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 12 UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT
 14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
 16 Plaintiff,
 17 v.
 18 ROBERT HUNTER BIDEN,
 19 Defendant.

No. CR 23-cr-00599-MCS

**GOVERNMENT’S FIRST MOTION
 IN LIMINE TO EXCLUDE ALLEGED
 DEFECTS IN THE INSTITUTION OF
 THE PROSECUTION**

Hearing Date: May 29, 2024
 Hearing Time: 1:00 p.m.
 Location: Courtroom 7C

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 21 The United States of America, by and through its counsel of record, hereby
 22 submits this Motion in Limine to Exclude Alleged Defects in the Institution of the
 23 Prosecution of this matter.

24 As discussed in its Motion, the United States seeks to exclude from trial:

- 25 (1) Questioning and argument related to issues raised in the defendant’s
 26 motion for vindictive and selective prosecution (ECF 27);
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- 1 (2) Questioning and argument related to alleged outrageous government
2 conduct with respect to the actions of certain IRS agents, as alleged in
3 his motion (ECF 28);
- 4 (3) Questioning and argument alleging the prosecution of the defendant is
5 somehow due to or part of a Russian malign election influence
6 campaign, as claimed by the defendant in a filing (ECF 48);
- 7 (4) Questioning and argument alleging that the defendant was singled out
8 for prosecution or that other taxpayers were not/are not prosecuted for
9 conduct similar to the defendant's;
- 10 (5) Questioning and argument that suggests the defendant's conduct should
11 have been subject to an audit or civil proceeding rather than criminal
12 investigation and prosecution; and,
- 13 (6) Questioning and argument related to selective prosecution claims on
14 Count 9 related to irrelevant and inapplicable COVID-era programs, as
15 alleged in his motion (ECF 31).

16 As explained below, the government believes the defendant has consented to
17 excluding the issues described in this motion, subject to some qualifications.

18 This motion is based on the attached memorandum of points and authorities, the
19 files and records in this case, and such further evidence and argument as the Court may
20 permit.

1 Dated: March 15, 2024

Respectfully submitted,

2 DAVID C. WEISS
3 Special Counsel

4 /s/ _____
5 LEO J. WISE
6 Principal Senior Assistant Special Counsel

7 DEREK E. HINES
8 Senior Assistant Special Counsel

9 Attorneys for Plaintiff
10 UNITED STATES OF AMERICA

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MEMORANDUM OF POINTS AND AUTHORITIES

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2 The United States, by and through undersigned counsel, respectfully moves this
3 Court to exclude argument and questioning of any witness related to claims alleging
4 defects in the institution of the prosecution of this matter, specifically questioning and
5 argument: (1) related to issues raised in the defendant’s motion for vindictive and
6 selective prosecution (ECF 27);¹ (2) related to claims of alleged outrageous government
7 conduct with respect to the actions of certain IRS agents, as alleged in his motion (ECF
8 28);² (3) alleging the prosecution of the defendant is somehow due to or part of a
9 Russian malign election influence campaign (ECF 48);³ (4) alleging that the defendant
10 was singled out for prosecution or that other taxpayers were not/are not prosecuted for
11 conduct similar to the defendant’s;⁴ (5) that suggests the defendant’s conduct should
12 have been subject to an audit or civil proceeding rather than criminal investigation and
13 prosecution;⁵ and, (6) related to the selective prosecution claims on Count 9 related to
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16 ¹ On May 15, 2024, counsel for the government conferred with defense counsel to
17 determine whether the defendant consented or opposed the exclusion of the six issues
18 described in this motion. The government believes the defendant has essentially
19 consented to all issues described in this motion but the government includes their full
20 position articulated in writing to government counsel. Defense counsel’s position on this
21 first issue was, “AS STATED, WE WILL NOT BE SEEKING TO ARGUE OR
22 QUESTIONS ON THOSE LEGAL ARGUMENTS. UNDERLYING ASPECTS (E.G.,
23 IF A WITNESS MADE AN EXTRAJUDICIAL STATEMENT MIGHT GO TO
24 CREDIBILITY OR BIAS).”

25 ² Defense counsel’s position on this issue was, “AS STATED, WE WILL NOT BE
26 SEEKING TO ARGUE OR QUESTIONS ON THOSE LEGAL
27 ARGUMENTS. UNDERLYING ASPECTS (E.G., IF A WITNESS MADE AN
28 EXTRAJUDICIAL STATEMENT MIGHT GO TO CREDIBILITY OR BIAS).”

³ Defense counsel’s position on this issue was “AGREED.”

⁴ Defense counsel’s position on this issue was, “We do not plan to argue that other
taxpayers have not been prosecuted but the issue of the work that your witnesses or ours
have done to support this case or their prior work may come up in examinations of those
witnesses.”

⁵ Defense counsel’s position on this issue was, “We do not plan to argue that other
taxpayers have not been prosecuted but the issue of the work that your witnesses or ours
have done to support this case or their prior work may come up in examinations of those
witnesses.”

1 irrelevant and inapplicable COVID-era programs, as alleged in his motion (ECF 31).⁶
2 Notwithstanding the fact that this Court has already ruled that there is no evidence for
3 these claims, *see* this Court’s Order on the Motions to Dismiss (ECF 67 at pp. 33-34, 43-
4 48, 50-52, 56, n. 42, 76), any inference or information regarding such claims is
5 impermissible at trial based under the evidentiary rules.

6 In numerous pretrial filings, defense counsel has unsuccessfully alleged defects in
7 the prosecution and improper prosecutorial motives, none of which have any place at
8 trial. Federal Rule of Criminal Procedure 12(b)(3) provides that a “motion alleging a
9 defect in instituting the prosecution” or a motion “alleging a defect in the indictment or
10 information” must be raised before trial. With respect to claims of vindictive and
11 selective prosecution or outrageous government conduct, the Ninth Circuit has clearly
12 held that such claims may not be presented to a jury because such issues are legal
13 matters for the Court, and are not theories of defense at trial. *United States v. Wylie*, 625
14 F.2d 1371, 1379 (9th Cir. 1980) (alleged “outrageous involvement by the government
15 agents” is a question of law for the court and not a matter for the jury). *See also, United*
16 *States v. Sun Myung Moon*, 718 F.2d 1210, 1229 (2d Cir. 1983) (defendant who
17 advances a claim of selective prosecution must do so in pretrial proceedings); *United*
18 *States v. Avery*, 2011 WL 13136810, *2-*3 (C.D. Cal., Dec. 15, 2011) (granting the
19 government’s motion in limine to exclude selective prosecution issue from the jury);
20 *United States v. Yagman*, 2007 WL 9724391, at *4–5 (C.D. Cal. May 16, 2007)
21 (precluding defendant from arguing prosecutorial vindictiveness to the jury).

22 This Court has already ruled that the defendant presented no evidence to support
23 any of his allegations regarding prosecutorial defects or improper prosecutorial motives;
24 they were all rejected in the April 1, 2024 Order on the Motions to Dismiss (ECF 67 at
25 pp. 33-34, 43-48, 50-52, 56, n. 42, 76).

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27 ⁶ Defense counsel’s position on this issue was, “AS STATED, WE WILL NOT BE
28 SEEKING TO ARGUE OR QUESTIONS ON THOSE LEGAL
ARGUMENTS. UNDERLYING ASPECTS (E.G., IF A WITNESS MADE AN
EXTRAJUDICIAL STATEMENT MIGHT GO TO CREDIBILITY OR BIAS).”

1 In any event, such claims do not go to whether the defendant is guilty or not
2 guilty with respect to the tax offenses and therefore are irrelevant at trial. The same is
3 true with respect to any argument or inference that other taxpayers are not prosecuted for
4 similar conduct. Moreover, even if such claims had some scintilla of probative value, it
5 would be substantially outweighed by the danger of unfair prejudice, confusion of the
6 issues, and misleading the jury. Fed. R. Evid. 403. *See United States v. Re*, 401 F.3d 828,
7 833 (7th Cir. 2005) (Rule 403 barred admission of government’s decision not to
8 prosecute someone other than defendant because it would mislead and confuse the jury).
9 *See also United States v. Goldfarb*, 2012 WL 1831508, at *2 (D. Ariz. May 18, 2012)
10 (precluding the parties from using evidence of the government’s charging decisions to
11 establish, directly or indirectly, defendant’s guilt or innocence).

12 The same logic applies to any argument that the defendant was entitled to an audit,
13 or should have been given subject to civil, rather than criminal, proceedings, or that other
14 taxpayers took advantage of COVID-era programs. Such arguments would be irrelevant
15 to the jury’s determination of the defendant’s guilt or innocence, particularly where he
16 was ineligible to participate in any of the programs enumerated in his motion on this
17 issue and where this Court already determined that the defendant has not “met his burden
18 to show similarly situated individuals have not been prosecuted for untimely payment of
19 income tax.” (ECF 67 at p. 78).

20 At trial, if the defense is permitted to suggest that a civil audit should have been
21 conducted first, that will create a substantial risk of misleading the jury, prejudicing the
22 government, and inviting jury nullification. Therefore, evidence or argument regarding
23 the availability of IRS civil audits or other civil proceedings is routinely excluded as
24 irrelevant in criminal tax cases. *See United States v. Buras*, 633 F.2d 1356, 1360 (9th
25 Cir. 1980) (explaining that the availability of civil remedies in a tax case “is irrelevant to
26 the issue of criminal liability” and finding that a jury instruction regarding civil remedies
27 “would serve only to confuse the jury”); *United States v. DeMuro*, 677 F.3d 550, 565 (3d
28 Cir. 2012) (district court properly excluded evidence of civil tax remedy because “it

1 opened the door to jury nullification, by inviting the jury to reason that the IRS should
2 have continued to pursue the matter civilly rather than criminally”); *United States v.*
3 *Burkhart*, 501 F.2d 993, 996 (6th Cir. 1974) (“The matter of civil liability is not an issue
4 when a jury is determining a defendant’s criminal liability for tax evasion”); *United*
5 *States v. Merrick*, 464 F.2d 1087, 1093 (10th Cir. 1972) (“no relevance” in a proposed
6 but rejected jury instruction that a civil case might be brought against a defendant who
7 was convicted of tax evasion).

8 Simply put, like evidence of improper prosecutorial motives, the availability of a
9 civil tax audit and other civil remedies or programs is irrelevant to the jury’s
10 consideration of whether the evidence proves the elements of the crimes charged. *See*
11 *Fed. R. Evid.* 401. Even assuming information about such civil remedies has some
12 probative value, that value would be substantially outweighed by the risk of misleading
13 or confusing the jury, prejudicing the government, and encouraging jury nullification.
14 *Fed. R. Evid.* 403.

15 It is a basic rule that evidence of charging decisions made during an investigation
16 should be excluded. *See United States v. Benson*, 957 F.3d 218 (4th Cir. 2020) (“As
17 other courts have observed, non-prosecution decisions are irrelevant because they often
18 take ‘into consideration the availability of prosecutorial resources, alternative priorities,
19 the expectation of prosecution by other authorities, or any number of other valid
20 discretionary reasons.’”); *see also, United States v. Reed*, 641 F.3d 992, 993 (8th Cir.
21 2011) (collecting cases and noting that “several circuits have unanimously upheld the
22 exclusion of evidence of prior charging decisions on the ground that many factors
23 unrelated to guilt may influence those decisions and their admission therefore risks
24 misleading the jury and confusing the issues”).

25 “In our criminal justice system, the Government retains ‘broad discretion’ as to
26 whom to prosecute.” *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United*
27 *States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982)). Therefore, courts consistently hold
28 that evidence or argument regarding charging decisions including whether to accept a

1 plea, whether to prosecute specific individuals, or whether to reach any other disposition
2 of a case against a potential defendant other than the defendant on trial should not be
3 admitted at trial.

4 Moreover, evidence or argument related to the government's charging decisions
5 are irrelevant because they would not make the existence of any fact that is of
6 consequence to the action more probable or less probable and are thus irrelevant. They
7 are not probative of the defendant's guilt or innocence and therefore should be excluded
8 on that basis alone. Fed. R. Evid. 402.

9 For these reasons, the government requests that the Court grant this motion and
10 exclude argument to the jury and the questioning of any witness related to claims
11 alleging defects in the indictment or in the institution of the prosecution of this matter are
12 excluded from trial.

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