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August 1, 2023

The Honorable Maryellen Noreika
J. Caleb Boggs Federal Building
844 N. King Street
Unit 19
Room 4324
Wilmington, DE 19801

RE: USA v. Biden, Case 23-cr-00061-MN and
Case 23-mj-00274-MN

Dear Judge Noreika:

I represent proposed intervenors Heritage Foundation and Mike Howell. Attached for the Court's consideration is a Motion For Leave to Intervene as well as a memorandum in Opposition to Defendant's Motion for Leave to File Under Seal.

I am at the Court's disposal should there be any questions or concerns.

Sincerely,

LAW OFFICES OF MURRAY, PHILLIPS & GAY

/s/ Julianne E. Murray

Julianne E. Murray
Bar ID 5649
215 E. Market Street
Georgetown, DE 19947
(302) 855-9300
julie@murrayphillipslaw.com
Counsel for Heritage Foundation and Mike Howell

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

UNITED STATES OF AMERICA)	
)	
)	
<i>Plaintiff,</i>)	
)	
v.)	
)	Case Nos. 1:23-cr-61 (MN)
)	1:23-mj-274 (MN)
ROBERT HUNTER BIDEN)	
)	
)	
<i>Defendant.</i>)	
)	

**MOTION OF THE HERITAGE FOUNDATION AND MIKE HOWELL
FOR LEAVE TO INTERVENE**

Movants The Heritage Foundation (“Heritage”) and Mike Howell (“Howell”) hereby move for leave to intervene in this matter for the limited purposes of opposing Defendant’s Motion for Leave to File Under Seal (No. 23-mj-274, ECF No. 17) and any subsequent related filings. In support of their Motion, Heritage and Howell state as follows:

- 1. Movants, the Heritage Foundation via the Daily Signal, and Howell, as an Investigative Columnist for *The Daily Signal*, are News Outlets and Thus Permitted to Intervene in This Action for the Limited Purpose of Obtaining Public Access to Records.**

The Heritage Foundation is a Washington, D.C.-based nonpartisan public-policy organization with a national and international reputation whose mission is to “formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.” Heritage Foundation, *About Heritage*, found at <https://www.heritage.org/about-heritage/mission> (last visited July 31, 2023). Heritage is a not-for-profit IRC Section 501(c)(3) organization which engages in

substantial dissemination of information to the public. Heritage operates a national news outlet, *The Daily Signal*. Mike Howell leads the Heritage Foundation’s Oversight Project and is an investigative columnist for *The Daily Signal*. By function, the Oversight Project is primarily engaged in disseminating information to the public. Oversight Project, *found at* <https://www.heritage.org/oversight> (last visited July 31, 2023); Twitter, *found at* @OversightPR (last visited July 31, 2023). Staff members of the Oversight Project regularly appear in television, radio, print, and other forms of media to provide expert commentary on salient issues in the national debate. Movants have a strong interest in informing the public and Congress on the workings of government. Movants work to provide the transparency necessary to restore the public’s trust in the equal administration of justice in the United States.

Limited intervention is the appropriate procedural method in the Third Circuit for media seeking access to judicial records. *See, e.g., Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994); *United States v. Cianfrani*, 573 F.2d. 835, 845–46 (3d Cir. 1978). Media “have standing to challenge protective orders in an effort to obtain access to information or judicial proceedings. [Media] may have standing notwithstanding the fact that ‘they assert rights that may belong to a broad portion of the public at large.’” *Pansy*, 23 F.3d at 777 (citations omitted).

2. Movants Seek Leave to Intervene to Oppose Sealing of Court Records.

Movants seek leave to intervene to oppose any sealing of records in either 23-mj-274 (MN) or 23-cr-61 (MN). Counsel for Defendant filed a Motion for Leave to File Under Seal (No. 23-mj-274, ECF No. 17) on July 26, 2023. On the afternoon of July 28, 2023, Counsel for Defendant contacted the undersigned requesting consent that certain portions of Movants’ proposed *Amicus* Brief be sealed pending resolution of the Motion for Leave to File Under Seal.

See Murray Decl. Ex. 1. Counsel for Defendant requested a response by 5:00 p.m. on July 28, 2023. *Id.* Counsel for Defendant further advised that should Movants not consent, Counsel intended to move for relief. Movants did not consent and explained at length moving to seal would be “absurd and frivolous.”¹ *Id.* at 2. Later that day, Counsel for *Amici* noted that the ECF system was down and requested to be copied on any filings made via email to the Clerk over the weekend. *Id.* On Monday at 10:59 a.m., Counsel for Defendant indicated that: “We disagree with the baseless assertions below, many of which are counterfactual and/or lacking a basis in law. *Id.* Nevertheless, as this identical issue is currently before the Court, we will await the Court’s ruling on the pending application and pursue further relief accordingly.” Murray Decl. Ex. 2, at 1. Thus, Defendant’s Counsel seek to *de facto* bind Movants to a ruling on a motion in which Movants did not litigate. Moreover, Defendant seeks *broader* putative relief as to Movants’ *Amicus* filing in that he seeks to seal a Congressional Quarterly Transcript of House Oversight and Accountability July 19, 2023 public hearing with the Internal Revenue Service Whistleblowers, the video of which is *publicly* available on the House’s website. It makes no sense to litigate these motions in a piecemeal manner as a matter of judicial economy. Such a procedure is also deeply unfair. Movants’ file herewith their Proposed Brief in Opposition as Exhibit 1.

Counsel for Movants contacted all counsel of record by email this morning seeking their position on this Motion. More than nine hours later no one has taken a position on this filing.

¹ Even though Counsel for Defendant gave Movants some 2.75 hours to respond, Movants met the deadline of 5:00 p.m. with a detailed response as to why they would not consent to sealing and the basis for their opposition to any motion to seal that may be filed.

WHEREFORE, Movants respectfully request leave to intervene to move for access to the plea agreement and diversion agreement entered into by the United States and Defendant and to oppose Counsel for Defendant's Motion for Leave to File Under Seal and any subsequent related filings.

Dated: August 1, 2023

Respectfully submitted,

LAW OFFICES OF
MURRAY, PHILLIPS & GAY

/s/ Julianne E. Murray
Julianne E. Murray
Bar ID 5649
215 E. Market Street
Georgetown, DE 19947
Tel: (302) 855-9300
julie@murrayphillipslaw.com

*Counsel for Amici The Heritage Foundation
and Mike Howell*

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

UNITED STATES OF AMERICA)	
)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case Nos. 1:23-cr-00061 (MN)
)	1:23-mj-274 (MN)
)	
ROBERT HUNTER BIDEN)	
)	
)	
<i>Defendant.</i>)	

**DECLARATION OF JULIANNE E. MURRAY IN SUPPORT OF MOTION OF THE
HERITAGE FOUNDATION AND MIKE HOWELL FOR LEAVE TO INTERVENE**

1. My name is Julianne E. Murray. I am Counsel to The Heritage Foundation and Mike Howell (“Movants”) and I am a Delaware attorney in good standing with this Court.

2. I make this declaration to provide the Court with additional information relevant to Movants’ Motion for Leave to Intervene.

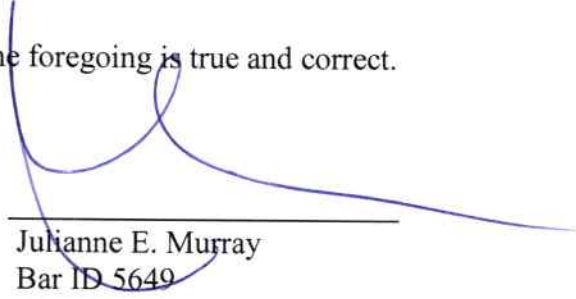
3. Attached hereto as Exhibit 1 is a true and correct copy of email correspondence between Counsel for Robert Hunter Biden and the undersigned counsel through 8:19 PM, Friday, July 28, 2023.

4. Attached hereto as Exhibit 2 is a true and correct copy of email correspondence from counsel for Robert Hunter Biden to the undersigned counsel dated July 31, 2023.

5. Attached hereto Exhibit 3 is a true and correct copy of a letter from Abbe David Lowell to the Hon. Jason Smith (June 30, 2023).

I declare under the penalty of perjury that the foregoing is true and correct.

August 1, 2023



Julianne E. Murray
Bar ID 5649

EXHIBIT 1

From: Julie Murray
Sent: Friday, July 28, 2023 8:19 PM
To: Richie Jones <rjones@bergerharris.com>
Cc: matthew.salerno@lw.com; Timothy.McCarten@lw.com; Brian.McManus@lw.com; clark@csvllp.com; Marsha De Freitas <mdefreitas@bergerharris.com>; Peter McGivney <pmcgivney@bergerharris.com>
Subject: RE: USA v. Biden Amicus Copies Attached

Hi Richie,

I note that ECF is down this weekend.

If you should make any filings by alternative means, please make sure to copy me of any submissions.

Best,

Julie

Julianne E. Murray, Esq.
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From: Julie Murray
Sent: Friday, July 28, 2023 4:59 PM
To: Richie Jones <rjones@bergerharris.com>
Cc: matthew.salerno@lw.com; Timothy.McCarten@lw.com; Brian.McManus@lw.com; clark@csvllp.com;

Marsha De Freitas <mdefreitas@bergerharris.com>; Peter McGivney <pmcgivney@bergerharris.com>

Subject: RE: USA v. Biden Amicus Copies Attached

Richie:

With all due respect, your position on this matter is absurd and frivolous.

You seek to seal: (1) two IRS whistleblower transcripts officially *publicly released June 22, 2023—over a month ago—*after a formal vote of the House Ways and Means Committee (<https://waysandmeans.house.gov/event/meeting-on-documents-protected-under-internal-revenue-code-section-6103/>); (2) a *public* letter from House Ways and Means Committee Chairman Smith dated July 14, 2023 (<https://waysandmeans.house.gov/smith-calls-on-ag-garland-and-u-s-attorney-weiss-to-submit-irs-whistleblower-testimony-into-hunter-biden-plea-agreement-proceedings/>); (3) a CQ transcript of a *public hearing* held on July 19, 2023 before the House Committee on Oversight and Accountability (we note the hearing is available in full video on the Committee’s webpage (<https://oversight.house.gov/hearing/hearing-with-irs-whistleblowers-about-the-biden-criminal-investigation/>)); and (4) portions of our filings that discussed the same.

To support your basis for sealing, you assert that somehow Fed. R. Crim. Proc. 6(e) (“6(e)”) is implicated and that 26 U.S.C. § 6103’s (“6103”) confidentiality provisions are implicated.

You also seek to seal a filing by a party that operates a news organization, *The Daily Signal*, and another who filed in his capacity as a reporter for that organization. *See* Proposed Amici Brief at 1. Thus, you seek to muzzle the press from engaging in core First Amendment activities.

That position is frivolous, and it appears that it may be undertaken for improper purposes such as intimidating Internal Revenue Service (“IRS”) Whistleblowers or seeking to attack IRS Whistleblowers Shapley and Ziegler in a collateral proceeding for putative criminal conduct. Indeed, the only logical basis for we can discern to seek to seal *public disclosures* by Congress and a *public hearing* is to seek to litigate the Whistleblowers conduct in *this Court*. But business before Congress and what Congress discloses in its official proceedings is not litigated in this Court, but in Congress, where your client did not act until *after the fact*.

First. You are woefully late in bringing this motion. We filed on July 25, 2023. If you thought the materials so sensitive, you should not have delayed.

1. The House Ways & Means Committee mark-up to release the transcripts was *publicly noticed* as required, but your client and his counsel did *nothing* to intervene before the House until after the fact on June 30, 2023.

2. Indeed, any number of parties could have publicly used these materials; my clients have filed the same materials on June 26th and June 29, 2023 in the United States District Court for the District of Columbia. *See Heritage Found. & Mike Howell v. DOJ*, 23-cv-1854 (DLF). The government raised no objection.

3. Hunter Biden has a number of lawyers working on this matter at multiple firms including not only your firm, but Winston & Strawn and Latham & Watkins.

Second. You provide *no* specifics as to what material is subject to 6(e) which, as you know, is carefully and narrowly defined. The Committee and the WBs were scrupulous to ensure all matters were handled appropriately and lawfully. You cannot simply throw around accusations of misconduct with *zero support*. Please identify with specificity—by page and line number—the exact material that you contend is subject to 6(e).

Third. Any information covered by Section 6103 was released pursuant to an express vote and authorization of the House Ways and Means Committee. That authorization is publicly available on the Committee's website. (http://waysandmeans.house.gov/wp-content/uploads/2023/06/COMPILED_Votes-06.22.pdf). You cannot seal information lawfully released by the House to the public regardless of its previously confidential character.

Fourth. The Court cannot provide you with the remedy you seek. You are complaining about material that is *currently available* to the world on the U.S. House of Representative's website—and has been available for over a month. The Court cannot order the House of Representatives to remove that material, nor can the Court order the unknown millions of people who have already downloaded that information to forget what they have seen. Any order sealing the same publicly available information in my client's filings would be utterly pointless—but would trample my

client's core First Amendment rights.

Please attach a full and complete copy of this communication to any filing you do make. And please know if you file, I will advise my clients of all available remedies and will not hesitate in seeking those remedies.

Best regards,

Julie

From: Richie Jones <rjones@bergerharris.com>
Sent: Friday, July 28, 2023 2:13 PM
To: Julie Murray <julie@murrayphillipslaw.com>
Cc: matthew.salerno@lw.com; Timothy.McCarten@lw.com; Brian.McManus@lw.com; clark@csvllp.com; Marsha De Freitas <mdefreitas@bergerharris.com>; Peter McGivney <pmcgivney@bergerharris.com>
Subject: RE: USA v. Biden Amicus Copies Attached

Dear Julie:

I'm sorry that we did not have a chance to meet in person on Wednesday. It was a bit hectic.

As you may be aware, Defendant has filed a preliminary Motion to Seal certain exhibits appended to the proposed *amici* of the Honorable Jason Smith, Chairman of U.S. House of Representatives Ways and Means Committee in the parallel case docket *United States v. Biden*, 1:23-mj-00274-UNAA (D. Del.) (the "Sealing Motion"). That motion is attached for reference, and the Court has invited further briefing from the government and counsel.

Upon review, at least some of the exhibits included with your proposed *amici* submission, as well as portions of the brief itself, present the same issues and concerns that we identified in the Sealing Motion. Specifically, your proposed *amicus* submission appears to contain information that is legally protected from disclosure or dissemination, including under Fed. R. Crim. P. 6(e), and thus should not be reflected on a public docket. The documents that contain such information—and thus should be filed under seal—include: portions of your *amicus* brief (portions of pages 6–13); Exhibit 5; Exhibit 6; Exhibit 7; and Exhibit 21. These materials are located within three docket entries, 13-2, 13-3, and 13-4. We therefore believe these materials should be sealed pending a resolution of the Sealing Motion.

Will your client consent to a request that the Court place those three docket entries under seal? Alternatively, Defendant intends to move the Court for that relief.

We would appreciate you advising us of your client's position on this issue by 5 pm so that we may take appropriate action. If we do not hear from you by then, we will operate under the assumption that your client would not consent.

Best,

Richie Jones



Richard I.G. Jones, Jr.
Partner
BERGER//HARRIS LLP
302.476.8430 direct
rjones@bergerharris.com

From: Julie Murray <julie@murrayphillipslaw.com>
Sent: Tuesday, July 25, 2023 4:11 PM
To: Richie Jones <rjones@bergerharris.com>
Subject: RE: USA v. Biden Amicus Copies Attached

EXTERNAL EMAIL

Sorry for the delay...

From: Julie Murray
Sent: Tuesday, July 25, 2023 12:15 PM
To: Richie Jones <rjones@bergerharris.com>
Subject: Re: USA v. Biden Amicus

Hey Richie,

I'm out of the office at the moment at an appointment. I tried to pull the documents down from the docket, but a couple of the documents are large and it's not working.

When I get back to the office in a couple of hours, I will send.

Thanks,

Julie

Sent from my iPhone

On Jul 25, 2023, at 11:31 AM, Richie Jones <rjones@bergerharris.com> wrote:

The letter, motion and accompanying brief please. We are checking to see why my office did not receive service in the meantime.

Thanks,

Richie

<image001.png> **Richard I.G. Jones, Jr.**
Partner
BERGER//HARRIS LLP
302.476.8430 direct
rjones@bergerharris.com

From: Julie Murray <julie@murrayphillipslaw.com>
Sent: Tuesday, July 25, 2023 11:15 AM
To: Richie Jones <rjones@bergerharris.com>
Cc: benjamin.wallace2@usdoj.gov; derek.hines@usdoj.gov; leo.wise@usdoj.gov;
clark@csvgllp.com; brian.mcmanus@lw.com; matthew.salerno@lw.com;
timothy.mccarten@lw.com; Marsha De Freitas <mdefreitas@bergerharris.com>
Subject: RE: USA v. Biden Amicus

EXTERNAL EMAIL

Good Morning Richie,

Hmm. I called the Clerk's office and they said all parties were noticed. I apologize. Do you just need the letter or do you need the letter, motion and accompanying brief?

Thanks!

Julie

From: Richie Jones <rjones@bergerharris.com>
Sent: Tuesday, July 25, 2023 10:37 AM
To: Julie Murray <julie@murrayphillipslaw.com>
Cc: benjamin.wallace2@usdoj.gov; derek.hines@usdoj.gov; leo.wise@usdoj.gov;
clark@csvgllp.com; brian.mcmanus@lw.com; matthew.salerno@lw.com;
timothy.mccarten@lw.com; Marsha De Freitas <mdefreitas@bergerharris.com>
Subject: RE: USA v. Biden Amicus

Julie:

We were just informed that you filed a letter in USA v. Biden, Case No. 23-cr-00061-MN. We did not receive electronic service. Would you please send me an electronic copy of whatever you filed?

Thanks,

Richie Jones

<image001.png> **Richard I.G. Jones, Jr.**
Partner
BERGER//HARRIS LLP
302.476.8430 direct
rjones@bergerharris.com

From: Julie Murray <julie@murrayphillipslaw.com>

Sent: Saturday, July 22, 2023 9:09 PM

To: benjamin.wallace2@usdoj.gov; derek.hines@usdoj.gov; leo.wise@usdoj.gov; clark@csvllp.com; Richie Jones <rjones@bergerharris.com>; brian.mcmanus@lw.com; matthew.salerno@lw.com; timothy.mccarten@lw.com

Subject: USA v. Biden Amicus

EXTERNAL EMAIL

Good Evening Gentlemen:

I have been retained by the Heritage Foundation and Mike Howell to seek leave to file an Amicus Brief in opposition of the Court accepting the plea agreement at this time in USA v. Biden, Case No. 23-cr-00061-MN.

As you know, I must ask the position of all counsel and include that position in my Motion seeking leave.

Accordingly, I ask that you respond by noon on Monday, July 24, 2023.

Best regards,

Julianne E. Murray, Esq.
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P.O. Box 561
Georgetown, DE 19947
(302) 855-9300 – phone
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EXHIBIT 2

From: Richie Jones <rjones@bergerharris.com>
Date: July 31, 2023 at 10:59:35 AM EDT
To: Julie Murray <julie@murrayphillipslaw.com>
Cc: matthew.salerno@lw.com, timothy.mccarten@lw.com, brian.mcmanus@lw.com, clark@csvglp.com, Marsha De Freitas <mdefreitas@bergerharris.com>, Peter McGivney <pmcgivney@bergerharris.com>
Subject: RE: USA v. Biden Amicus Copies Attached

Julie,

We disagree with the baseless assertions below, many of which are counterfactual and/or lacking a basis in law. Nevertheless, as this identical issue is currently before the Court, we will await the Court's ruling on the pending application and pursue further relief accordingly.

Best,

Richie



Richard I.G. Jones, Jr.
Partner
BERGER//HARRIS LLP
302.476.8430 direct
rjones@bergerharris.com

From: Richie Jones
Sent: Friday, July 28, 2023 2:13 PM
To: Julie Murray <julie@murrayphillipslaw.com>
Cc: matthew.salerno@lw.com; Timothy.McCarten@lw.com; Brian.McManus@lw.com; clark@csvglp.com; Marsha De Freitas <mdefreitas@bergerharris.com>; Peter McGivney <pmcgivney@bergerharris.com>

EXHIBIT 3



NORTH AMERICA SOUTH AMERICA EUROPE ASIA

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Washington, DC 20036
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F +1 (202) 282-5100

ABBE DAVID LOWELL
Partner
(202) 282-5000

June 30, 2023

VIA ELECTRONIC MAIL

Representative Jason Smith
Chairman
Committee on Ways and Means
U.S. House of Representatives
1139 Longworth HOB
Washington, D.C. 20515

Re: Ways & Means June 22 Release of Transcripts and Proposed Actions

Dear Chairman Smith:

Since taking the majority in 2023, various leaders of the House and its committees have discarded the established protocols of Congress, rules of conduct, and even the law in what can only be called an obsession with attacking the Biden family. Your recent actions and joint statement with Chairmen Comer and Jordan make clear that you have joined this ignoble group, adopting their irresponsible tactics as your own. In fact, yesterday's press release by the three of you seeking the testimony of a dozen law enforcement personnel based on the unsworn and slanted statements of the IRS agents is now the proverbial card castle—something that looks real but has no foundation.

Releasing the transcripts of and exhibits from interviews of self-styled IRS “whistleblowers” who may be claiming that title in an attempt to evade their own misconduct was an obvious ploy to feed the misinformation campaign to harm our client, Hunter Biden, as a vehicle to attack his father. It is no secret these interviews were orchestrated recitations of mischaracterized and incomplete “facts” by disgruntled agents who believed they knew better than the federal prosecutors who had all the evidence as they conducted their five-year investigation of Mr. Biden.

Let me be specific: (a) your release of material violated the spirit, if not the letter, of the tax laws and federal rules governing investigations; (b) your attempt to protect the IRS agents was a transparent effort to provide cover to those with a bias and an axe to grind so deep and sharp as to have allowed them to avoid answering for their own conduct under oath; and (c) you then choreographed the dissemination of incomplete half-truths, distortions, and totally unnecessary details about Mr. Biden.

A. Improper Disclosures of Investigation and Tax Information

Ironically, your counsel started each of the two interviews with a hollow recognition of the privacy of the very information you then irresponsibly released. “Majority Counsel 1” stated:

Chairman Smith takes our tax privacy laws extremely seriously, and we have worked diligently to make sure that you can provide your disclosure to Congress in a legal manner . . . 26 U.S.C. Section 6103 makes tax return and return information confidential, subject to specific authorizations or exceptions in the statute. The statute anticipates and provides for whistleblowers like yourself to come forward and share information with Congress . . .

May 26, 2023, Interview Transcript of Gary A. Shapley, Jr. (Shapley Tr.) at 6. Nowhere in the provision is there language to allow for the wholesale release of untested information from a self-proclaimed whistleblower to the public in the manner you did. Disclosure to Congress is not the same as disclosure to *Fox News*. Indeed, Majority Counsel went on to state:

The chairman considers this entire interview and the resulting transcript as protected confidential information under Section 6103. . . I’d like to remind the witness and everyone in the room that 26 U.S.C. Section 7213 makes it unlawful to make any disclosure of returns or return information not authorized by Section 6103. Unauthorized disclosure of such information can be a felony Punishable by fine or imprisonment. . . we ask that you not speak about what we discuss in this interview to individuals not designated to receive such information.

Id. at 7. It seems that Majority Counsel should have read these provisions and warnings to you in addition to the witness.

There are myriad good reasons for tax return information to be kept private. One, this information can be complicated and nonsensical without a full understanding of the many things that go into listing something as income or expense or as taxable. Another, tax returns themselves can never explain how complex business entities like LLCs, partnerships, and overlapping joint ventures can operate so that a tax item can be understood.

In addition to Section 6103, Federal Rule of Criminal Procedure 6(e) prohibits disclosure of material obtained for a grand jury (e.g., from a subpoena or search warrant). There was no attempt by your witnesses or counsel to distinguish what information came from that process. Indeed, it is clear from what was said that various information *had such a source*. For example, Shapley Exhibits 8 and 9 appear to come from subpoenas to or a search warrant served on *third party record-keepers* that the agents admitted they did *not* provide the Committee. *See* Shapley Tr. at 14.

There are equally several reasons for grand jury secrecy under Rule 6(e). Aside from protecting against the release of one-sided information—the Supreme Court in *United States v. Williams* ruled that a prosecutor need not present exculpatory evidence to that body—grand jury

secrecy allows for the possibility, as occurred in the case of our client, for government attorneys to sift the evidence before making a charging decision on the basis of that one-sided presentation often made by case agents who have blinders to anything other than what they were told to obtain.

Protecting the information that you improperly released, as well as preventing leaks of information that occurred in the public appearances of Mr. Shapley, are so important that various courts have stated such disclosures are “more egregious” than the alleged crimes that agents, like Mr. Shapley, are supposed to investigate. *See, e.g., United States v. Walters*, 910 F.3d 11, 32 (2d Cir. 2018) (concurring opinion). At least once before, in April 2023, Mr. Shapley used Congress to provide him cover to make other unauthorized disclosures when he wrote a letter claiming political interferences with his investigation which was given to the media likely before Members of Congress could open their copies. This week you did it again.

The timing of the agents’ leaks and your subsequent decision to release their statements do not seem innocent—they came shortly after there was a public filing indicating the disposition of the five-year investigation of Mr. Biden. To any objective eye your actions were intended to improperly undermine the judicial proceedings that have been scheduled in the case. Your release of this selective set of false allegations was an attempt to score a headline in a news cycle—full facts be damned. We all know the adage: an allegation gets page one attention, while the explanation or exoneration never gets coverage at all or is buried on page 10. This letter is an attempt to make sure the response is found.

B. Accountability for Illegal Leaks in the Investigation

As you and your staff know by now, the investigation in which Mr. Biden was a subject was plagued by leaks to the media about the investigation that violate various laws—tax laws and grand jury rules—as well as codes of conduct for law enforcement agents and attorneys. One of the most egregious leaks was an October 6, 2022, *Washington Post* article where sources that could only be from law enforcement told reporters that they had “sufficient evidence to charge” our client with tax and gun crimes. The article detailed what “agents” had gathered and what “agents” had determined. Devlin Barrett & Perry Stein, *Federal agents see chargeable tax, gun-purchase case against Hunter Biden*, WASH. POST (Oct. 6, 2022), <https://www.washingtonpost.com/national-security/2022/10/06/hunter-biden-tax-gun-charges/>. It is a tried-and-true tactic of aggrieved agents, who believe they know better than experienced prosecutors and disagree with those prosecutors timing or conclusions, to seek to influence an outcome of an investigation and pressure prosecutors to charge by leaking to the media. Happens all the time.

With this known practice and the publication of articles where the only source who would know what “agents” did and believed were the “agents,” the Committee’s conduct was, at the least, curious and was purposely designed to avoid getting to the bottom of who was dealing in illegal leaks. For example, the two agents who appeared on May 26 and June 1, 2023 were not sworn in. They were not told—as every government interviewer does—that providing false testimony could lead to criminal charges (e.g., 18 U.S.C. § 1001). While the subject of leaks came up once or twice, neither agent was asked “You obviously had disagreements with the prosecutors about the

evidence. Before appearing here today, did you talk to or communicate in any way with anyone in the media? Do you know which of your colleagues were talking to the media? Did you ever provide any information of any kind about your work with anyone to the media? Have you been notified by any Justice Department, IRS, or Treasury office that you are the subject of any investigation concerning leaks? Were you removed from the investigation about which you complain here today because you were the subjects of such an investigation? Why would Treasury Department or Justice Department officials seek your emails and communications if not to determine whether you were the ones leaking to the media?” And when one of the agents mentioned the outrageous October 6, 2023, leak indicating agents had concluded that charges against Mr. Biden should be brought, you allowed the agent to suggest unchallenged that the leak which was very prejudicial to Mr. Biden “might have come from” the defense. June 1, 2023, Interview Transcript of Agent X (Agent X Tr.) at 58. A ridiculous proposition.

Now that these shortcomings have been noticed, will the Committee follow up now and ask everyone who came or comes forward and claims the title of “whistleblower” to answer those questions? In that regard, it was more than a little odd for Mr. Shapley to start his interview by declaring “[t]here is no reward for me becoming a whistleblower” and to conclude his interview by thanking the Committee and saying: “Just thanks for listening. My life’s on the line here, so do what you can?” Mr. Shapley may be reaping the “reward” from the cover you have given him considering the penalties for agents illegally leaking this type of information. And how could Mr. Shapley’s life “be on the line” (e.g., was he suggesting someone in the U.S. Attorney’s Office in Delaware or elsewhere was threatening him physically? If so, wouldn’t intimidation or threats to a federal agent be ripe for inquiry by the Committee?). Perhaps, Mr. Shapley was referring to his status in some investigation of his *own conduct*, and his plea to have your Committee “do what you can” was to help him in that regard.

And, with respect to the integrity of your proceeding, there were dozens of occasions when a question was asked and then you allowed the agent to go “off the record” before an answer was recorded. In many instances, this very unusual and constant “off the record” practice was to allow an answer to be better framed before “on the record” returned. On June 1, 2023, you asked Agent X, “Have you ever been removed from an investigation prior to the one at issue here?” Agent X then asked “Can we go off the record for a second.” Agent X Tr. at 47. When you came back on the record, the question was left hanging. On occasions when an agent seemed to be confused, you allowed his/her attorney to go off the record to apparently coach the correct answer. For example, Agent X was asked about events in 2015 and started to answer, but Mr. Zerbe asked to go off the record, so he “could be sure.” *Id.* at 68. This happened on other occasions as well. *See, e.g., id.* at 75 (“What were the three filings you were referring to?” followed by “Can we go off the record”); *id.* at 76 (after Agent X was asked about the access to an IRS system, Mr. Zerbe said, “Let me go off the record”); *id.* at 77 (when Agent X was asked about media articles including “Trump’s tweets,” a committee counsel went off the record); *id.* at 89 (when Agent X was asked “what the hazards of litigation were in particular?”, he asked “Can we go off the record”); *id.* at 121 (when asked if Agent X has been excluded in other presentation by defense attorneys with prosecutors, Mr. Zerbe said “Let’s go off the record”); *id.* at 151 (when Agent X was asked about his views of whether the U.S. Attorney could bring a case in the District of Columbia, Mr. Zerbe

said “Let me go off the record”). What real inquiry allows this practice of a witness speaking off the record to then have a better answer, and what occurred at each and every such off the record moment?

Your proceedings clearly adopted the agents’ point of view that they were removed from the investigation because they, not the experienced prosecutors and law enforcement leaders, knew the right thing to do and were being punished for making their views known. But your conclusion is absurd under the slightest of scrutiny. With the entire media, Congress, Inspectors General, and the public watching, how could it be remotely possible that the supervisors and attorneys the agents named were retaliating against them? Isn’t it more likely that this feigned retaliation theory has been spun because there is evidence that the wrongdoing in the case was committed by the agents turned “whistleblowers”? How could you believe the agents’ stories at face value when it would make no sense for Republican-appointed and career prosecutors to turn away from any wrongdoing committed by Mr. Biden? Your report fails to note, for example, that the investigation you and your Republican colleagues have focused on began *during the Republican Trump Administration, supervised by two Republican Attorneys General, carried forward by a hold-over Republican U.S. Attorney, and pursued and reviewed by career and experienced attorneys*. What possible motive would any of these people have to ignore proper evidence and fail to bring proper charges if those were warranted? And, critically, what reason would Attorney General Garland—a former prosecutor, advisor to Justice Department officials, and federal judge with an impeccable reputation for honesty and integrity—have to lie about the authority that he provided the U.S. Attorney in Delaware? Moreover, why would the U.S. Attorney for the District of Columbia who recently confirmed that the U.S. Attorney for Delaware, as the Attorney General has stated, had complete authority to file any charges in D.C. have reason to also lie? The answers are “none.” Believe long-standing, experienced, and highly reputed and Senate-confirmed public officials or believe biased IRS agents; you chose the latter.

If you wanted to find out if the agents who you have dubbed “whistleblowers” were not the sources of illegal leaks and others were responsible, you did everything possible to avoid that inquiry.

C. The Dissemination of Half-Truths, Distortions, and Unnecessary Information

Perhaps the most troubling of all the Committee’s conduct was to allow the disclosure of one-sided, biased, incomplete, and distorted presentation of Mr. Biden’s conduct and tax issues. In all law enforcement, there is a proper allocation of roles: agents, police, and investigators gather information, and prosecutors and lawyers evaluate the information for the requirements of bringing a charge and trying a case. It is supposed to be that way because each party to the process brings their own experience and ability and provides an overall view to create a proper outcome. Agents tend to seek out and see inculpatory information; prosecutors weigh that against both exculpatory data and the rules for bringing cases (e.g., evidence of willfulness, admissibility of information, statutes of limitations, venue, legal precedents, agency long-standing policies).

Just as in the intelligence sphere raw data must be reviewed and evaluated, so too in criminal investigations the same process must occur. In the end, these checks and balances are a critical part of our country's legal system, which insures the presumption of innocence. What you did turns all that on its head. You gave disgruntled agents free reign to present their views with no counterweight. You knew ahead of time that the agents disagreed with the broader view that prosecutors bring to the process. You knew there were certainly agents in the case who already had tried to improperly influence the decision-making through illegal leaks. You knew that the prosecutors in the case—adhering to the law, rules, and ethical restraints—would not be able to respond. You knew that, as in all matters, thorough cross-examination would be a tool to provide more reliable results. Yet, for all you knew, you simply allowed those who had a clear bias to be the ones on whom you relied to provide the public with your revelations of “wrongdoing.”

According to the agents, Mr. Biden committed clear chargeable tax offenses for almost every tax year from 2014–2019 and a set of IRS supervisors and Justice Department attorneys did not care. On its face, this is a ridiculous premise. This letter and certainly made-for-media proceedings you have been conducting and now with Chairmen Comer and Jordan you plan to continue, are not the forum to rebut each and every one of the agents' improper statements concerning Mr. Biden's taxes. However, had you and your staff asked the agents thorough questions, they would have confirmed that the charges they sought require a taxpayer's intentional and willful violation, that there be a tax deficiency to address, that any tax error was not the result of mistakes people make all the time in compiling their taxes, that there was no excusable disability or other defense (e.g., an accountant's loss of records or an accountant's passing away). These and so much more are how responsible prosecutors evaluate evidence before filing a charge. Investigating agents do not do this; rather, prosecutors who have to write and justify charges and try them in court do.

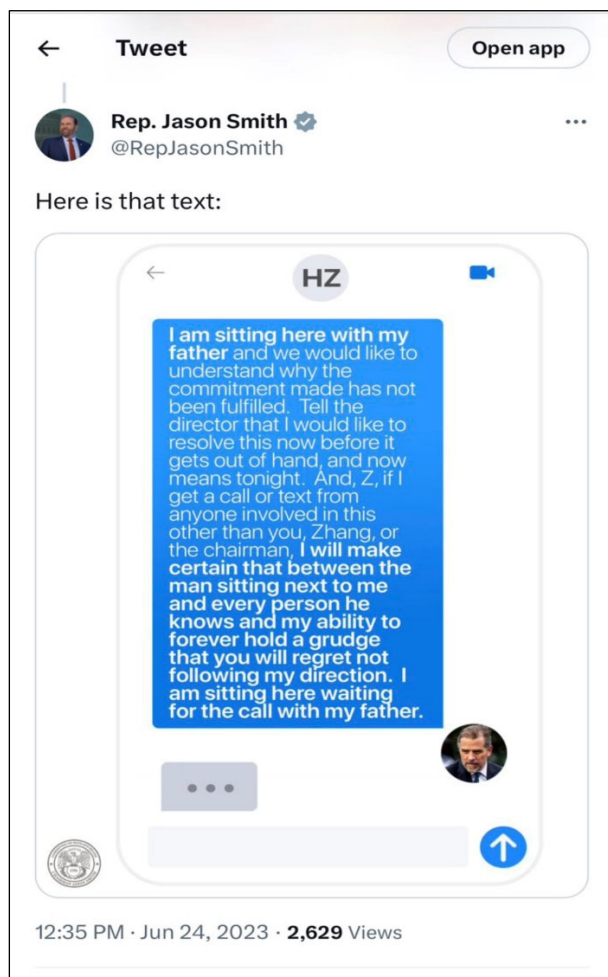
You can readily know the slant that the agents put on the events with just a few examples of their willingness to bend facts to support their version of events:

- The agent indicating that some laptop was authentic (Shapley Tr. at 12) completely ignores the real issue, which is whether *data* that has now been accessed, copied, disseminated, stolen, and manipulated is authentic, including communications the agent was relying on. Various media outlets have concluded data purporting to be from Mr. Biden is not authentic (and various Republican operatives have admitted they manipulated the hard drive contents).
- Continued reference to an unsolicited email purportedly sent from a former business associate, Tony Bobulinski, who coined the phrase “Ten held by H for the big guy.” (Shapley Tr. at 18). By now, a complete review of communications indicates 1) such a breakdown was never included in any agreement, 2) the concept was that of Bobulinski's, with whom Mr. Biden never did business and about whom any of his views were deemed by his business associate as being Bobulinski's “wishful thinking,” and 3) finally, that our client never responded or acknowledged that communication, ever.

- A gratuitous and intentionally misleading statement like “The years in question included foreign income . . . through a partnership with a convicted felon” (Shapley Tr. at 25), when the conviction he refers to was after the transaction involved and had *nothing* to do with that transaction.
- A conclusion with no support (Shapley Tr. at 97) that people he identified as employees of one of Mr. Biden’s entities were “not working.”
- Accepting the right-wing theory that some purported laptop was “abandoned” (Shapley Tr. at 104) when the agent had no basis to make that legal conclusion which is being contested in separate litigation.
- Stating the decisions of the prosecutors left Mr. Biden “tax free” (Shapley Tr. at 154) when the agents know well that years ago Mr. Biden paid all taxes due with interest and penalties, as often is the opportunity people have as a mitigating factor before any civil or criminal cases are filed.

The errors and omissions by the agents were magnified by the those you and your staff committed. These include making sure salacious and unnecessary details (e.g., references to prostitutes) were included in your release, allowing allegations of much earlier tax issues (not at all in the period the agents were assigned to investigate) to go unanswered, and even to willfully misrepresenting communications the agents claimed were authentic.

In one excerpt that has now gotten a great deal of media attention, Mr. Biden is alleged to have been sitting next to his father on July 30, 2017, when he allegedly sent a WhatsApp message, urging the completion of some business transaction. *See* Shapley Tr. at 14. The inference is that the referenced message was being sent to an official of CEFC (China Energy) to forward a false narrative about the Bidens’ involvement in that company. The facts, which some media has now reported, are that President Biden and our client were *not* together that day, the company being referenced was *not* CEFC but Harvest Financial Group (with a person who also had the initial “Z”), and that *no* transaction actually occurred. More important, *your own actions* call into question the authenticity of that communication and your subsequent use of it. The agent only described one message, but you took that purported text and disseminated images of it on June 22 and June 24 in two Twitter postings.



The screen-grab images you posted are not real and contain myriad of issues: both include a photo of Mr. Biden not from 2017 but from the White House Easter Eggroll in April 2022 (long after the purported message was sent); both images portray the message in a blue bubble, when WhatsApp messages are in green; one image super-imposed the Chinese flag for the contact ID, when surely that was not how a text or contact was kept; and one purports to be a screenshot with the “. . .” of someone composing a text (as in Apple’s iMessage) when that does not happen on WhatsApp. In short, the images you circulated online are *complete fakes*. Many media articles confirm that data purported to have come from Mr. Biden’s devices has been altered or manipulated. You, or someone else, did that again. All of the misstatements about this communication and your use of a false text are good examples of how providing one-sided, untested, and slanted information leads to improper conclusions.

Equally misleading are the agents’ and your statements that involvement of the Justice Department Tax Division in advising on a tax investigation was unusual or indicated interference with the authority of the U.S. Attorney. Quite to the contrary, *non*-involvement by the Tax Division would have been unusual. There is rare exception to the involvement the Tax Division plays before any criminal case is brought based on tax issues. That is for the very sound reason that millions

of Americans every year have errors and omissions on tax filings, and there are so many different reasons for a person's or company's actions that a consistent approach to what is a civil case and a criminal case is needed. Countless investigations would have been misfiled as criminal cases were it not for the wiser review based on decades of experience of the Tax Division. Mr. Biden did not get any more favorable treatment to have these experts involved in his investigation, and excluding the Tax Division would have been an act worthy of agents' concern for disparate treatment—not the opposite.

Moreover, in tax cases especially, prosecutors reach out to defense counsel to understand the explanations and defenses a person or company may have to a tax filing error or omission. Indeed, unless a tax charge is an adjunct to some other set of criminal counts (i.e., organized crime, drug trafficking), meetings with defense counsel are routine. It is not unusual for case agents not to attend such meetings, and the protestation by the agents you interviewed that they are always included is simply false. Once again, prosecuting attorneys meet with defense attorneys and make an evaluation based on a complete picture—a tax error or omission, the reason for it, evidence of willfulness, other mitigating factors (a person's health, or other disability) before ascribing a fraudulent intent that would turn a civil case into a misdemeanor or a misdemeanor into a felony.

Furthermore, various statements by the agents demonstrate either a misunderstanding by the agents or, worse, a purposeful attempt to create a false narrative. These include the red-herring issue of appointing the U.S. Attorney in Delaware to be a special counsel when for all intents and purposes the delegation to that U.S. Attorney was as great as that which a special counsel would receive; that prosecutors "let" statutes of limitations expire rather than deciding that a charge was not supported for a year in which a statute of limitations running was irrelevant; implying that the October 7, 2022, meeting in Delaware of prosecutors and agents was somehow the agents' doing when it is clear from the chronology that it was called the day after a destructive media leak by some agent, likely made with the intent to pressure some inappropriate decision in the investigation; that the agents knew better than the lawyers as to whether an attorney-client privilege review of material was required; or that a Tax Division memorandum recommended some type of charge(s) when the agent admits he never saw it.

Chairman Smith, it is easy when a committee does not operate with fairness and thoroughness and an adherence to rules and procedures to forward a false political narrative. You have done that, and it appears that you (joined now by other Republican chairs who have also been shown to shoot first—sometimes at their own feet—and aim second) will continue to do that. We can only hope that the specious methods you are using, some of which are laid out in this letter, will inform the public of the right way things should be done.

Sincerely,



Abbe David Lowell

Counsel for Robert Hunter Biden



cc: Richard Neal, Ranking Member, House Committee on Ways and Means

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

_____)	
UNITED STATES OF AMERICA)	
)	
)	
<i>Plaintiff,</i>)	
)	
v.)	
)	Case Nos. 1:23-cr-61 (MN)
)	1:23-mj-274 (MN)
ROBERT HUNTER BIDEN)	
)	
)	
<i>Defendant.</i>)	
_____)	

[PROPOSED] ORDER

THIS MATTER having come before the Court upon the motion of The Heritage Foundation and Mike Howell for an Order granting leave to intervene for the limited purposes of opposing Defendant’s Motion for Leave to File Under Seal (No. 1:23-mj-274 (MN), ECF No. 17) and any subsequent related filings, and the Court having considered the motion, and for good cause shown, the Court hereby **GRANTS** the motion.

IT IS SO ORDERED this _____ day of August, 2023.

Hon. Maryellen Noreika
United States District Judge

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

_____)
UNITED STATES OF AMERICA)
)
)
	<i>Plaintiff,</i>)
)
v.)
)
ROBERT HUNTER BIDEN)
)
)
	<i>Defendant.</i>)
_____)

Case Nos. 1:23-cr-61 (MN)
1:23-mj-274 (MN)

**INTERVENORS’ OPPOSITION TO DEFENDANT’S
MOTION FOR LEAVE TO FILE UNDER SEAL**

**LAW OFFICES OF
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Dated: August 1, 2023

Intervenors Heritage Foundation and Mike Howell¹ oppose Defendant Robert Hunter Biden's Motion for Leave to File Under Seal (No. 23-mj-274, ECF No. 17) ("Motion" or "Mot."). It is contrary to law and fact, appears to be made for improper purposes, and when considered on the relevant record, is frivolous.

BACKGROUND

In addition to seeking to seal the House Ways and Means Committee Chairman Jason Smith's *Amicus* filing via the present Motion, Defendant has *also* requested that Heritage consent to the sealing of *Heritage's* filing which contained the *identical* Internal Revenue Service ("IRS") Whistleblower Transcripts that the Defendant's Motion seeks to seal. *See* Mot. at 1–2. This broader record is directly relevant to Defendant's filed Motion.

On July 28, 2023, Counsel for Defendant contacted Heritage's counsel requesting consent to seal certain portions of Heritage's *Amici* Brief prior to Defendant filing a motion to seal in No. 23-cr-61. Amazingly, Defendant sought to seal the two IRS Whistleblower Transcripts *publicly* released by the House Ways and Means Committee on June 22, 2023—over four weeks ago—pursuant to a formal vote of the Committee.² But the Defendant does not stop there. The Defendant also wants to seal other public documents: (1) a *public letter* from Chairman Smith to the Attorney General of the United States dated July 14, 2023³; (2) a Congressional Quarterly transcript of a *public hearing* with the IRS Whistleblowers held on July 19, 2023 before the House

¹ The Intervenors are collectively referred to as "Heritage" throughout this brief.

² *See* <https://waysandmeans.house.gov/event/meeting-on-documents-protected-under-internal-revenue-code-section-6103/>.

³ *See* <https://waysandmeans.house.gov/smith-calls-on-ag-garland-and-u-s-attorney-weiss-to-submit-irs-whistleblower-testimony-into-hunter-biden-plea-agreement-proceedings/>.

Committee on Oversight and Accountability⁴; and (3) portions of Heritage’s *Amici* filing that discussed the foregoing. Counsel for Defendant demanded a response by 5:00 p.m. on July 28, 2023, a mere 2.75 hours after making the request, and further advised that should Heritage not consent, Defendant intended to file a motion with the Court. Heritage did not consent, and instead, explained at length that Defendant’s attempt to seal would be “absurd and frivolous.” Exhibit 1, at 2 to the Declaration of Julliane E. Murray In Support of Motion for Leave to Intervene (Aug. 1, 2023) (“Murray Decl.”). Later that day, Heritage’s counsel noted that the ECF system was down and requested to be copied on any email filings made to the Clerk over the weekend. On Monday at 10:59 a.m., Counsel for Defendant changed positions and indicated that they would try to litigate the issue without involving Heritage: “[A]s this identical issue is currently before the Court, we will await the Court’s ruling on the pending application and pursue further relief accordingly.” Murray Decl. Ex. 2 at 2. While the Court’s ruling on Defendant’s Motion to seal in No. 23-mj-274 would not be the law of the case as to Heritage, it would be *de facto* controlling. Thus, Defendant has sought to game this litigation to effectively move to seal Heritage’s *Amicus* filing without affording them an opportunity to respond. Not only is that inefficient both for the Court and all other parties—it is deeply unfair.

ARGUMENT

I. The Law is Simple: Heritage Has a First Amendment Right of Access to this Court.

The law is simple and clear. Begin with the First Amendment right of access to courts. Defendant’s Motion seeks to seal a filing related to a plea hearing deferred due to legal questions discussed for hours in open court. In the Third Circuit, the First Amendment right of access

⁴ The hearing is available for the world to see in full video on the Committee’s webpage. See <https://oversight.house.gov/hearing/hearing-with-irs-whistleblowers-about-the-biden-criminal-investigation/>.

unambiguously applies. *See, e.g., United States v. Thomas*, 905 F.3d 276, 282 (3d Cir. 2018) (the First Amendment right of access applies to plea hearings and, by extension, to documents related to those hearings). Accordingly, Defendant must thus satisfy the high bar of strict scrutiny. *See, e.g., In re Avandia Mkt. Sales Practices and Prods. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019); Transcript of July 26, 2023 Hearing at 97:7–9 (No. 23-mj-274, ECF No. 18). As this Court stated in this matter, *Avandia* summarizes the applicable standards and controls. *See Oral Order, United States v. Biden*, 23-mj-273 (July 25, 2023) (ECF No. 12):

As the House Ways and Means Committee’s Opposition correctly notes, Defendant misstates the applicable standard; misquotes its leading authority; and all but concedes *Avandia* is fatal to the Motion. 23-mj-274, ECF No. 22-1, at 1–2, 7–8 (“Opposition” or “Opp.”). And all this despite being on notice of the Court’s application of strict scrutiny.

II. Defendant Does Not Come Close to Surviving Strict Scrutiny.

There is no compelling interest capable of satisfying strict scrutiny in sealing materials that have been public for well over a month and have been continuously plastered on worldwide news sources. *See, e.g., Thomas*, 905 F.3d at 282 (“compelling governmental interest” required to seal plea hearing related materials).

To take an example, national network television carried lengthy portions of the House Oversight hearing—*live*—that Defendant wishes to seal. This is not the case where a matter is public only incidentally or in a specific geographic area. This matter is known in every corner of the globe. Even if the information Defendant seeks to seal was wrongfully released—which is emphatically not the case—“the cat is out of the bag. . . . Once announced to the world, the information lost its secret characteristic.” *In Re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990). Tellingly, Defendant fails to mention *In re Subpoena Duces Tecum Served on Amerix Corp.* where the Court confronted the exact situation present here, albeit with a Senate Subcommittee.

No. 07-cv-2737 (WDQ), 2008 WL 11518429 (D. Md. Jan. 31, 2008). That Court decisively rejected the argument that it should seal previously confidential materials officially released by a Senate Subcommittee:

But the Senate’s previous public disclosures lessen the privacy concerns associated with some of the documents requested by the Government. To the extent that compliance with the Government’s subpoena would cause Amerix to disclose financial or proprietary information that is not already public, those materials may be filed under seal. Materials previously disclosed by the Senate investigation, or published or produced as a result of any other regulatory activity will not be produced under seal.

Id. at *3.

The cases are legion that sealing widely public materials is improper. Defendant addresses none of them. *See, e.g., OJ Commerce, LLC v. KidKraft, Inc.*, 34 F.4th 1232, 1241 (11th Cir. 2022) (“It follows that a party should not seek to seal information that is already public, *see Perez-Guerrero v. U.S. Att’y Gen.*, 717 F.3d 1224, 1236 (11th Cir. 2013), or that would cause no harm to a party if disclosed”); *Virginia Dep’t of State Police v. Wash. Post*, 386 F.3d 566, 578 (D.C. Cir. 2004) (affirming unsealing of records where information asserted to be law enforcement sensitive was already public); *Wash. Post. v. Robinson*, 935 F.2d 282, 291–92 (D.C. Cir. 1991) (unsealing plea agreement over Government objection and holding that, while sealing to withhold fact that defendant is cooperating in order to protect the integrity of an investigation and safety of defendant can be a compelling interest, it was not a compelling interest where it was already widely reported in the media that defendant was cooperating).⁵

⁵ *See also BASF Corp. v. SNF Holding Co.*, No. 17-cv-251, 2019 WL 3554699, at *10 (S.D. Ga. Aug. 5, 2019); *P&L Development LLC v. Bionpharma, Inc.*, No. 17-cv-1154, 2019 WL 2079830, at * 8 (M.D.N.C. May 10, 2019); *Meyers v. Kaiser Foundation Health Plan Inc.*, No. 17-cv-4946 (LHK), 2019 WL 120657, at *3 (N.D. Cal. Jan. 6, 2019); *Reed v. Paramo*, No. 15-cv-5636 (CAS), 2018 WL 10562057, at *2 (C.D. Cal. Sept. 25, 2018); *United States v. Morales*, No. 14-cr-3188 (LAB), 2015 WL 2406099, at *3 (S.D. Cal. May 19, 2015); *United States v. Loughner*, 769 F.Supp.2d 1188, 1196 (D. Ariz. 2011); *United States v. Key*, No. 98-cr-446 (ERK), 2010

III. Defendant's Delays in Seeking Relief Operate as a Waiver and are Fatal to Any Purported Claim of "Injury".

Defendant has been woefully tardy in seeking to protect the supposed confidential materials. This is shown in multiple ways.

First, the identical transcripts were publicly filed on July 25, 2023 in Heritage's *Amicus* filing (ECF No. 13-1). But Defendant took no steps at all to seal these materials until the afternoon of *July 28th*. Even then, Defendant sought no relief regarding these materials which are publicly available on this Court's docket *right now*.

Second, apart from this case, the House Ways and Means Committee mark-up to release the transcripts was *noticed* on June 20, 2023 as required, and everyone knew that proceeding pertained to the Hunter Biden investigation, but Defendant did *nothing* to intervene in that proceeding. Defendant's counsel did *not* make submissions at the Congressional hearing. Defendant did *not* seek injunctive relief in the U.S. District Court for the District of Columbia against re-publication of the offending Congressional materials. Defendant's Counsel did not even bother to send a letter objecting prior to the Committee markup. It was only *after* the House Committee voted to approve the public release of the materials and they had been the subject of mass press coverage for over a week that Defendant finally sent an objection letter, on June 30, 2023.

Third, Heritage has already filed many of the same materials in other federal courts. On June 26 and June 29, 2023, Heritage filed the public transcripts as exhibits in the United States District Court for the District of Columbia. *See Heritage Found. & Mike Howell v. DOJ*, 23-cv-1854 (DLF). The case was widely reported. One would expect that Defendant, along with his

WL 3724358, at *3 (E.D.N.Y. 2010); *United States v. Zazi*, No. 09-cr-663 (RJD), 2010 WL 2710605, at *3-4 (E.D.N.Y. June 30, 2010).

plethora of lawyers working on this matter at multiple global law firms—including the major international law firms of Winston & Strawn and Latham & Watkins—almost certainly would have been monitoring the news and was aware of that litigation. Defendant could easily have sought leave to intervene and seal. Defendant could have litigated this issue over a month ago. He did not. That litigation decision appears to be strategic.

These cumulative instances of delay operate as a waiver of Defendant’s Motion. Defendant’s delay is fatal to any showing of injury. *See In re Avandia*, 924 F.3d at 678 (party seeking to seal must show material in question “will work a clearly defined and serious injury to the party seeking closure” (internal quotation and citation omitted)); *Hulton v. Artesian Water Co.*, No. 22-cv-1584 (MN), 2023 WL 3582672, at *2 (D. Del. May 23, 2023) (Norieka, J.) (similar); *United States v. Earquhart*, No. 17-cr-143 (BR), 2021 WL 2481675, at *2 (E.D.N.C. June 17, 2021) (“*Patriot Grp. Int’l, Inc. v. Janus Glob. Operations LLC*, No. 1:16-cv-907 (LMB/TCB), 2016 WL 11668615, at *2 (E.D. Va. Aug. 11, 2016) (where the public had access to documents for nearly a month, the “defendant’s delay in moving to seal operates as a waiver” (internal citation omitted)).

IV. Defendant Has Failed to Show Any Real Prejudice.

Defendant cannot meet his burden of demonstrating that the material in question “will work a clearly defined and serious injury.” *In re Avandia*, 924 F.3d at 678 (internal quotation and citation omitted); *see also Hulton*, 2023 WL 3582672, at *2. Defendant’s *true* complaint is not with what is or is not on this Court’s public docket, but is with the fact that the IRS Whistleblower transcripts and related materials are *currently available* to the world on the House of Representative’s website—and have been so available for over a month. The same material is also widely available on a number of third-party websites such as C-SPAN and Congressional Quarterly. *That* putative injury cannot be remedied *here*. The Court cannot order the House of

Representatives to remove that material, nor can it enter a prior restraint against C-SPAN or Congressional Quarterly, nor can the Court order the unknown millions of people (and virtually every news outlet in the world) who have already downloaded that information to forget what they have seen. Any order sealing the same publicly available information would serve no purpose, and hence, would do nothing to alleviate the supposed harm suffered by Defendant.

V. It is Reasonable to Conclude that Defendant Is Attempting to Improperly Attack the IRS Whistleblowers.

Given the clear state of the law and obvious lack of legal merit in the Defendant's Motion, one must ask *why* he bothered to file it. Regrettably, it is reasonable to conclude that Defendant's Motion is undertaken for improper purposes, specifically to intimidate IRS Whistleblowers Shapley and Ziegler and to smear them in a collateral proceeding with supposedly criminal conduct, and more broadly to intimidate any further whistleblowing about the investigation of Defendant. Indeed, the only coherent rationale for seeking to seal *public disclosures* by Congress, *public letters* from Congress, and a *public Congressional hearing*—all of which have been continuously covered in the press here and abroad—is to seek to litigate the Whistleblowers's conduct in *this Court*. *Cf.* Letter from Abbe David Lowell to the Hon. Jason Smith (June 30, 2023) (Murray Decl. Ex. 3) (accusing IRS Whistleblowers of criminal leaks to press of both 6(e) and 6103 information; assigning them the pejorative “self-styled IRS ‘whistleblowers’” despite official acknowledgment of their protections; and stating “[i]t is no secret these interviews were orchestrated recitations of mischaracterized and incomplete ‘facts’ by disgruntled agents who believed they knew better than the federal prosecutors who had all the evidence as they conducted their five-year investigation of Mr. Biden”).

But business before Congress, and what Congress discloses in its official proceedings, is not litigated in this Court. Those questions are dealt with *in* Congress, which enjoys a presumption

of regularity. *See, e.g., Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978); *Ashland Oil v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1977), *cf. Bragg v. Jordan*, __F.Supp.3d__, No. 23-cv-3032, 2023 WL 2999971, *12 (S.D.N.Y. Apr. 19, 2023) (in a conflict between District Attorney Alvin Bragg and House Judiciary Committee Chairman Jim Jordan, the fact that both parties are acting politically does not alter analysis).

CONCLUSION

The Motion is completely lacking in any factual or legal merit and arguably has been taken for an improper purpose. It should be denied forthwith and the Administrative Seal should be dissolved.

Respectfully submitted,

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Dated: August 1, 2023