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14 UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 ALEXANDER SMIRNOV,

19 Defendant.

No. CR 2:24-cr-00091-ODW

**GOVERNMENT'S FOURTH MOTION
IN LIMINE TO EXCLUDE ALLEGED
DEFECTS IN THE PROSECUTION;
MEMORANDUM IN SUPPORT;
EXHIBITS IN SUPPORT**

Hearing Date: November 25, 2024

Hearing Time: 10:00 a.m.

Location: Courtroom of the Hon.
Otis D. Wright

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26 Plaintiff, the United States of America, by and through its counsel of record,
27 hereby submits this Fourth Motion in Limine to Exclude Alleged Defects in the
28 Prosecution of this matter. As discussed in this Motion, the United States moves to

1 exclude the defendant from introducing evidence, argument, or questioning that suggests
2 or otherwise implies that the prosecution is politically motivated, that the government is
3 selectively or vindictively prosecuting him, that government agents or prosecutors
4 engaged in outrageous government misconduct, that the prosecution of him is unlawful
5 for any reason, that the prosecution is costly or inappropriately funded, or that the
6 prosecutors or agents are conflicted. While these are issues that the defendant could
7 have raised pretrial under Federal Rule of Criminal Procedure 12(b), at trial these topics
8 and issues are irrelevant under Federal Rule of Evidence 401, are prejudicial under
9 Federal Rule of Evidence 403, and courts routinely exclude defense counsel from raising
10 such issues before the jury.

11 This Motion is based upon the attached memorandum of points and authorities and
12 declaration of Leo J. Wise, the filings and records in this case, and any further argument
13 as the Court may deem necessary.

14 Dated: November 1November 1, 2024

15 Respectfully submitted,

16 DAVID C. WEISS
17 Special Counsel

18 /s/
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20 Principal Senior Assistant Special Counsel

21 DEREK E. HINES
22 Senior Assistant Special Counsel

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 In a prior filing in this matter, and in various communications with the government,
4 the defendant has argued that this prosecution is “politically-motivated,” or words to that
5 effect. *See, e.g.*, Def.’s Mot. for Pretrial Release at 7, attached as Exh. 1 (describing
6 prosecution as “makeweight and politically-motivated”). In a filing dated yesterday, the
7 defendant claimed “that Mr. Smirnov’s prosecution . . . smacks of political bias and targets
8 a United States citizen who has the misfortune of . . .not having a familiar relationship
9 with the President . . .” Def’s Motion in Limine to Take Judicial Notice of Contents of an
10 Unrelated Hearing Transcript, ECF 148 at 7. He has never provided any discovery to the
11 government or evidence to this Court supporting his baseless claims—indeed, there is no
12 such evidence because the claims are meritless. Further, the defendant never filed a motion
13 to dismiss the Indictment based on an argument that this prosecution is selective or
14 vindictive due to political animus or political motive, claims which can only be raised
15 pretrial under Federal Rule of Criminal Procedure 12(b)(3) and are not matters appropriate
16 for a jury to consider. *United States v. Avery*, 2011 WL 13136810, *2-3 (C.D. Cal. Dec.
17 15, 2011) (granting the government’s motion in limine to exclude selective prosecution
18 issue from the jury); *United States v. Yagman*, 2007 WL 9724391, at *4–5 (C.D. Cal. May
19 16, 2007) (precluding defendant from arguing prosecutorial vindictiveness to the jury).
20 Yet, the defendant opposes this motion, suggesting that he intends to engage in
21 inappropriate questioning and argument before the jury contrary to the law.

22 Additionally, in prior filings in this matter, the defendant unsuccessfully argued that
23 the Special Counsel was unlawfully appointed, that the prosecutors are conflicted, and that
24 this prosecution is unlawful because of an Appropriations Clause violation. *See* Def. Mot.,
25 ECF 93 at 12. (arguing appointment issues and that “this case presents a conflict-of-
26 interest so evident that it cannot be reasonably denied”); Def. Supp., ECF 115 (raising
27 appropriations-related claims about costs of prosecution and expenditures). The Court
28 denied the defendant’s motion and found that the Special Counsel was not unlawfully

1 appointed, that there is no conflict of interest, and that there was no Appropriations Clause
2 violation. Criminal Minutes, ECF 111, Trans. at 42. These arguments are only permitted
3 to be made to the Court under Federal Rule of Criminal Procedure 12(b)(3), and are
4 inappropriate for a jury’s consideration because they have no relevance under Federal Rule
5 of Evidence 401 and risk misleading the jury and wasting the jury’s time under Federal
6 Rule of Evidence 403. Nonetheless, the defendant has also advised that he opposes a
7 motion to exclude him from arguing his meritless pretrial claims to the jury.

8 The Court should enter an order precluding the defendant from introducing
9 evidence, argument, or questioning that suggests or otherwise implies that the prosecution
10 is politically motivated, that the government is selectively or vindictively prosecuting him,
11 that government agents or prosecutors engaged in outrageous government misconduct,
12 that this prosecution is unlawful for any reason, that the prosecution is costly or
13 inappropriately funded, or that the prosecutors or agents are conflicted. For the following
14 reasons, these issues are irrelevant under Federal Rule of Evidence 401, are prejudicial
15 under Federal Rule of Evidence 403, and courts in the Ninth Circuit routinely exclude such
16 issues from being raised before the jury.

17
18 **2. ARGUMENT**

19 Federal Rule of Criminal Procedure 12(b)(3) provides that a “motion alleging a
20 defect in instituting the prosecution” or a motion “alleging a defect in the indictment or
21 information” must be raised before trial. Each of the claims discussed above involve
22 alleged defects in the institution of the prosecution or indictment that could have been
23 raised pretrial by the defendant, but the defendant did not pursue many of them. Moreover,
24 law in this circuit expressly provides that claims involving political motivations of
25 prosecutors and outrageous conduct of agents may not be presented to a jury because those
26 issues are pretrial matters the Court must decide, not the jury. *United States v. Wylie*, 625
27 F.2d 1371, 1379 (9th Cir. 1980) (alleged “outrageous involvement by the government
28 agents” is a question of law for the court and not a matter for the jury); *Avery*, 2011 WL

1 13136810, at *2-3 (granting the government’s motion in limine to exclude selective
2 prosecution issue from the jury); *Yagman*, 2007 WL 9724391, at *4–5 (precluding
3 defendant from arguing prosecutorial vindictiveness to the jury). This law has developed
4 because such claims are not relevant to the jury’s determination under Federal Rules of
5 Evidence 401/402 as these issues do not have a tendency to make a fact more or less
6 probable and, thus, are inconsequential in determining the action. Moreover, to the extent
7 such claims could arguably be probative of some fact of consequence, the claims are
8 excluded under Federal Rule of Evidence 403 because they mislead the jury, confuse the
9 issues, and waste the jury’s time.

10 Recently, the government litigated these very issues in the matter of *United States*
11 *v. Robert Hunter Biden*, where the defendant in that case sought to accuse the Special
12 Counsel of selective and vindictive prosecution and outrageous government conduct due
13 to fictitious claims of political bias and unlawful motives. In that case, the defendant filed
14 pretrial motions alleging the Special Counsel and his prosecutors were acting at the
15 direction of Congressional Republicans and former President Donald J. Trump. The court
16 denied the motions and found the defendant presented no evidence to support any of his
17 allegations. *United States v. Robert Hunter Biden*, 23-599-MCS, 2024 WL 3950676, at *7
18 (C.D. Cal. Apr. 1, 2024). After losing his pretrial motions with the court, the defendant
19 conceded his arguments were not appropriate to present to a jury, the court agreed, and the
20 court issued an order prohibiting the defendant from raising such arguments or questioning
21 at trial without first previewing them with the court outside the presence of the jury. *Id.*

22 Similarly in this case, the defendant has insinuated and alleged improper
23 prosecutorial motive and defects in various communications with the government and in
24 court filings, including, for example, in his pretrial release motion filed in the District of
25 Nevada in which he called this prosecution “makeweight and politically-motivated,” *see*
26 Exh. 1 at 7, and in a motion in limine where he claims the prosecution “*smacks* of political
27 bias,” ECF 148 at 7, which means only “to *seem* to contain or involve” according to
28 Merriam-Webster’s Dictionary. But unlike defendant Robert Hunter Biden who filed

1 pretrial motions raising these types of claims for consideration by the district court (which
2 were denied) and then conceded such claims could not be raised before the jury, defendant
3 Alexander Smirnov has never raised these claims for this Court’s consideration in this
4 case. Yet, he opposes the government’s motion to preclude him from arguing them before
5 the jury, which is the wrong audience for any such grievances. In other words, defendant
6 Smirnov appears to be preparing to introduce irrelevant and unfounded claims to the jury
7 despite the fact that the law expressly precludes him from doing so, which defendant Biden
8 conceded and numerous courts in this Circuit have recognized. *Biden*, 2024 WL 3950676,
9 at *7 (citing cases).

10 In this case, the defendant’s invented claims of “political-motivation” appear to be
11 the opposite of defendant Biden’s baseless claims. While defendant Biden claimed he
12 could prove prosecutors were acting at the behest of Republicans, defendant Smirnov
13 appears to be ready to contend that prosecutors and investigators “seem” to be acting at
14 the direction of certain Democrats or “seem” to be acting to protect certain Democrats.
15 The defendant’s motion in limine appears to concede that he doesn’t actually have any
16 evidence of political bias, otherwise he obviously would have raised it in a motion to
17 dismiss the indictment and wouldn’t merely be alleging the prosecution “seems” to or
18 “smacks” of political bias. But even if the defendant had actual evidence of political bias
19 (which he obviously does not), such claims do not go to whether the defendant is guilty or
20 not guilty with respect to the false statement and obstruction offenses charged in the
21 Indictment. Therefore, any argument or questioning that suggest improper political
22 motivation is irrelevant at trial. Fed. R. Evid. 401.

23 The same is true with respect to any argument or inference that other confidential
24 sources are not prosecuted for similar conduct, which is an element of a selective
25 prosecution claim that the defendant could have raised pretrial and is also not relevant to
26 a jury’s determination. Moreover, even if such claims had some scintilla of probative
27 value, it would be substantially outweighed by the danger of unfair prejudice, confusion
28 of the issues, and misleading the jury. Fed. R. Evid. 403; *see United States v. Re*, 401 F.3d

1 828, 833 (7th Cir. 2005) (Rule 403 barred admission of government’s decision not to
2 prosecute someone other than defendant because it would mislead and confuse the jury);
3 *see also United States v. Goldfarb*, 2012 WL 1831508, at *2 (D. Ariz. May 18, 2012)
4 (precluding the parties from using evidence of the government’s charging decisions to
5 establish, directly or indirectly, defendant’s guilt or innocence). If the defendant were to
6 suggest to the jury that the prosecution of him were politically motivated, it would not be
7 to prove any fact of consequence to the jury’s determination is less likely, rather, it would
8 invite jury nullification. This would then create a mini-trial on the prosecutor’s
9 motivations to try to overcome prejudicial statements made by defense counsel about the
10 prosecution’s motives and bias. These claims have no merit, but more importantly, these
11 claims are not relevant and would be a waste of the jury’s time.

12 The defendant’s claims about the Special Counsel being unlawfully appointed,
13 conflicted, and inappropriately funded likewise have no relevance in this matter under
14 Federal Rule of Evidence 401. While the defendant was permitted to raise these challenges
15 under Federal Rule of Criminal Procedure 12(b), the Court denied those claims because
16 they are meritless. At this stage, there is no precedent that permits him to relitigate these
17 issues or make these arguments before the jury. Rule 12(b)(3) provides that these
18 challenges must be raised before trial, and, because they have no relevance to the
19 defendant’s guilt or innocence, the defendant cannot raise them at trial. These claims
20 would confuse the jury and waste the jury’s time, and they should likewise be excluded
21 under Federal Rule of Evidence 403.

22 **3. CONCLUSION**

23 For these reasons, the government requests that the Court grant this motion and
24 enter the government’s proposed order excluding argument, evidence, and questioning
25 related to claims alleging defects in the indictment or in the institution of the prosecution
26 of this matter.