**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

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| UNITED STATES OF AMERICA | ) | |
| v. | ) | Criminal Action No. 1:23-cr-00061-MN |
| ROBERT HUNTER BIDEN, | ) | |
| Defendant. | ) | |

**MR. BIDEN'S NOTICE REGARDING AN APPROPRIATIONS CLAUSE APPEAL**

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In prior filings (D.E.127) and in the Court's order yesterday denying the motion for injunctive relief (D.E.191), the possibility of an interlocutory appeal was mentioned. Mr. Biden seeks to inform the Court and counsel that, with jurors now being summoned, witnesses subpoenaed, and proceedings beginning on Monday, Mr. Biden has decided to proceed to trial and forgo an interlocutory appeal.

Depending on the outcome of the trial, there could be a later appeal of this and other issues. Mr. Biden understands that this Court has denied the motion on the merits by finding that no Appropriations Clause violation has occurred, but Mr. Biden believes the argument is meritorious and, at a minimum, meets the legal definition of not being frivolous. In every appeal, an appellant has been denied relief in the district court and sometimes those appeals succeed and sometimes they fail, but rarely are legal arguments brought in good faith deemed frivolous even if they do not prevail.[1] Mr. Biden's motions seeking to remedy Appropriations Clause violations are supported by Supreme Court case law and make colorable—arguably persuasive—arguments that should not be deemed frivolous. *See, e.g.*, D.E.62 at 5–6 (discussing *United States v. Nixon*, 418 U.S. 683 (1974)). Mr. Biden reserves the right to present these arguments on appeal in the future.

The Third Circuit dismissed the prior appeal of Mr. Biden's motion to dismiss for lack of jurisdiction because it found he did not seek injunctive relief explicitly enough for the denial of

[1] For an appeal to be frivolous, an appellate court must find that the district court's "disposition is so plainly correct that nothing can be said on the other side," *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) (Easterbrook, J.), or that the appellants arguments "have no arguable basis in fact of law," *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). The issue is not even whether the appeal is likely to succeed on the merits, but only whether the appeal is arguable; the test is designed to screen out only "inarguable claims." *Id.* This high standard is followed in this circuit. *See, e.g.*, *United States v. Tyler*, 2016 WL 6728804, at *1 (M.D. Pa. Nov. 15, 2016) ("A claim is frivolous if it lacks an arguable basis in law or fact"); *United States v. Rigas*, 2008 WL 11450826, at *1 (M.D. Pa. July 24, 2008) ("'a matter is not frivolous if any of the legal points are arguable on their merits.'") (quoting *Death Row Prisoners of Pa. v. Ridge*, 948 F. Supp. 1282, 1286 (E.D. Pa. 1996)) (denying double jeopardy claim, but recognizing appeal of the issue is not frivolous).

that motion to qualify as an appeal of denied injunctive relief under 28 U.S.C. § 1292(a)(1), but the Third Circuit did not cross the jurisdictional threshold to consider the merits of Mr. Biden's arguments or find them frivolous. This Court's now explicit denial of an injunction would permit an interlocutory appeal under Section 1292(a)(1), but, as stated above, Mr. Biden is not seeking that interlocutory relief and appreciates the Court's consideration of his motions.

Dated: May 30, 2024

Respectfully submitted,

/s/ *Abbe David Lowell*
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of May, 2024, I filed the foregoing notice with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/ *Abbe David Lowell*
Abbe David Lowell

*Counsel for Robert Hunter Biden*