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May 9, 2024

SENT VIA ECF

Molly C. Dwyer, Clerk of Court
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *United States v. Robert Hunter Biden*, C.A. No. 24-2333; Response to the Special Counsel's Rule 28(j) Letter (D.E.14)

Dear Ms. Dwyer,

A Third Circuit motions panel dismissed Biden's appeal for lack of jurisdiction, but no mandate has issued and this Court is not bound by that opinion. *United States v. Biden*, No. 24-1703, D.E.17-1 (3d Cir. May 9, 2024). Biden will seek panel reconsideration and rehearing *en banc*.

As to the Diversion Agreement immunity issue, the Third Circuit split from this Court's precedents allowing such interlocutory appeals. *United States v. Morales*, 465 F. App'x 734, 736 (9th Cir. 2012); *United States v. Sandoval-Lopez*, 122 F.3d 797, 799–800 (9th Cir. 1997); *cf. United States v. Mendez*, 28 F.4th 1320, 1323–24 (9th Cir. 2022) (denial of diversion to juvenile justice system is a collateral order). Additionally, the Special Counsel is wrong in claiming the "Third Circuit considered the exact same issues," as Biden also seeks mandamus here due to the district court's violation of the party presentation rule to reach a different construction of the Agreement than the Special Counsel asserted and the Delaware district court reached.

The Third Circuit also broke from this Circuit's precedents allowing interlocutory appeals from denied Appropriations Clause injunctions under 28 U.S.C. §1292(a)(1). *See, e.g., United States v. Pisarski*, 965 F.3d 738, 743 (9th Cir. 2020). By contrast, the Third Circuit found the injury of federal funds being

improperly spent can somehow be remedied after those funds are spent (without explaining who would pay the U.S. Treasury back). But a Section 1292(a)(1) appeal specifically applies to “interlocutory orders,” so no collateral order is needed. The Third Circuit also reached the merits, concluding Biden had not sought injunctive relief there, but the district court below understood Biden did in the case on appeal here. Cal.D.E.67 at 26. Any question of waiver goes to the merits panel.

In rejecting Biden’s separation of powers interlocutory appeal, the Third Circuit again broke from this Court’s precedents recognizing such appeals as collateral orders. *See, e.g., United States v. Williams*, 68 F.4th 564, 569–70 (9th Cir. 2023); *United States v. Claiborne*, 727 F.2d 842, 844–45 (9th Cir. 1984).

With respect to the Special Counsel’s invalid appointment, the Third Circuit erred in disregarding that the Supreme Court found a challenge to improperly brought proceedings is a collateral order. *Axon Enterp. v. FTC*, 598 U.S. 175, 191–92 (2023). The Third Circuit distinguished *Axon* because as a civil case, but that is no answer because the test for collateral orders is the same in all contexts and abuse of government power is *worse* in the criminal context.

Respectfully submitted,

/s/ Abbe David Lowell
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