taxes for
28 2016, 2017, and 2018 as well as that owed for tax year 2020. In total, on October 15,
2021, Mr. Biden caused to be paid \$2,600,158 for various tax years going back to 2016
(including tax year 2019).

⁴ Nathan J. Richman, *Pandemic Payment Flexibility Doesn’t Have an Expiration Date*,
177 Tax Notes Federal 1014, 1014 (Nov. 2022).

⁵ *Id.* (emphasis added).

1 relief program, which further demonstrates that persons with tax debts in the same range
2 as Mr. Biden were not being targeted for criminal enforcement.

3 On December 19, 2023, the IRS touted as “a major step to help people who owe
4 back taxes,” the agency’s *new* failure to pay penalty relief for approximately 4.7 million
5 individuals, businesses, and tax-exempt organizations for the 2020 and 2021 tax years. In
6 explaining the motivation for the program, IRS Commissioner Danny Werfel stated:

7 The IRS wants to help taxpayers and provide them easy options to deal with
8 unpaid tax bills and avoid additional interest and penalties. People receiving
9 these notices should remember that there are frequently overlooked options
10 that can help them set up an automatic payment plan or catch up with their tax
11 filings. Making additional improvements in the collection area will be an
12 important focus for the IRS going forward as we continue and accelerate our
13 transformation work.⁶

14 (Ex. B) Bringing criminal charges against an individual who timely filed their return for
15 late payment of 2019 taxes is diametrically opposed to the IRS’s publicly stated goals.
16 And yet, rather than use its resources to engage in the promised “transformation work”
17 affecting taxpayers to help taxpayers resolve outstanding debts, certain IRS Criminal
18 Investigation agents in 2023 appear to have been more focused on using the agency’s
19 resources to investigate Mr. Biden for failing to pay his 2019 tax obligation on time, even
20 though they have long been paid with interest and penalties.

21 *Fourth*, the tax liability for the 2019 tax year arises in part from the liquidation of a
22 529 Plan tuition account for which Mr. Biden was the owner. The account was liquidated
23 by the financial institution to comply with certain matters in connection with divorce
24 proceedings. Mr. Biden’s attorney assisted in procuring the distribution from the 529 Plan
25 in February 2019, facilitating the wiring of the funds to Mr. Biden’s ex-wife, and preparing
26

27 ⁶ Press Release, Internal Revenue Service, IRS Helps Taxpayers By Providing Penalty
28 Relief On Nearly 5 Million 2020 And 2021 Tax Returns; Restart Of Collection Notices
In 2024 Marks End Of Pandemic-Related Pause (Dec. 19, 2023), *available at*
<https://www.irs.gov/newsroom>.

1 the 2019 tax return in 2020. Further, Mr. Biden provided his accountants with an account
2 statement reflecting the distribution from the 529 Plan for purposes of preparing Mr.
3 Biden's 2019 tax return. Thus, Mr. Biden provided his accountants with sufficient
4 information to prepare the return correctly. Section 529(c) of the Internal Revenue Code
5 provides that, with specific enumerated exceptions, distributions and earnings from 529
6 Plans are generally *not included* in the gross income of a contributor to the 529 Plan. *See*
7 26 U.S.C. § 529(c)(1). Where a taxpayer has vetted a thorny issue like this through his
8 accountants, criminally prosecuting the taxpayer is unheard of.

9 ARGUMENT

10 I. COUNT 9 SHOULD BE DISMISSED AS SELECTIVE AND VINDICTIVE

11 Mr. Biden's motion to dismiss the entire Indictment for a selective and vindictive
12 prosecution establishes that DOJ had decided not to bring this charge, but that Special
13 Counsel Weiss reversed course in response to pressure from extremist Republicans and in
14 retaliation for Mr. Biden's insistence that the prosecution honor the Diversion Agreement
15 that the prosecution signed. Mr. Biden will not repeat those arguments here, but will
16 highlight why prosecutors would not have otherwise brought this specific charge
17 concerning 2019 taxes.

18 Mr. Biden would otherwise *not* have been prosecuted for a 2019 failure to pay
19 income tax charge. The Supreme Court explains that, "in view of our traditional aversion
20 to imprisonment for debt," courts should "not without the clearest manifestation of
21 Congressional intent assume that mere knowing and intentional default in payment of a
22 tax where there had been no willful failure to disclose the liability is intended to constitute
23 a criminal offense of any degree." *Spies v. United States*, 317 U.S. 492, 498 (1943). The
24 Ninth Circuit in *Wilson v. United States* later applied *Spies*' guidance in a case of income
25 tax evasion, concluding that the court "cannot find the semblance of such Congressional
26 intent" for proving a charge of tax evasion. 250 F.2d 312, 320–21 (9th Cir. 1957)
27 ("[T]here is nothing in any revenue statute which would alter the subjective element of
28 felonious tax evasion . . . It would require a clear manifestation of Congressional intent

1 that the Internal Revenue Code should be construed to set up one rule for ‘special fund’
2 taxes.”); *see also United States v. Bishop*, 412 U.S. 346, 361 (1973) (applying *Spies* and
3 noting “[t]he Court’s consistent interpretation of the word ‘willfully’ to require an element
4 of *mens rea* implements the pervasive intent of Congress to construct penalties that
5 separate the purposeful tax violator from the well-meaning, but easily confused, mass of
6 taxpayers.”). And in *United States v. Croessant*, the Third Circuit agreed *Spies*’ language
7 “creates a strong inference” that Congress’s intent controls and courts should give effect
8 to the congressional language. 178 F.2d 96, 98–99 (3d Cir. 1949) (“Speaking of the
9 language used by Congress the Court says: ‘It may well mean something more as applied
10 to nonpayment of a tax than when applied to failure to make a return.’”). Additionally,
11 *Spies* has been applied to assess the meaning of ‘willfulness’ in certain non-tax contexts
12 to determine Congress’s intent in the statute’s plain language. *See, e.g., United States v.*
13 *Damra*, 621 F.3d 474, 499 (6th Cir. 2010) (applying *Spies* to assess ‘willfulness’ element
14 of a conspiracy charge, 18 U.S.C. § 371); *Neely v. United States*, 300 F.2d 67, 73 (9th Cir.
15 1962) (applying *Spies* to assess ‘willfully’ under 18 U.S.C. § 1001 for making a false
16 statement, in order to give effect to the clearest manifestation of congressional intent).

17 Consequently, more is needed to warrant criminal charges where a defendant has
18 disclosed their tax liability, but nevertheless failed to pay. That something extra does not
19 exist here; it is not even alleged. Mr. Biden did timely disclose his tax liability and he
20 ultimately paid his 2019 taxes, with interest and penalties, at a time when the federal
21 government was especially mindful in being lenient about late payments due to the
22 COVID-19 epidemic. Absent proof of some additional factors establishing willfulness, a
23 delayed payment made during the pandemic in connection with a timely filed return does
24 not warrant a criminal charge.⁷ There is no reason why Mr. Biden *alone* should be placed
25 in a debtor’s prison for people who both properly disclosed their tax liability and
26

27 ⁷ It would surely be a tremendous waste of IRS resources to have collections or revenue
28 agents chase down every taxpayer who failed to pay in full or had a check to the IRS get
lost in the mail for evidence of “willfulness” in making the delayed payment.

1 ultimately paid their taxes in full, with interest and penalties. That is not the American
2 way, and it was especially true in the wake of COVID-19.

3 As discussed above, the IRS's collection relief and leniency programs in place in
4 response to the COVID-19 pandemic in 2020 and 2021 necessarily militated against
5 holding American taxpayers criminally responsible for outstanding tax debts. For
6 instance, DOJ has hardly, if ever, criminally charged individual taxpayers for failure to
7 timely *pay* Form 1040 for tax year 2019. Mr. Biden has identified only a handful of
8 criminal cases nationwide in which DOJ has brought *criminal* charges in connection with
9 tax year 2019, and those were charges for failure to *file* an individual tax return for tax
10 year 2019. *See, e.g., United States v. Laws*, No. 21-mj-00055-DSC (W.D.N.C. Feb. 2021)
11 (failure to file individual tax returns 2015 – 2019); *United States v. Peterson-Janovec*, No.
12 21-cr-00124-JRT-BRT (D. Minn. May 2021) (failure to file individual tax returns 2018 –
13 2019); *United States v. Xiong*, No. 22-cr-00189-PJS-JFD (D. Minn. Aug. 2022) (failure
14 to file individual tax return 2019); *United States v. Madera*, No. 23-cr-00135-ZNQ (D.N.J.
15 Feb. 2023) (failure to file individual tax return 2019); *United States v. Walczak*, No. 23-
16 cr-80024-KAM (S.D. Fl. Feb. 2023) (failure to file individual tax return 2018 – 2020);
17 *United States v. Morford*, No. 23-cr-00112-RGE-HCA (S.D. Iowa July 2023) (plea
18 agreement indicates failed to file individual tax return for 2019, among other years). For
19 tax year 2019, we have not identified a single case in which a defendant timely filed a tax
20 return but was later charged individually (unrelated to employment) for failing to pay that
21 2019 self-assessed tax on time. Moreover, we have not identified a single case where a
22 taxpayer was charged under Section 7203 with a crime for late payment of tax where the
23 taxpayer had timely filed his or her return (and was not alleged to be a fraudulent return).
24 Each of the above cases charged violations of Section 7203 for failure to *file* an individual
25 tax return for 2019, and not for failure to *pay* 2019 taxes on time. And unlike in those
26 instant cases, Mr. Biden was not delinquent in filing his individual return; he filed a 2019
27 Form 1040 on October 15, 2020 (Indict. ¶ 156.) and paid his 2019 tax debt due (with
28 interest and penalties) the following year on October 15, 2021.

1 Part of the rationale for not *criminally* prosecuting failure to pay charges for the
2 2019 tax year is likely due to the IRS’s collections leniency efforts and programs in place
3 in this period to lessen the burden on American taxpayers. As noted above, the IRS
4 instituted several changes in November 2020 designed to help taxpayers impacted by
5 COVID-19 more easily settle their tax debts. Among the collection procedures
6 implemented, “[s]ome individual taxpayers who only owe for the 2019 tax year and who
7 owe *less than \$250,000* may qualify to set up an Installment Agreement without a notice
8 of federal tax lien filed by the IRS.” (Ex. A) Other terms included that the IRS would
9 offer “flexibility for some taxpayers who are temporarily unable to meet the payment
10 terms of an accepted Offer in Compromise.” For the 2019 tax year, Mr. Biden had a self-
11 assessed tax due of less than \$250,000.

12 Furthermore, as discussed *supra* at 4, a records search indicates that the IRS chose
13 not to file a notice of federal tax lien regarding Mr. Biden’s taxes even though Mr. Biden
14 did not formally seek such relief under the IRS’s COVID-19 program. This suggests that,
15 during the COVID-19 pandemic, the IRS was exercising its discretion to informally grant
16 temporary collection relief to taxpayers as well. Having declined to take even this civil
17 step against Mr. Biden, it is all the more remarkable that years after he paid in full the
18 prosecution would take the unprecedented step of charging him criminally.

19 Critically here, that relief program continued through at least *tax year 2022*, which
20 would cover the period in which Mr. Biden paid and fully resolved his 2019 tax obligation
21 (on October 15, 2021). And still, during that period, “nearly 1.07 million agreements that
22 otherwise would have entered default instead had the balances increased.”⁸ Additionally,
23 as that relief program was coming to a close, on August 24, 2022, the IRS announced
24 *additional* “broad-based penalty relief for certain 2019 and 2020 returns due to the
25 pandemic,” including that “[n]early 1.6 million taxpayers will automatically receive more
26
27

28 ⁸ Richman, *supra* note 4 at 1014.

1 than \$1.2 billion in refunds or credits.”⁹ (Ex. C) The IRS’s intentions and relief efforts
2 were clear: given the widespread hardships caused by COVID-19, the IRS sought to lessen
3 or alleviate the tax burdens for 2019 and 2020 for taxpayers to allow them to more easily
4 settle their tax debts.

5 In due course, millions of taxpayers entered payment plans, received refunds or tax
6 credits, or arranged an Installment Agreement without a notice of federal tax lien, or, like
7 Mr. Biden, simply paid their taxes with interest and penalties. Other than Mr. Biden, they
8 did *not* face criminal charges for failure to pay 2019 Form 1040, particularly when having
9 filed an individual tax return as Mr. Biden did on October 15, 2020, and paid that tax
10 obligation, with interests and penalties, the following year in October 2021. Why should
11 Mr. Biden be treated any differently than millions of taxpayers for tax year 2019? The
12 extension and relief programs provided by the IRS in 2020 and 2022, which covered tax
13 year 2019, confirm this was not an enforcement priority for the IRS.

14 Moreover, the IRS implemented an additional failure-to-pay penalty relief program
15 in December 2023, which it has touted as “a major step to help people who owe back
16 taxes.” *See supra* at 5. This program offers new failure to pay penalty relief for
17 approximately 4.7 million taxpayers, businesses, and tax-exempt organizations for the
18 2020 and 2021 tax years. Mr. Biden’s treatment by DOJ for the 2019 tax year ought to be
19 no different (again, given that he *fully paid* his 2019 tax obligations in 2021), and would
20 fall squarely within the mold of a selective and vindictive prosecution. At the very least,
21 Mr. Biden has shown that the criminal failure to pay charge against him for the 2019 tax
22 year is a statistical anomaly. If the prosecution had a valid reason to criminally prosecute
23 Mr. Biden for this conduct, surely the prosecution could identify others among the millions
24

25
26 ⁹ Press Release, Internal Revenue Service, COVID Tax Relief: IRS Provides Broad-Based
27 Penalty Relief For Certain 2019 And 2020 Returns Due To The Pandemic; \$1.2 Billion
28 In Penalties Being Refunded To 1.6 Million Taxpayers (Aug. 24, 2022), *available at*
<https://www.irs.gov/newsroom>; Press Release, Internal Revenue Service, \$1.2 Billion In
IRS Penalty Relief Refunds Coming For Certain 2019 And 2020 Tax Returns (Sept. 12,
2022), *available at* <https://www.irs.gov/newsroom>.

1 who paid their Fiscal Year 2019 taxes late who it would have prosecuted under the same
2 principle. Defense counsel see none.

3 Finally, it bears repeating that this is not just a situation where DOJ has not
4 criminally prosecuted others who are similarly situated to Mr. Biden; this is a situation
5 where neither the U.S. Attorney for this District nor the Special Counsel himself
6 determined this charge was warranted. Even when the Special Counsel reversed course
7 under pressure and filed tax charges in Delaware, those charges were limited to two failure
8 to pay income tax misdemeanors (concerning tax years 2017 and 2018)—not this charge.
9 The fact that DOJ would not have brought this charge if left to its own devices is therefore
10 established and demonstrates that the piling on of criminal charges with Count 9 reflects
11 a selective and vindictive prosecution.

12 CONCLUSION

13 Mr. Biden respectfully requests that Count 9 of the Indictment be dismissed.

14
15 Date: February 20, 2024

Respectfully submitted,

16 By: /s/ Angela M. Machala

17 Angela M. Machala (SBN: 224496)

18 AMachala@winston.com

19 WINSTON & STRAWN LLP

333 S. Grand Avenue, 38th Fl.

20 Los Angeles, CA 90071-1543

21 Telephone: (213) 615-1700

Facsimile: (213) 615-1750

22 Abbe David Lowell (*admitted pro hac vice*)

23 AbbeLowellPublicOutreach@winston.com

24 Christopher D. Man

CMan@winston.com

25 WINSTON & STRAWN LLP

1901 L Street NW

26 Washington, DC 20036

27 Telephone : (202) 282-5000

28 Facsimile: (202) 282-5100

Attorneys for Robert Hunter Biden