UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GARY A. SHAPLEY

and

JOSEPH A. ZIEGLER
Appellants,

v.

DEPARTMENT OF THE TREASURY

and

DEPARTMENT OF JUSTICE,
Agencies.

DOCKET NUMBER
xx-1221-25-xxxx-W-1

DATE: February 27, 2025

INITIAL APPEAL

This individual right of action ("IRA") appeal is for two employees of the Internal Revenue Service ("IRS"), a component of the Department of the Treasury, who were retaliated against for their whistleblower disclosures surrounding the criminal investigation into Hunter Biden.

Gary A. Shapley ("Appellant 1") is an IR-04 Supervisory Special Agent ("SSA") with IRS Criminal Investigations ("IRS-CI") who oversaw the investigation into Hunter Biden. Appellant 1 serves as the supervisor for Joseph A. Ziegler ("Appellant 2"), a GS-13 Special Agent ("SA") with IRS-CI, who initiated the criminal tax investigation into Hunter Biden and served as its case agent. Prior to their work on and protected whistleblower disclosures about the Hunter Biden case, code-named "Sportsman," Appellant 1 and Appellant 2 (collectively "the Appellants") had impeccable records and were both well-known and well-respected within IRS-CI.

Early in 2019, Appellant 2 found that the Delaware U.S. Attorney's Office ("USAO") and the Department of Justice Tax Division ("DOJ Tax") (both collectively "DOJ") handled the Sportsman investigation differently from any other tax investigation he had worked in his now 15 years with IRS-CI. The Appellant disclosed this fact to his IRS-CI supervisor at the time. But

when the Appellant raised these issues with the Delaware USAO and DOJ Tax, it was not welcome.

When Appellant 1 became Appellant 2's manager in January 2020, Appellant 2 disclosed to Appellant 1 that he believed DOJ's handling of the Sportsman investigation was an abuse of authority. When Joe Biden became the Democrats' presumptive presidential nominee in the spring of 2020, DOJ's preferential treatment of Hunter Biden began to look like gross mismanagement. Both Appellants made protected whistleblower disclosures further up the IRS-CI chain of command about DOJ's handling of the case. But that led to Appellant 1's immediate supervisors wanting nothing to do with a case that was sure to be highly scrutinized. They extracted themselves from any meaningful involvement in decision-making or management of the case, resulting in a significant change in duties, responsibilities, and working conditions for Appellant 1 ("Personnel Action 1").

From 2020 to 2022, the Appellants continued to make protected disclosures within IRS-CI about the Sportsman case. Despite the issues with the investigation, by late 2021 the IRS, the Delaware USAO, and DOJ Tax had all agreed on six years' worth of criminal charges against Hunter Biden. But as the case moved from the investigation to the prosecution stage, Delaware U.S. Attorney ("USA") David Weiss had to present the case in two other jurisdictions overseen by USAs appointed by President Biden. The Appellants saw that this activity, known only behind the scenes to investigators and prosecutors on the case, conflicted with Attorney General Merrick Garland's sworn testimony to Congress. Thus, the public impression that no charging decisions were made by appointees of President Biden was false. To the Appellants, this posed a major issue, including possible violations of law, rule, or regulation, that they disclosed to their IRS-CI chain of command. However, their IRS-CI chain of command remained disengaged from the case and failed to act on their protected disclosures.

In August 2022, the Appellants began raising their protected disclosures about the Sportsman case with the Delaware USAO. This culminated in a highly contentious meeting on October 7, 2022, when Appellant 1 made protected disclosures to USA Weiss about the many ways the case had been mishandled. From that point forward, DOJ's relationship with the Appellants changed completely. DOJ sought Appellant 1's communications with his IRS-CI supervisory chain, an unusual move which exposed even more of the Appellants' previously internal protected whistleblower disclosures. USA Weiss complained about Appellant 1 to the

IRS, leading to the IRS passing over Appellant 1 for a detail for which he was clearly the most qualified ("Personnel Action 2"). USA Weiss and DOJ marginalized and isolated the Appellants and demanded that the IRS remove them from the Sportsman case ("Personnel Action 3"). Not only did the IRS agree to remove the Appellants, but it also commenced a cascading series of retaliatory actions against the Appellants—especially after they blew the whistle to multiple inspectors general, to Congress, and to OSC. Taken together, these actions add up to a significant change in duties, responsibilities, and working conditions ("Personnel Action 4"):

(A) Marginalization and isolation of the Appellants;

(B) Removal of the Appellants from the Sportsman investigation;

(C) Reduction in grade from IR-01 to IR-04 of a detail the IRS knew Appellant 1 intended to apply for;

(D) Prevention of Appellant 1 from being considered for various vacancies;

(E) Reductions in Appellant 1's duties and responsibilities with the Joint Chiefs of Global Tax Enforcement ("J5");

(F) Unreasonable scrutiny of and unreasonably delaying or reversing approvals for the Appellants' investigative requests; and

(G) Backdating communications to falsely make Appellant 1 look tardy in his approval requests.

These PPPs require corrective action. Appellant 1 and Appellant 2 filed prohibited personnel practice ("PPP") complaints with the U.S. Office of Special Counsel ("OSC") on May 17, 2023 and June 21, 2023, respectively. Both PPP complaints alleged multiple personnel actions in retaliation for making protected whistleblower disclosures within the IRS and to the Department of Justice ("DOJ"), the DOJ Office of Inspector General ("OIG"), the Treasury Inspector General for Tax Administration ("TIGTA"), and Congress.

FACTS ALLEGED

I. BACKGROUND

Appellant 1

Appellant 1 was hired by the IRS in 2009 as an 1811 criminal investigator in IRS-CI's Washington, D.C. Field Office ("WDCFO"). From January 2013 to January 2018, Appellant 1 was assigned to sit at DOJ Tax as part of its Swiss Bank Program. There, Appellant 1 served as

the case agent on investigations into Credit Suisse and HSBC Switzerland, which resulted in the U.S. government recovering $3 billion tax dollars.[1]

In December 2017 Appellant 1 took on duties as an acting SSA within IRS-CI's WDCFO. In January 2018 Appellant 1 was assigned to IRS-CI's distinguished International Tax and Financial Crimes ("ITFC") group, a team of elite criminal investigative special agents located around the U.S. focusing on complex high-dollar international tax investigations. In April 2018 Appellant 1 was promoted to permanent SSA.

In June 2018, IRS-CI Chief Don Fort selected Appellant 1 to help stand up the J5, a group working on tax enforcement issues with foreign partners Canada, the United Kingdom, the Netherlands, and Australia. Appellant 1's work involved developing governance documents, researching laws to share information with foreign J5 partners, writing up information-sharing criteria, and working closely with foreign partners to develop J5 cases. Appellant 1 also created and evaluated investigative priorities for the J5 and for the ITFC.

In January 2020, Appellant 1 was given the prestigious appointment of SSA over the ITFC. As ITFC SSA, Appellant 1 reported to Assistant Special Agent in Charge ("ASAC") George Murphy, who in turn reported to WDCFO Special Agent in Charge ("SAC") Jackson.

As supervisor of the ITFC, virtually all the J5 tax cases were worked under Appellant 1's supervision. Thus, in 2021 Appellant 1 supervised the resolution of the largest individual tax case in IRS history, which resulted in $550 million in tax dollars being recovered by the U.S. government.[2]

Appellant 1's duties as supervisor of the ITFC also included presenting approximately half of a monthly briefing (colloquially called the J5 "Chief Brief") to the IRS-CI Chief, the J5 Lead, J5 staff, and other senior agency leadership from IRS-CI International Operations (later renamed Global Operations) and the involved field offices. He was also regularly invited through the J5 to speak before such fora as the Australian Criminal Intelligence Commission, the Australian Taxation Office, the Canadian Tax Agency, Her Majesty's Revenue and Customs (United Kingdom), and the Israel Tax Agency.

[1] *See* https://www.justice.gov/archives/opa/pr/credit-suisse-pleads-guilty-conspiracy-aid-and-assist-us-taxpayers-filing-false-returns; https://www.justice.gov/archives/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa.

[2] https://www.justice.gov/archives/opa/pr/founder-russian-bank-pleads-guilty-tax-fraud.

Appellant 2

Appellant 2 was hired by the IRS in 2010 as an 1811 Criminal Investigator in IRS-CI's Atlanta Field Office. From August 2016 through October 2018, Appellant 2 worked a complex captive insurance international tax investigation. During that time with the Atlanta Field Office, Appellant 2 also served as the office's Public Information Officer.

Appellant 2 was assigned to the ITFC in November 2018. As a member of the ITFC, he initially reported to SSA Matthew Kutz in the WDCFO, who in turn reported to ASAC Murphy.

II. WHISTLEBLOWER DISCLOSURES TO IRS

When Appellant 2 started his tenure with the ITFC in November 2018, he was reviewing bank reports as part of an investigation into a global social media company. Those bank reports identified Hunter Biden as paying prostitutes related to a potential prostitution ring and indicated Biden was living lavishly through a corporate bank account.[3] In addition, there was media reporting on Hunter Biden and tax issues in his divorce proceedings with his ex-wife.[4] Thus, Appellant 2 opened a criminal tax investigation into Hunter Biden.

SSA Kutz directed Appellant 2 to prepare an initiation package for DOJ Tax.[5] But when Appellant 2 sent SSA Kutz a package similar to those he would have for any other tax case, SSA Kutz indicated Appellant 2 would need much more evidence than usual "for a political family like this."[6] Appellant 2 believed this was an abuse of authority, and disclosed to SSA Kutz that he believed IRS-CI should treat every taxpayer the same regardless of their last name.[7] After sending SSA Kutz three different initiation packages, SSA Kutz finally approved sending the case to DOJ Tax for review.[8] It was transmitted on April 12, 2019.[9]

While developing the case, Appellant 2 learned in February 2019 that the Delaware USAO had also opened a case into Hunter Biden in conjunction with the Federal Bureau of

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[3] Committee on Ways and Means, U.S. House of Representatives, Interview of Joseph Ziegler (https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-2-Transcript_Redacted.pdf) ("Ziegler Transcript"), at 17.
[4] *Id.*
[5] *Id.* at 18.
[6] *Id.* at 18–19.
[7] *Id.* at 19.
[8] *Id.*
[9] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T27-Exhibit-206-HWM-DOJ-Tax-Provided-Timeline-OIG-Email-04.15.2019_Redacted.pdf.

Investigation ("FBI").[10] When Appellant 2 sent the initiation package to DOJ Tax, DOJ's first feedback was that the IRS's tax case should be joined with the Delaware USAO's case.[11] Appellant 2 pointed out that they could not bring tax charges in Delaware, as the proper venue for those would be in Washington, D.C. or California, the two locations Hunter Biden resided and should have filed his taxes in.[12] Further, assigning the case to a small state like Delaware created significant potential additional conflicts of interest, as investigators and prosecutors on the team knew the Biden family.[13] That potential was exacerbated on April 26, 2019, when former Vice President Joe Biden announced his candidacy in the presidential primaries. Still, on April 29, 2019, Appellant 2 was informed DOJ had made a final decision to assign Appellant 2's Hunter Biden tax case to the Delaware USAO.[14] When the cases were joined in May 2019, Appellant 2 learned the FBI had code-named its case "Sportsman."[15] Through the duration of the investigation and prosecution, Appellant 2 and those assigned within IRS-CI were in close contact with FBI investigators, the Delaware USAO prosecutors, and DOJ Tax prosecutors (collectively "prosecution team").

Appellant 2 also soon learned that merging the two cases would have other implications. According to the Internal Revenue Manual ("IRM"), Section 9.5.1.2.1.1 (3) (Interview with Subjects of Investigations):

> In most administrative Title 26 or tax-related Title 18 investigations, the subject should be contacted for an initial interview to confront him/her with the allegations and to identify potential defenses or other weaknesses in the case before making further investigative contacts. Contact with the subject should be made within the first 30 days of numbering a subject criminal investigation. A decision not to contact the subject should be documented in management's investigation review files. The initial interview of the subject may take place at the same time as the initial interview with the return preparer and the accountant.

When Appellant 2 requested to follow the normal IRS-CI procedures of interviewing Hunter Biden, putting him on notice regarding his unfiled tax returns and unpaid tax liabilities, DOJ

[10] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T27-Exhibit-206-HWM-DOJ-Tax-Provided-Timeline-OIG-Email-04.15.2019_Redacted.pdf.
[11] Ziegler Transcript at 19.
[12] *Id.* at 19–20.
[13] *Id.* at 20.
[14] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T28-Exhibit-207-HWM-Email-SSA-Referral-04.29.2019_Redacted.pdf.
[15] Ziegler Transcript at 19–20.

rejected the request. Appellant 2 repeated the request so many times DOJ attorneys would get visually upset with him.[16]

When Appellant 1 became the ITFC supervisor in January 2020, Appellant 2 made protected disclosures to Appellant 1 about how the case had been handled. And when former Vice President Joe Biden became the presumptive Democrat nominee for President in April 2020 and DOJ continued to further slow-walk the Sportsman investigation, the Appellants made protected disclosures together to their IRS-CI chain of command. For example, the Appellants had a June 16, 2020 telephone call with ASAC Murphy, SAC Jackson, and DFO Robnett. According to Appellant 1's notes, he stated on the call: "DOJ Tax has made a concerted effort to drag their feet concerning conducting search warrants and interviewing key witnesses in an effort to push those actions to a timeframe where they can invoke the Department of Justice rule of thumb concerning affecting elections."[17] The Appellants also noted that if typical IRS procedures had been followed in the Sportsman case, they would have already executed search warrants, conducted interviews, and served document requests. The IRS-CI supervisors communicated in the June 16, 2020 phone call that the Appellants should defer to DOJ on these decisions, notwithstanding IRS protocols.[18]

The Appellants continued to make protected disclosures to their IRS-CI chain of command in phone calls, emails, and meetings. For example, the Appellants disclosed to their chain of command that when the FBI sent DOJ a search warrant in early August 2020 as part of its Foreign Agents Registration Act investigation, Delaware USAO Assistant U.S. Attorney ("AUSA") Lesley Wolf emailed: "[S]omeone needs to redraft attachment B. . . . There should be nothing about Political Figure 1 [former Vice President Biden] in here."[19]

One month later, in a September 3, 2020 prosecution team phone call, AUSA Wolf and DOJ Tax attorneys discussed removing Hunter Biden's name from electronic search warrants and several document requests. Appellant 2 disclosed on the call that he believed removing the

[16] *Id.* at 21–22.
[17] Committee on Ways and Means, U.S. House of Representatives, Interview of Gary Shapley (https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-1-Transcript_Redacted.pdf) ("Shapley Transcript"), at 17.
[18] *Id.* at 13.
[19] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T23-Exhibit-202-HWM-Email-BS-Warrant-08.07.2020_Redacted.pdf; *see also* https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T24-Exhibit-203-HWM-Draft-of-BS-Warrant_Redacted.pdf.

subject's name was unethical, and he was uncomfortable doing it.[20] Still, DOJ Tax attorneys said they would still be able to get "most" of the information they sought even without using Hunter Biden's name.[21] The Appellants disclosed this to their IRS-CI chain of command.

Appellant 1 attempted to get his chain of command involved with these issues. On October 2, 2020, AUSA Wolf emailed Appellant 2 regarding a date for interviewing Hunter Biden:

> Spoke with David [Weiss] this morning, who seemed comfortable with a date of around 11/17- which is consistent with what we talked about yesterday. He understands you are comfortable with that, but I mentioned discussing it with your SAC as well to confirm agency position. Kelly can reach out to him or he will give her a call to do so.[22]

Appellant 1 forwarded the email to ASAC Murphy:

> There has been some discussion that the USAO is uncomfortable with conducting the subject interview of Sportsman while he is in Delaware (this is a possibility if conducted closer to Thanksgiving on 11/26). With that being said I think our position should be to try to make these interviews happen preferably 11/12 or 11/13 with a fallback position being 11/16 or 11/17. I don't think it is of any operational benefit to extend these dates any further than they have already.
>
> So SAC Jackson can call USA Weiss or, according to the email below, USA Weiss will call SAC Jackson. If SAC Jackson does not receive a call and does not want to call please let me know and I will provide our position, explained above, to the USAO.[23]

SAC Jackson did not, in fact, want to receive a call, and the discussion between USA Weiss and SAC Jackson never took place. It became clear to the Appellants that despite (or perhaps because of) the issues with DOJ, ASAC Murphy and SAC Jackson did not want to be a part of day-to-day decisions in the Sportsman case, which as a high-profile case bound to invite eventual scrutiny had the potential for detrimental impact to their careers. Appellant 1 became the IRS's chief point of contact for USA Weiss and the chain of command at the Delaware USAO and, with few exceptions, was usually the highest-level IRS-CI official engaging with IRS partners on the Sportsman investigation. This left him with all responsibility for the case—

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[20] https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-1-Transcript_Redacted.pdf at 128–29.

[21] Ziegler Transcript at 25–26; Shapley Transcript at 15.

[22] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T85-Shapley-3_Attachment-4_WMRedacted.pdf.

[23] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T85-Shapley-3_Attachment-4_WMRedacted.pdf.

but none of the authority. Overall, Appellant 1's IRS-CI supervisors refusing to engage on the Sportsman case significantly increased Appellant 1's duties and responsibilities ("Personnel Action 1").

As the Appellants continued to experience issues with DOJ, Appellant 1 began thoroughly documenting these issues so Appellant 2 would not need to, as Appellant 2's communications would be subject to discovery. Appellant 1 ensured that he made protected disclosures of the issues to his supervisors including in the regular "Monthly Significant Case Report" ("SCR") he transmitted up through his chain of command to the IRS-CI Chief.

II. PRESIDENTIAL ELECTION AND GOING OVERT

On October 14, 2020, the *New York Post* reported publicly on Hunter Biden's laptop.[24] On October 19, 2020, Appellant 1 emailed Assistant U.S. Attorney ("AUSA") Lesley Wolf, the Delaware USAO lead on the Sportsman case:

> We need to talk about the computer. It appears the FBI is making certain representations about the device and the only reason we know what is on the device is because of the IRS-CI affiant search warrant that allowed access to the contents. If Durham also executed a search warrant on the device we need to know that so my leadership is informed. My management has to be looped into whatever the FBI is doing with the laptop. It is IRS-CI's responsibility to know what is happening.[25]

A meeting to discuss the laptop was scheduled for October 22, 2020.[26] In the three-hour meeting, investigators asked to see the items on the laptop, which they would need to testify to as part of the investigation. AUSA Wolf responded that this was a "historical review," and that they could discuss later what access investigators had.[27] AUSA Wolf also laughed as she said a lot of people were going to be asking for the laptop.[28]

The prosecution team had its regular meeting following the laptop meeting. For some time prior, AUSA Wolf had in earlier prosecution team phone calls that the Pittsburgh USAO had requested to brief the Delaware USAO's Hunter Biden investigative team on multiple occasions, but that AUSA Wolf had refused the briefing because she did not want to receive the

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[24] https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad.
[25] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T86-Shapley-3_Attachment-5_WMRedacted.pdf.
[26] *See* Shapley Transcript, Exhibit 6.
[27] *Id.* at 3.
[28] *Id.*

information. But in the October 22, 2020 prosecution team call, AUSA Wolf stated that the Principal Deputy Attorney General had *ordered* the Delaware USAO to receive the briefing from the Pittsburgh USAO, and that it had been scheduled for October 23, 2020.[29]

In the same phone call, AUSA Wolf told the prosecution team that USA Weiss had reviewed the IRS's draft physical search warrant for Hunter Biden's residences, including the Biden guest house in Delaware where Hunter Biden had resided for a time. AUSA Wolf said USA Weiss agreed the IRS had identified enough evidence to provide probable cause for the warrant. Nevertheless, she stated USA Weiss had not approved the investigative team executing the warrant.[30]

Soon thereafter, Appellant 1 and IRS-CI SA James Havrilla had a phone call with SAC Jackson in late October 2020 in which Appellant 1 attempted to make a number of protected disclosures about the Delaware USAO's handling of the case. Yet when Appellant 1 told SAC Jackson that Chief Lee needed to be briefed on these issues, SAC Jackson responded that Chief Lee did not need to know any details. When Appellant 1 indicated SAC Jackson should at least be aware of the information, she responded: "I do not want to know anything I don't need to know." SAC Jackson told Appellant 1 in the phone call that Appellant 1 should be the one communicating about the case with USA Weiss going forward.[31] Appellant 1 interpreted this to mean that SAC Jackson believed the less information she knew about problems with a high-profile matter like this one, the less there was a chance that such problems could negatively affect her career.[32]

The presidential election took place on November 3, 2020. The following Monday, November 9, SAC Jackson emailed Appellant 1 to convey a request from IRS-CI Deputy Chief Robnett for a one-page summary of the Biden investigation for the IRS Deputy Commissioner.[33] The case summary read in part: "To date no proactive interviews have occurred as a result of

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[29] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 2.
[30] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T87-Shapley-3_Attachment-6_WMRedacted.pdf.
[31] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 2–3.
[32] *Id.*
[33] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T88-Shapley-3_Attachment-7_WMRedacted.pdf; https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T89-Shapley-3_Attachment-8_WMRedacted.pdf.

guidance provided to the investigative team by the USAO in Delaware, DOJ Tax PDAG and the Deputy Attorney General's office."[34]

The next day, on November 10, 2020, USA Weiss informed the prosecution team that overt interviews would be further delayed because the presidential election was being contested.[35]

The Delaware USAO ultimately approved overt interviews for a "day of action" on December 8, 2020. In preparation for the day of action, the prosecution team had a 12-hour meeting at the Delaware USAO's office on December 3, 2020. USA Weiss came in and out of the meeting. In the meeting, investigators shared with prosecutors their interview outlines for some of the various witnesses they planned to interview on the day of action. Regarding an email that read "Ten held by H for the big guy," investigators had questions on their outline about the identities of H and the "big guy" as well as the clearly tax-related question of why this percentage was to be held separately, with the association hidden. Yet AUSA Wolf interrupted and informed investigators they were not allowed to ask questions about President-Elect Biden. When multiple people in the room spoke up and objected that these questions were critical to the IRS and FBI investigations, AUSA Wolf replied that there was no "specific criminality" to that line of questioning.[36]

Appellant 1 and FBI SSA Joseph Gordon were assigned to conduct the interview of Hunter Biden and arrived in Los Angeles before the December 8, 2020 day of action. Because Hunter Biden had recently been assigned Secret Service protection, Appellant 1 and SSA Gordon went into the Los Angeles FBI Field Office and understood the Los Angeles FBI SAC would contact the Secret Service SAC to let him know the FBI SAC would be calling with some important information in the morning. The plan was for the FBI SAC to inform the Secret Service SAC that investigators would be arriving shortly to attempt to interview Hunter Biden.[37]

Instead, on December 7, 2020, ASAC Murphy called Appellant 1 to inform him FBI headquarters had notified Secret Service headquarters—as well as the Biden presidential

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[34] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T90-Shapley-3_Attachment-9.pdf.
[35] Shapley Transcript at 17–18.
[36] *Id.* at 18.
[37] *Id.* at 117; Committee on Oversight and Accountability, U.S. House of Representatives, Interview of Joseph Gordon (https://oversight.house.gov/wp-content/uploads/2023/08/FBI-SSA-Transcribed-Interview-Transcript.pdf) ("Gordon Transcript"), at 31–33.

transition team.[38] On December 8, SSA Gordon's ASAC called to inform him that SSA Gordon and Appellant 1 wouldn't even be allowed to approach the house where Hunter Biden was staying.[39]

In the one interview investigators were able to complete on the day of action, investigators that when Hunter Biden closed his Washington, D.C. practice and moved to California, he moved all of his financial records into a storage unit in Northern Virginia.[40] Through intensive investigation, IRS-CI investigators already had probable cause to believe Hunter Biden had filed false returns with the IRS for 2014, attempting to hide the income from his million-dollar board agreement with Ukrainian energy company Burisma.[41] In such a case it was critically important to access independent documents and not rely on a subject who had already attempted to deceive the IRS. Accordingly, that night Appellant 2 emailed the prosecution team with a draft search warrant for the storage unit, writing:

> I'm happy we had a draft of this. I kept the computer language in the warrant in case there are electronic devices at the site (since he literally moved his entire office) – CD's DVDs, flash drives, etc.
>
> We will work to get this approved ASAP on our end so please communicate your thoughts. I would like to possibly execute this sometime next week (I think that is reasonable given the upcoming holiday).[42]

Yet in a phone call on Friday, December 11, 2020, AUSA Wolf communicated to Appellant 2 that the Delaware USAO and DOJ Tax had decided that a request for documents already issued to Hunter Biden's counsel was sufficient. Appellant 2 pointed out that this would allow the subject to decide which records he wanted to turn over, and disclosed that this was a significant deviation from IRS-CI investigative practice. When AUSA Wolf was not moved, Appellant 2 proposed not letting Hunter Biden's counsel know investigators had learned of the storage unit, and if the storage unit was not accessed within 30 days showing Hunter Biden's good faith effort to comply with the document request, then executing the search warrant on the

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[38] Shapley Transcript at 117–18; Gordon Transcript at 33, 40.
[39] *See also* Gordon Transcript at 34.
Committee on Oversight and Accountability, U.S. House of Representatives, Interview of Joseph Gordon (https://oversight.house.gov/wp-content/uploads/2023/08/FBI-SSA-Transcribed-Interview-Transcript.pdf) ("Gordon Transcript"), at 34.
[40] Ziegler Transcript at 26, Shapley Transcript at 21, 114–15.
[41] Ziegler Transcript at 62, 91; Shapley Transcript at 25.
[42] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T25-Exhibit-204-HWM-Email-Storage-Unit-12.09.2020_Redacted.pdf.

storage unit. AUSA Wolf responded that she was worried about what this might do to the relationship with opposing counsel.[43]

Appellant 2 then disclosed to AUSA Wolf that it appeared to him prosecutors were inappropriately more worried about litigation against them than in properly executing the investigation. AUSA Wolf responded that if Appellant 2 had these views, she had concerns about working with Appellant 2 moving forward and might need to address that with IRS-CI upper management. Appellant 2 told AUSA Wolf he did not mean to offend her, but provided evidence of why the approach to this case deviated from IRS-CI standard practice. AUSA Wolf told Appellant 2 he didn't understand how much effort it took just to get the overt day of action accomplished that week. Appellant 2 reiterated that he did not want to have a bad relationship with the Delaware USAO, but believed it was important that there be an environment where he could disclose issues as he saw them.[44]

The contentious call ended with AUSA Wolf saying she would think about Appellant 2's proposal to not tell opposing counsel about the storage unit and to execute the search warrant in a month if the storage unit hadn't been accessed.[45] After the call, Appellant 2 immediately disclosed the conversation to Appellant 1 and requested that his IRS-CI chain of command support pursing the search warrant per standard IRS-CI investigative practice.[46]

When Appellant 1 requested that SAC Jackson join a call with USA Weiss to communicate this request as a united front from IRS-CI she seemed annoyed, and acted as though her needing to be involved with the case represented a failure on the Appellants' part. In the call that day between Appellant 1, SAC Jackson, and USA Weiss, Appellant 1 made the case the storage unit search warrant was a critical investigative step, especially if it became clear that Hunter Biden was not taking his own steps to gather the required documents. USA Weiss agreed that prosecutors would not inform Hunter Biden's counsel about the storage unit, and would allow investigators to execute the search warrant in a month if the storage unit hadn't been accessed.[47]

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[43] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T26-Exhibit-205-HWM-JAZ-Storage-Unit-Notes-Dated-12.20.2020_Redacted.pdf; *see also* Ziegler Transcript at 28.
[44] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T26-Exhibit-205-HWM-JAZ-Storage-Unit-Notes-Dated-12.20.2020_Redacted.pdf; *see also* Ziegler Transcript at 28–29.
[45] *Id.*
[46] Ziegler Transcript at 28; Shapley Transcript at 21.
[47] Shapley Transcript at 21, 115.

But less than an hour after the phone call between IRS-CI and USA Weiss, the Appellants learned AUSA Wolf had simply informed Hunter Biden's counsel of the storage unit, undermining the investigative plan USA Weiss had agreed to.[48] The Appellants disclosed to their chain of command that they believed this was inappropriate.[49] SAC Jackson agreed she would talk to the DFO about the issue, and on Monday, December 14, 2020, ASAC Murphy forwarded Appellant 1 an email from SAC Jackson indicating that she had a call scheduled with the DFO and Deputy Chief Robnett "about the frustration of the USAO not allowing us to go forth with the S[earch] W[arrant]."[50] However, as far as the Appellants are aware, IRS-CI leadership had no further contact with DOJ regarding the issue. The Appellants never learned whether records from the storage unit were included with what Hunter Biden provided to the government.[51]

In Appellant 1's SCR to his IRS-CI chain of command at the end of the month, he recounted:

> Leading into the day of action the team was aware of a storage unit that held personal and business financial and tax records. The one person interviewed on the day of action confirmed the storage unit and provided more than enough probable cause to obtain a search warrant to seize the records related to this investigation from the storage unit. Without including the IRS, the Delaware USAO unilaterally decided not to conduct a search warrant on this location[,] instead deciding to inform defense counsel for Sportsman about the storage unit and requesting they hand over the documents in good faith . . . .
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> * * *
>
> This investigation has been hampered and artificially slowed by various claims of potential election meddling. Even after the election, our day of action to go overt was delayed by more than two weeks. The FBI is a partic[i]pating agency that is forcing decisions upon IRS-CI even though the only viable charges are currently tax charges. The USAO and FBI received congressional inquiries concerning this investigation and have repeatedly ignored their requests, openly mocking the members of [C]ongress who made the requests. It appears that someone at DOJ leaked information to the media after our day of action.[52]

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[48] *Id.*

[49] *See, e.g.*, Ziegler Transcript at 28–29; *see also* https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/A2-final-of-affidavit-2-ziegler-8-22-2023.pdf at 2.

[50] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T92-Shapley-3_Attachment-11_WMRedacted.pdf.

[51] Shapley Transcript at 22.

[52] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T91-Shapley-3_Attachment-10_WMRedacted.pdf.

III. INVESTIGATING DURING BIDEN PRESIDENCY

IRS-CI management's abdication of responsibility and Appellant 1's increased responsibilities to make decisions in the case and communicate with the IRS's partners took on additional significance with the inauguration of President Biden and officials appointed by him taking the helm of DOJ and the IRS.

On January 20, 2021, a colleague of Hunter Biden's defense counsel was appointed Acting Assistant Attorney General for DOJ's Criminal Division—a potential conflict that received media attention[53] and congressional scrutiny.[54] Within IRS-CI, Appellant 2 emailed the Delaware USAO on January 26, 2021 to ask for the filter terms which had been used to determine which of the materials produced to the Delaware USAO under warrant were relevant to the IRS-CI investigation and in turn produced to investigators.[55] Appellant 2 realized from the terms provided no variations of Joseph Biden's name or of his known aliases were being used to identify relevant documents, despite the Appellants believing relevant documents involved the now-President.[56]

On February 17, 2021, a Member of Congress sent then-Judge Garland, President Biden's nominee to serve as Attorney General, a letter which was reported in the media:[57]

> I write to request that, during your Senate confirmation hearings, you commit to keeping David C. Weiss as the United States Attorney for the District of Delaware until his office completes its investigation into Hunter Biden. . . . This probe is critical to defending the integrity of our republic and ensuring the Biden Administration will not be the subject of undue foreign influence. . . . This investigation must be transparent and impartial so that all Americans have faith in the results, whatever they may be.[58]

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[53] https://www.washingtonexaminer.com/news/1195295/tucker-carlson-reports-doj-hired-ex-business-partner-of-hunter-biden-criminal-defense-attorney; https://www.axios.com/2021/02/02/hunter-biden-ex-colleague-doj-job; https://nypost.com/2021/02/02/new-doj-hire-is-a-former-associate-of-hunter-bidens-lawyer; https://www.foxnews.com/politics/doj-official-former-colleague-hunter-biden-defense-attorney.

[54] https://www.grassley.senate.gov/imo/media/doc/2021-02-03%20CEG%20RHJ%20to%20DOJ%20(McQuaid).pdf.

[55] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T54-Exhibit-315A-Filter-Review-Keywords-Email-01.26.2021_Redacted.pdf.

[56] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/A3-NEW-Affidavit-3-for-HWM-Committee-v09.08.2023.pdf at 6.

[57] https://www.washingtontimes.com/news/2021/feb/18/ken-buck-demands-merrick-garland-keep-prosecutor-i; https://www.theepochtimes.com/us/ag-nominee-asked-not-to-replace-us-attorney-handling-hunter-biden-case-3700674.

[58] https://s3.documentcloud.org/documents/20485526/rep-buck-letter-to-merrick-garland.pdf.

The Appellants already had ample cause to feel the Sportsman investigation was, in fact, *not* being conducted in a transparent and impartial manner. Appellant 1 scheduled for Appellant 2 and a new secondary case agent, ITFC member SA Christine Puglisi ("Co-Case Agent"), to brief new IRS-CI WDCFO SAC Darrell Waldon and DFO – South Michael Batdorf on the case on March 2, 2021. Appellant 1 informed them of such problems as DOJ blocking IRS-CI from obtaining physical search warrants and denying requests to speak with certain witnesses.[59] But when the Appellants indicated in the briefing that DOJ's misconduct had been egregious enough that they might need to blow the whistle outside of the IRS, SAC Waldon visibly disengaged from the conversation.[60]

Around this time frame, Appellant 1 was selected as an Acting ASAC in IRS-CI's New York Field Office ("NYFO"). However, as SAC Waldon steered clear of the Sportsman case, IRS-CI decided to have Appellant 1 continue to supervise it. Appellant 1, in theory, was to report to SAC Waldon on the case, but SAC Waldon engaged only minimally with the case moving forward, thus continuing the IRS's imposition of additional duties and responsibilities upon Appellant 1 after his protected disclosures.[61]

During his second month as Acting New York ASAC, Appellant 1 wrote in the SCR for May 2021 that went through SAC Waldon and DFO Batdorf up to IRS-CI Deputy Chief Robnett and Chief Lee:

> This investigation has been hampered and slowed by claims of potential election meddling. Even after the election, the day of action was delayed by more than two weeks. . . . [I]t appears there may be campaign finance criminal violations. AUSA Wolf stated on the last prosecution team meeting that she did not want any of the agents to look into the allegation. She cited a need to focus on the 2014 tax year, that we cannot yet prove the allegation beyond a reasonable doubt and that she does not want to include their Public Integrity unit because they would take authority away from her. We do not agree with her obstruction on this matter. The assigned AUSA does not like dissenting opinions. The USAO and FBI have received congressional inquiries concerning this investigation and it's believed they have ignored their requests.[62]

[59] *See, e.g.*, Batdorf Transcript at 104–05.
[60] Shapley Transcript at 21.
[61] *Id.*
[62] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T95-Shapley-3_Attachment-14_WMRedacted.pdf.

In the months following, Appellant 1 began compiling with Appellant 2 and the Co-Case Agent an actual list of irregularities in the Sportsman investigation. Appellant 1 also disclosed to DFO Batdorf that he was keeping such a list.

Prosecutors requested that Appellant 2 aim to finalize a prosecution report by the end of 2021 with IRS-CI's recommended charges for Hunter Biden. To finalize IRS-CI's investigation, on September 9, 2021, Appellant 2 emailed the prosecution team: "Attached are these document requests for interviews I'm planning to do that are out of town."[63] AUSA Wolf whittled down the CC list to Delaware USAO and DOJ tax and replied after the close of business that day: "I do not think that you are going to be able to do these interviews as planned." She indicated they required approval from DOJ Tax, all the way up to Acting Assistant Attorney General for Tax Stuart Goldberg, and that they had other priorities.[64]

In response to AUSA Wolf's email, Appellant 1 emailed DOJ Tax Counsel Jason Poole the morning of September 10, 2021: "Do you have time for a quick call. Re: Sportsman. I wanted to get your perspective and attempt to get some of these planned interviews completed next week in lieu of postponing them."[65] When Poole was unable to talk until later that afternoon, Appellant 2 emailed AUSA Wolf:

> I had planned stuff like this weeks in advance to prevent this from happening. I had brought up these interviews on multiple occasions dating back to August 18th, and now we are being prevented from doing it 4 days before. This is making it difficult for me in doing my job. I don't understand why DOJ-Tax Senior Management is needing to approve and/ or witness interviews and maybe this is a conversation that needs to be had at a higher level.
>
> I can push these interviews off, just know that I am trying to do as much as I can to plan and get the tasks handed down to me accomplished in a timely manner, in effort to ultimately finish the pros report.
>
> I discussed with Mark [Daly] that the interviews we have planned for the end of the month should be a priority as they relate to a former employee, previous business partners, and some of the 2018 Expenditures.[66]

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[63] Ziegler Transcript at 29.
[64] *Id.*; *see also* https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/A2-final-of-affidavit-2-ziegler-8-22-2023.pdf at 3–4.
[65] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T96-Shapley-3_Attachment-15_WMRedacted.pdf.
[66] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T29-Exhibit-208-HWM-Email-w-Lesley-Wolf-09.10.2021_Redacted.pdf.

Appellant 1 discussed the issue with DOJ-Tax Counsel Poole that afternoon, and confirmed that Appellant 2 had to cancel his IRS-CI approved travel from Atlanta to Washington, D.C. to conduct the interviews.

The cancellations impacted Appellant 2's administrative work within IRS-CI, where Appellant 1 was only his supervisor for the purposes of the Sportsman case and all other requests (including administrative requests) had to be approved through his normal chain of command. When Appellant 2 informed supervisors on September 20, 2021 that he now intended to conduct the interviews the following week, Acting ASAC David Denning—Appellant 2's day-to-day supervisor for everything other than the Sportsman case while Appellant 1 served as the Acting NYFO ASAC—ASAC Denning indicated rescheduling the travel might require filling out a new travel form and going through an approval process again, which had not been past IRS-CI practice for delayed interviews. More significantly, ASAC Denning questioned whether Appellant 2's travel even made sense at all, asking for assurances that prostitutes would be at specific addresses. Appellant 2 responded to ASAC Denning in a lengthy email, copying the Sportsman Co-Case Agent:

> I've looked through my timeline of Events. This trip changed because our first two trips in the beginning of September were canceled . . . . (Our detailed witness list is attached with status). This is all in preparation of me finishing the prosecution report by the end of 2021 and I have been maintaining a schedule in order to do so. This was also discussed in detail at the Chief Briefing, in which I detailed all of the travel that needed to be done in completing the case. I am trying to keep multiple people on the same page and do everything that I can to complete these planned interviews and to-do items.
>
> * * *
>
> As far as this trip, I do not feel comfortable in sending out collaterals and having others involved in this investigation. Some of these individuals could be prostitutes (some are even his prior employees), and locating them could be a challenge, and I will do all I can in preparing to find them. This is what I do in locating all witnesses in all of my cases. The level of assurance you are requesting is not standard operating procedure and I don't think it's something we can accomplish in this specific investigation. We have done a good job of keeping our circle small and I know that the prosecution team wants to keep it that way. We are not and have not sent collaterals related to this case as requested by DOJ and the US Attorney's Office.
>
> A few weeks ago, DOJ-Tax was a roadblock in the investigation, and some interviews were postponed because they weren't ready.
>
> * * *

> These interviews are already planned for next week, and I would hope that you reconsider the request . . . .[67]

ASAC Denning emailed back:

> I think you hit the nail on the head . . . , these witnesses may be hard to find. We want more assurance your efforts will be productive. If you don't want to have a collateral done, what ideas do you have because we are not approving it as is for Los Angeles due to that fact.[68]

As ASAC Denning and Appellant 2 went back and forth, Appellant 2 explained: "The US attorney as well as DOJ-Tax do not want us getting others involved and have asked multiple times that we keep the investigative circle small. If you [or] Darrell [Waldon] still see this as an issue, please call my cell so that we can work this out."[69]

When ASAC Denning again pushed back, Appellant 2 forwarded the exchange to DFO Batdorf that evening:

> So I thought that I was going to be able to get a victory and that DOJ-Tax was going to be my only hurdle (See below).
>
> Again, I hate to bother you with this, I'm almost at the end of my rope and I think I'm at the point again where I need your help. I have a ton of interviews and travel planned and scheduled for the next 3 months, keeping on a timeline is extremely important and I don't want this to continue to be a problem. I don't mind the questions from management, but it feels like they are not listening to me. I'm just trying to get the job done efficiently and expeditiously so I have the best work product for CI.
>
> I don't want to put some details in this email, so can you give me a call at some point tomorrow to discuss?
>
> I'm CC'ing Shapley only because I've briefed him on what has happened and because he's been my management on this case since day 1.[70]

Meanwhile, later that evening of September 20, 2021, DOJ Tax Counsel Daly finally sent Appellant 2 an email with the subject line: "Emails sent to management with list of ten document requests to be served[.]"[71] The body of the email read simply: "Asked whether they object[.]"[72] Appellant 2 responded almost immediately: "You are the man!! Thank you. I'll fill you in

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[67] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T68-Exhibit-507-Batdorf-Email-Regarding-Coming-to-him_Redacted.pdf.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Ziegler Transcript at 30.
[72] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T30-Exhibit-209-HWM-Case-agent-frustration-09.20.2021_Redacted.pdf.

tomorrow on my issues. I'm almost at the end of my rope and I'm sick of fighting to do what's right."[73]

By the end of the week, AUSA Wolf indicated the interviews had still not been approved by DOJ Tax. Appellant 1 emailed DOJ Tax Counsel Poole the afternoon of Friday, September 24, 2021:

> Following up on our last discussion; [sic] I have agents ready to travel on Sunday to conduct witness interviews. The AUSA said she cannot give the final [redacted] until DOJ Tax approves them. Is this accurate? That was not my understanding after we spoke.
>
> [Hoping] there is some miscommunication and we can get these tasks completed as scheduled.[74]

Altogether, Appellant 1 had multiple phone calls with Poole about the issue before DOJ Tax Acting Assistant Attorney General Goldberg approved the document requests.[75]

In October 2021 the entire prosecution team met and agreed on what charges the IRS-CI prosecution report should include, and Appellant 2 began drafting the report.[76]

In November 2021 Appellant 1 was selected for a not-to-exceed ("NTE") one-year position as ASAC of IRS-CI's Chicago Field Office, with a possibility of being selected as the permanent Chicago ASAC. Appellant 1 would fill the position remotely, beginning in December 2021. The WDCFO would also have a new ASAC start at the same time, Lola Watson. However, as an ASAC, Appellant 1 would continue to supervise the Hunter Biden case, rather than ASAC Watson. Further, because SAC Waldon continued to be absent from the case and left those duties and responsibilities to Appellant 1, Appellant 1 met directly with DFO Batdorf in November 2021 to discuss the case. In the meeting, Appellant 1 made further protected disclosures to DFO Batdorf about the handling of the case.[77] For example, Appellant 1 discussed the Appellants and the Co-Case Agent had assembled of irregularities in the case.

On December 20, 2021, AUSA Wolf emailed the entire prosecution team:

> [J]ust wanted to take a moment to thank you for all of your work on this investigation over the last year. We've been able to accomplish so much only because of our efforts as a group (with extra credit to Joe Z, of course) and look

[73] *Id.*
[74] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T96-Shapley-3_Attachment-15_WMRedacted.pdf.
[75] Shapley Transcript at 107.
[76] Ziegler Transcript at 32–33.
[77] Shapley Transcript at 22.

> forward to seeing where 2022 takes us. Your professionalism, dedication, and at times much needed senses of humor are greatly appreciated.[78]

On February 25, 2022, IRS-CI sent the prosecution report to DOJ Tax and the Delaware USAO.[79]

IV. BIDEN APPOINTEE CONFLICTS OF INTEREST

On March 14, 2022, DOJ prosecutors had a taxpayer conference with Hunter Biden's defense counsel.[80] Investigators were not permitted to join the meeting.[81]

At the end of March 2022, the Delaware USAO presented the case for the 2014 and 2015 charges to the District of Columbia ("DC") USAO. Once again, the IRS investigators were not permitted to attend. Nevertheless, sometime in the week of March 28, 2022, DOJ Tax Senior Litigation Counsel Mark Daly called Appellant 2 and said the First Assistant USA at the DC USAO was optimistic about the case when they presented it and would assign an AUSA to assist.[82]

But then on March 31, 2022, a reporter asked White House Communications Director Kate Bedingfield at a press briefing:

> During the last presidential debate, then-Vice President Biden was asked if there was anything inappropriate or unethical about his son's relationships, business dealings in China and/or Ukraine. The President said, "Nothing was unethical." He went on to say, "My son has not made money in terms of this thing about, what you're talking about, China." Does the White House stand by that comment that the then-Vice President made?

Bedingfield replied: "We absolutely stand by the President's comment. And I would point you to the reporting on this, which reference statements that we made at the time that we gave to the Washington Post, who worked on this story."[83]

Soon thereafter, DOJ Tax Counsel Daly called Appellant 2 and told him that after DC USA Matthew Graves (appointed by President Biden) had reviewed the case, the DC USAO did

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[78] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T21-Exhibit-200-HWM-Email-LW-Praise-12.20.2021_Redacted.pdf.

[79] Ziegler Transcript at 34.

[80] *Id.*

[81] *Id.* at 82–83.

[82] Shapley Transcript at 24, 65, 153; Ziegler Transcript at 36.

[83] https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/03/31/press-briefing-by-director-of-communications-kate-bedingfield-and-nec-director-brian-deese.

not support bringing the 2014 and 2015 charges.[84] Then, on April 3, 2022, White House Chief of Staff Ron Klain declared on ABC's *This Week* news program that President Biden was confident his son didn't break the law.[85] Appellant 1 believed USA Graves had a clear conflict of interest and should have recused himself from reviewing the case.[86] Appellant 1 disclosed these issues to his IRS-CI chain of command.

Sometime in March or April 2022, the Delaware USAO requested from the IRS all management-level communications about the Hunter Biden case. Appellant 1 discussed this request with DOJ Tax Counsel Daly several times in April 2022. Appellant 1 raised that this was an unusual request, since Appellant 1 was not a potential witness and any exculpatory evidence would have been provided to DOJ by Appellant 2 and Co-Case Agent. Still, Appellant 1 produced to the Delaware USAO his SCRs going back to January 2020, which included various protected disclosures to Appellant 1's IRS-CI chain of command regarding the Hunter Biden case—many of them protected disclosures about the Delaware USAO's own misconduct. Since Appellant 1 never heard anything back from DOJ about the discovery materials and his whistleblower disclosures in them, Appellant 1 assumed no one at DOJ read the materials at that time.[87]

On April 26, 2022, Attorney General Garland appeared before the Senate Committee on Appropriations. In the hearing, Senator Bill Hagerty asked Garland: "I want to ask you how the communications have worked within your Department and with the White House on this. First, have you been briefed on the Hunter Biden investigation matter yourself?" Garland responded: "[USA Weiss] is supervising the investigation, and I'm not at liberty to talk about internal Justice Department deliberations, but he is in charge of that investigation. ***There will not be interference of any political or improper kind***." (Emphasis added.) Senator Hagerty asked: "Are any senior officials in your Department being briefed?" Garland simply replied that "the normal processes of the Department occur" and again noted that USA Weiss was the supervisor of the investigation. Senator Hagerty then noted:

> Earlier this month, White House Chief of Staff, Ron Klain, stated on national television that quote, "the President is confident that his son didn't break the law,"

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[84] Shapley Transcript at 24, 55, 66, 100–02, 153; Ziegler Transcript at 36–37, 111, 153, 158; *see also* https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 3.
[85] https://abcnews.go.com/Politics/week-transcript-22-white-house-chief-staff-ron/story?id=83832024.
[86] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 3.
[87] Shapley Transcript at 26-27.

> and the White House Communications Director said that President Biden maintains his position that his son did nothing that was unethical. This is on national television. The President's already told his subordinates, clearly—these are people that he can fire at will—that he and his family did nothing wrong. How can the American people be confident that his Administration is conducting a serious investigation?

Attorney General Garland responded:

> Because we put the investigation in the hands of a Trump appointee from the previous administration, who is the United States Attorney for the District of Delaware, and because you have me as the Attorney General, who is committed to the independence of the Justice Department from any influence from the White House in criminal matters.

Senator Hagerty closed:

> Well, I think the observation here is terribly critical, because there's an obvious conflict of interest here because, if those who are investigating the Biden family and their enterprise can be fired by the head of the family who's being investigated—that is, Joe Biden can fire the Attorney General in Delaware—he can have an impact on all of your staffing.

The exchange between Senator Hagerty and Attorney General Garland received significant media attention.[88] Yet the public reporting made clear to Appellant 1 that the public had no idea that USA Graves had been asked to bring the 2014 and 2015 tax charges against Hunter Biden in DC —and had said no, overruling the decision of his career staff and arguably contradicting Attorney General Garland's testimony to Congress.

Attorney General Garland's testimony further triggered a letter from U.S. Senators Chuck Grassley and Ron Johnson about the case, who wrote in a May 9, 2022 letter reported by the media:[89]

> Delaware is the Bidens' home state and Hunter Biden has acknowledged his connection with state officials in the past. . . . In light of the extraordinary public interest in the Hunter Biden criminal case and Attorney General Garland's repeated

[88] https://www.cnn.com/2022/04/26/politics/merrick-garland-hunter-biden-investigation/index.html; https://www.foxnews.com/politics/garland-question-hunter-biden-investigation-special-counsel; https://www.dailymail.co.uk/news/article-10755897/Merrick-Garland-insists-Biden-NOT-interfered-investigation-son-Hunter.html; https://nypost.com/2022/04/26/sen-hagerty-asks-ag-garland-if-joe-biden-was-involved-with-hunters-business-deals; https://www.washingtontimes.com/news/2022/apr/26/ag-merrick-garland-defends-independence-hunter-bid; https://www.theepochtimes.com/us/attorney-general-tight-lipped-on-hunter-biden-investigation-4428109.

[89] https://nypost.com/2022/05/09/sens-press-prosecutor-on-recusal-in-hunter-biden-tax-case; https://www.washingtonexaminer.com/news/2356279/grassley-and-johnson-want-answers-from-us-attorney-handling-hunter-biden-case.

> refusal to provide transparency to Congress and the American people with respect to the aforementioned conflicts of interest, please respond to the following[.][90]

The letter again raised the possibility of needing a special counsel or independent counsel to investigate the Hunter Biden case and inquired: "Have any employees in the [Delaware USAO] been recused from the Hunter Biden criminal case?"[91]

Around this time, Appellant 1 was contacted by his FBI SSA counterpart on the Sportsman investigation. The FBI SSA said his field office leadership believed they should push for a special counsel to be appointed in the Hunter Biden case, and told Appellant 1: "My leadership is wondering why your leadership isn't asking for a special counsel in this investigation." During the same period, Appellant 2 had this same discussion about a special counsel with his FBI counterparts on the investigation. The Appellants disclosed this information to DFO Batdorf, with whom he had discussed his concerns many times, but Batdorf responded that he wouldn't even know how to go about calling for a special counsel.[92] The Appellants are unaware whether the issue was ever raised any further within the IRS-CI chain of command.

On May 13, 2022, Appellant 1 emailed DFO Batdorf and SAC Waldon:

> We learned today that the new tentative date for the 3rd taxpayer conference (that we believed was scheduled for next week) is tentatively planned for 5/31. I stress tentatively. As a result of the new time frame, I wanted to ask if you thought it may be better to request to present to Jason Poole/David Weiss in advance of that meeting. . . . This tactic…to move things down the road backing us up against a statute…appears to be purposeful at this point.[93]

On June 15, 2022, all relevant participants in the Sportsman case, including the Appellants, met at DOJ headquarters. FBI SAC Thomas Sobocinski interjected multiple times in the meeting that the evidence was clearly enough to charge tax violations. During breaks in the meeting, he also told the Appellants that he believed the violations should be charged as soon as possible and that the delays were unacceptable.[94]

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[90] https://www.ronjohnson.senate.gov/services/files/FAB82BFC-B90B-4AB3-B952-F372EE0663D2.
[91] *Id.*
[92] Shapley Transcript at 26.
[93] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T99-Shapley-3_Attachment-18_WMRedacted.pdf.
[94] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 4.

V. PROTECTED DISCLOSURES TO DOJ

On July 7, 2022, Senators Grassley and Johnson again wrote to Attorney General Garland and USA Weiss:

> [W]e have serious concerns about . . . the ongoing Hunter Biden criminal case.
>
> * * *
>
> With respect to that criminal case, we've made our ongoing concerns clear with respect to DOJ's handling of it. . . . To date, the Biden administration has refused to answer whether there have been any recusals from the Hunter Biden criminal case based on conflicts of interest or other reasons.
>
> * * *
>
> Congress has a constitutional responsibility to ensure the proper execution of, and compliance with, conflicts of interest laws and regulations. DOJ's failure to comply with these laws and regulations will undermine the integrity of any investigation and cast a public cloud – whether warranted or not – over the matter. Your continued failure to answer fundamental questions with respect to the Hunter Biden criminal case not only calls into question DOJ's and FBI's handling of the matter, it calls into question whether DOJ and FBI will take the necessary steps to pursue other relevant investigative threads.[95]

This letter raised several of the same issues Appellant 1 had been disclosing to his own IRS-CI chain of command.

In early August 2022, DOJ Tax finally gave the Delaware USAO discretion to contact the Central District of California ("CDCA") USAO for the 2017 to 2019 tax charges.[96] This was relevant to Appellant 1 because the Attorney General had led Congress to believe no such approval was needed for the Delaware USAO to be able to approach other jurisdictions to present the case.

Also in August 2022, Chicago SAC Justin Campbell and DFO Jonathan Larsen informed Appellant 1 that they would like to convert his NTE IR-01 appointment to a permanent appointment as the IR-01 Chicago ASAC. Yet around this same period, it became known in IRS-CI that Christine Mazzella was making plans to retire from the IRS at the end of the year, although she was not yet at mandatory retirement age. Mazzella had served as the IR-01 J5 Lead since early 2020, when Appellant 1 had only recently been selected to lead the ITFC and thus did not apply for the J5 Lead. But while Mazzella was in the position it was elevated to IR-01 status.

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[95] https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_doj_fbi_hunter_biden_recusals.pdf.
[96] Ziegler Transcript at 38.

That made it the perfect next step for Appellant 1, who had also now been in an IR-01 position for the better part of a year. Thus, Appellant 1 communicated to SAC Campbell and DFO Larsen his interest in the J5 Lead position. Given Appellant 1's work in helping to stand up the J5, his involvement since then, and his supervision of nearly all the J5 tax cases, he was widely viewed as the most qualified for the J5 Lead position. Therefore, SAC Campbell and DFO Larsen approved plans to move forward with Appellant 1's conversion from an NTE to a permanent IR-01 as Chicago ASAC, anticipating he would be selected for the IR-01 J5 Lead position.

On August 16, 2022, the Appellants attended a meeting in Delaware with USA Weiss and the prosecution team, including DOJ Tax counsel. The Appellants brought their list of issues with the case and raised some of them with the prosecutors. The Appellants also learned in the meeting that Hunter Biden's defense counsel had told prosecutors that if they charged Hunter Biden they would be committing "career suicide."[97]

> On August 17, 2022, Appellant 1 emailed DFO Batdorf and SAC Waldon of the meeting:
>
> > We again pushed back on not charging 2014/2015. . . . The USA agrees with us but then talks to DOJ Tax and they convince him otherwise. This has happened a couple times. As a result, we will continue to communicate our position to ensure this moves forward consistent with how other tax cases would be treated with similar fact patterns.
> >
> > I explained that if 2014 is not charged how it would severely diminish the picture of the overall conduct and would essentially sanitize some major issues to include the Burisma/Ukraine unreported income. I also explained that if 2014 is not charged and/or included in a statement of facts in a guilty plea, that the unreported income from Burisma that year would go untaxed. I believe leaving out 2014/2015 would deliver a message that is contrary to IRS's efforts to promote voluntary compliance.
> >
> > * * *
> >
> > We raised some issues we have had during the investigation but did not bring up all of our concerns. Many of our concerns may not be material depending on the decisions the USAO/DOJ make in the end. We met with FBI after and they recently communicated similar issues with Delaware USAO.[98]

DFO Batdorf responded: "Thank you Gary. For the read out and your efforts. I will talk with the Chief and DC and hopefully they can discuss with [Principal Associate Deputy Attorney General for DOJ Tax] Stewart [sic][Goldberg] during their next meeting. At least show full support for

[97] Shapley Transcript at 27.

[98] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T101-Shapley-3_Attachment-20_WMRedacted.pdf.

the 2014/2015 years."[99] Around this time Appellant 1 also told DFO Batdorf about the "career suicide" threat from Hunter Biden's attorneys.

On September 12, 2022, Appellant 1's Chicago SAC issued Appellant 1 an "Outstanding" performance evaluation for his first year as an IR-01 ASAC, noting how he had distinguished himself from the other two ASACs he worked with:

> Gary – you started as the detailed ASAC for Branch C in December 2021. Among the 3 branches, you quickly set yourself apart as a leader among your peers. Your strong desire to seek excellence no matter the situation has provided a positive impact to our entire field office. I have enjoyed working closely with you again and look forward to watching you continue to grow as a leader!

On Sunday, September 18, 2022, CBS News's *60 Minutes* aired an interview with President Biden. In the segment, the interviewer asked: "I wonder what you would like to say about your son and whether any of his troubles have caused conflicts for you or for the United States." President Biden responded in part: "[N]o, there's not a single thing that I've observed at all from th– that would affect me or the United States relative to my son Hunter."[100] Appellant 1 saw reports of the interview in the media.[101]

The next day, on Monday, September 19, 2022, a group of 33 United States Senators wrote a letter to Attorney General Garland requesting that USA Weiss be given special counsel protections in order to investigate and prosecute the Hunter Biden case. The letter noted: "Given that the investigation involves the President's son, we believe it is important to provide U.S. Attorney Weiss with special counsel authorities and protections to allow him to investigate an appropriate scope of potentially criminal conduct, avoid the appearance of impropriety, and provide additional assurances to the American people that the Hunter Biden investigation is free from political influence."[102] The letter received press coverage,[103] which Appellant 1 read.[104]

On Tuesday, September 20, 2022, Appellant 1 emailed USA Weiss to ask if he had time that week for a quick phone call, writing: "I am interested in any updates from your perspective,

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[99] *Id.*

[100] https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18.

[101] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 4.

[102] https://www.cornyn.senate.gov/wp-content/uploads/2022/09/Hunter-Biden-Special-Counsel-Letter-FINAL-2.pdf.

[103] https://nypost.com/2022/09/19/33-senators-call-for-hunter-biden-special-counsel-cite-doj-politicization, https://theweek.com/hunter-biden/1016827/33-senators-want-special-counsel-privileges-for-hunter-biden-investigator.

[104] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 4–5.

current charging strategy and timelines."[105] USA Weiss responded at 1:23 pm on Wednesday, September 21, 2022: "I will set up a meeting/teleconference in the near term to provide updates to IRS and FBI. Talk to you soon."[106] Then, at 3:32 pm, Delaware USAO Criminal Division Chief Shawn Weede emailed Appellant 1 and his FBI counterpart, ASAC Ryeshia Holley: "We'd like to schedule a call with you on Wednesday, September 28, to discuss our expected charging timeline and status in Sportsman."[107] Appellant 1 responded, "I will be out of the country next week but do not want to push this off," and offered some alternate dates.[108]

In the standing prosecution team phone call that same day, September 22, 2022, AUSA Wolf and DOJ Tax communicated to the IRS-CI and FBI agents that although a pause in overt activity was not required by DOJ policy, the decision had been made "not to charge until after the election. They said why should they shoot themselves in the foot by charging before."[109] AUSA Wolf also indicated that the prosecution recommendation for the 2017 through 2019 charges would be reviewed by CDCA USA Martin Estrada, who had been nominated by President Biden and who the United States Senate had just confirmed days earlier. Again, Appellant 1 believed USA Estrada should recuse himself from the charging decision.[110]

Immediately after the call, Appellant 1 messaged DFO Batdorf: "Big news on Sportsman. Joe Ziegler and I need to speak with you as soon as possible."[111] DFO Batdorf responded in part: "Is it urgent that I need to step out? Good news or bad news?"[112] Appellant 1 messaged back: "Bad news. Continued inappropriate decisions affecting timing. I.e. Election. . . . I believe their actions are simply wrong and this is a huge risk to us right now."[113] DFO Batdorf replied: "10-4. I a[m] tied up for the next few hours . . . . Will reach out most likely tomorrow morning. Please ensure your ASAC and SAC are updated as well."[114]

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[105] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T110-Shapley-3_Attachment-29_WMRedacted.pdf.
[106] *Id.*
[107] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T106-Shapley-3_Attachment-25_WMRedacted.pdf.
[108] *Id.*
[109] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T103-Shapley-3_Attachment-22.pdf; *see also* https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 5.
[110] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 5.
[111] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T104-Shapley-3_Attachment-23.pdf.
[112] *Id.*
[113] *Id.*
[114] *Id.*

Accordingly, Appellant 1 emailed SAC Waldon, ASAC Watson, and DFO Batdorf:

> During today[']s SM team call there was some information provided to the team concerning decisions made by the USAO and DOJ that need to be discussed. For example, the AUSA stated that they made a decision not to charge until after the election. In itself, the statement is inappropriate let alone the actual action of delaying as a result of the election. There are other items that should also be discussed that are equally inappropriate.[115]

On Friday, September 23, 2022, in the email thread with Delaware USAO Criminal Chief Weede, FBI ASAC Holley emailed: "Let's wait to have this meeting when Gary is back. Also, can we meet in person and include USA Weiss. SAC Sobocinski will also be present."[116] The meeting was ultimately scheduled for October 7, 2022.[117]

Because Appellant 1 was aware of SAC Sobocinski's and ASAC Holley's concerns about the case, he emailed ASAC Holley on October 4, 2022:

> [D]o you have a top three items you plan to raise so we can be on the same page? My list includes the following as the top three items:
>
> 1. Special counsel
>
> 2. election deferral comment – continued delays
>
> 3. venue issue?
>
> Of course these just scratch the surface of issues but I think it is best if we are united and to stick to the most important topics.[118]

ASAC Holley responded on October 6, 2022 with her list of topics, which included "Delays," "Venue," and "Communication."[119] Appellant 1 also met with ASAC Holley in her office to discuss the issues they wanted to raise in the October 7 meeting.[120]

The October 7, 2022 meeting in Delaware included USA Weiss, First Assistant USA Shannon Hanson, and Criminal Chief Weede from the Delaware USAO; SAC Waldon and Appellant 1 from the IRS; and SAC Sobocinski and ASAC Holley from the FBI. Appellant 1 took notes at the meeting.[121] USA Weiss told the attendees he was not the deciding person on whether the DC USAO brought the case, and that accordingly, the 2014 and 2015 years would

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[115] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T105-Shapley-3_Attachment-24.pdf.
[116] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T106-Shapley-3_Attachment-25_WMRedacted.pdf.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T82-Shapley-3_Attachment-1.pdf at 6.
[121] https://empowr.us/wp-content/uploads/2023/09/2023-09-13-Letter-to-House-Judiciary-10-7-22-notes.pdf.

not be charged. USA Weiss also revealed that when he had presented the case to the DC USAO he had requested special charging authority from DOJ, but the request was denied and he was told to follow the process.

As Appellant 1 later described: "Everyone in that meeting seemed shellshocked, and I felt misled by the [Delaware USAO]. At this point, I expressed to [USA] Weiss several concerns with how this case had been handled from the beginning. The meeting was very contentious and ended quite awkwardly."[122]

After the meeting, SAC Waldon asked Appellant 1 to send an email to DFO Batdorf about what transpired during the meeting.[123] Appellant 1's email that evening, copying SAC Waldon, in part read in bold: "**Weiss stated that he is not the deciding person on whether charges are filed[.]** I believe this to be a huge problem – inconsistent with DOJ public position and Merrick Garland testimony."[124] Appellant 1's email also noted:

> 3. They are not going to charge the 2014/2015 tax years
>   a. I stated, for the record, that I did not concur with that decision and put on the record that IRS will have a lot of risk associated with this decision because there is still a large amount of unreported income in that year from Burisma that we have no mechanism to recover
>
> * * *
>
> 4. FBI SAC asked the room if anyone thought the case had been politicized . . . .
>
> * * *
>
> 6. Both us and the FBI brought up some general issues to include:
>   a. Communication issues
>   b. Update issues
>   c. **These issues were surprisingly contentious**[.][125]

Appellant 1 also asked in the email that SAC Waldon comment if Appellant 1 missed anything. Monday, October 11, 2022 was Columbus Day, but early on October 12, 2022, SAC Waldon emailed: "Thanks, Gary. You covered it all. . . . Mike, let me know if you have any questions."[126]

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[122] Shapley Transcript at 29.
[123] Waldon Transcript at 45.
[124] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T76-Shapley-1_Attachment-6_Redacted.pdf at 3.
[125] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T76-Shapley-1_Attachment-6_Redacted.pdf at 3.
[126] *Id.* at 2.

VI. MARGINALIZATION AND REMOVAL FROM SPORTSMAN CASE

Sometime after the October 7, 2022 meeting, it strongly appears that the Delaware USAO first read IRS-CI's discovery materials, which included Appellant 1's protected disclosures to his chain of command regarding DOJ's handling of the Sportsman case. According to SAC Waldon, sometime in the latter half of October USA Weiss told SAC Waldon that he would no longer be communicating with ASAC Shapley and would be going directly to SAC Waldon.[127]

On October 17, 2022, the prosecution team had its last call. USA Weiss was not on the call. When the Appellants asked about issuing additional subpoena requests, they were told there was no grand jury to issue any subpoenas out of. When the Appellants asked what the timing was for the CDCA USAO to make a decision, DOJ Tax Counsel Daly responded, "I am not the boss of them."[128]

On October 24, 2022, AUSA Wolf and DOJ Tax Counsel Daly called Appellant 2 and requested all of Appellant 1's "reports" and emails since May 2022. In response, Appellant 2 emailed Wolf and Daly, copying Appellant 1 and the Co-Case Agent:

> I do not author our case reporting up to our senior leaders . . . . (They are called SCR – Significant Case Reports). Since Shapley would be the one to provide both of the items you both had requested, I would suggest scheduling a conference call with him to set up getting the exact stuff you need.

Appellant 1 responded the next morning offering to chat with prosecutors about the request, but AUSA Wolf simply forwarded his email to Delaware USAO Criminal Chief Shawn Weede. Chief Weede then emailed Appellant 1: "To review for discovery purposes, we're requesting emails and any reports you authored on the case. My understanding is that we have your reports up until May 2022, so please provide any authored thereafter."

Meanwhile, apparently after USA Weiss's discussion with SAC Waldon about no longer communicating with Appellant 1, in late October the IRS listed the J5 Lead vacancy. However, rather than listing it as an IR-01 position, as it had been under the incumbent, the vacancy was only listed as an IR-04 position. Although confused by the change to IR-04, Appellant 1 applied for the position on November 3, 2022. Despite having an offer to convert to permanent IR-01 status, Appellant 1 also allowed his NTE IR-01 ASAC position to expire on November 6, 2022.

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[127] Waldon Transcript at 76, 109–10, https://gop-waysandmeans.house.gov/wp-content/uploads/2024/03/HWM251550_Final_Redacted_Waldon-with-Exhibits.pdf.

[128] Shapley Transcript at 29.

In a November 7, 2022 phone call with Appellant 1 and Appellant 2, FBI SA Michael Dzielak indicated that the Delaware USAO had now also requested management documents from the FBI, but that the FBI would not be providing these documents because it was a departure from the normal investigative and charging process.[129] Appellant 1 expressed to SA Dzielak that the Delaware USAO appeared to be using the discovery process as a guise to review any and all documents that could have been critical of its unethical handling of the investigation, and SA Dzielak agreed.[130]

On November 8, 2022, the Delaware USAO canceled the prosecution team meeting scheduled for the next day. After learning of the cancellation, Appellant 1 emailed USA Weiss, copying SAC Waldon: "During our October 7th meeting you asked that we have another meeting in November with the same audience. Since the 'prosecution team' meeting scheduled for tomorrow was canceled, our next meeting is very important to ensure we have an open line of communication."[131] USA Weiss did not respond.

On November 9, 2022, Appellant 1 emailed FBI ASAC Holley: "Since our discussion on October 7 where we, again, discussed the lack of communication/transparency from their office it appears they have double downed [sic] and we have received almost nothing since then."[132] The Delaware USAO was now requesting updated discovery from all of the IRS team, so later that day Appellant 1 emailed Delaware USAO Chief Weede that gathering the discovery would take a little more time than originally estimated. Appellant 1 also wrote:

> Do you know why the "prosecution team" meeting scheduled for today was canceled by your office? Do you know if it will be rescheduled? My agent asked if it would be rescheduled and he has not received a return email. I have spoken to FBI about this and the lack of communication is having a negative impact on the team.

On November 10, 2022, SAC Waldon instant messaged Appellant 1: "David [Weiss] reached out with concerns regarding the timing of us turning everything over. . . . Can you give me an update on the timing?" Appellant 1 responded:

> There is no communication now and Shawn emailed asking for the newly requested discovery. . . . I believe they are using discovery as cover to see what critical

[129] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T108-Shapley-3_Attachment-27.pdf.
[130] *Id.*
[131] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T110-Shapley-3_Attachment-29_WMRedacted.pdf.
[132] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T109-Shapley-3_Attachment-28_WMRedacted.pdf.

> statements have been said about their handling of the case. FBI alluded to [the] same thing on the call I updated you about the other day.

Appellant 1 also messaged: "I can't believe they are doing what they are doing. It keeps me up at night wondering if it should be raised to an objective party. I do not believe they are doing the right thing and it is purposeful...plain and simple. Not just about this discovery nonsense." Shortly thereafter Appellant 1 again emailed USA Weiss, informing him the FBI was available for a December 5 prosecution team meeting.[133]

On November 22, 2022, USA Weiss had a telephone call with IRS-CI Deputy Chief Ficco regarding Appellant 1.[134]

On November 29, 2022, IRS IT spent several hours fixing issues with Appellant 1's computer which were preventing the archiving of Appellant 1's emails. Once resolved, the discovery included Appellant 1's additional protected disclosures to his chain of command since May 2022, including his SCRs.[135] Appellant 1 sent a link to Appellant 2, which uploaded the discovery for the Delaware USAO to review. Appellant 1 also informed SAC Waldon and DFO Batdorf that the discovery was complete.

That same day, International Field Operations Director Scott Goodlin contacted Appellant 1 to schedule an interview for the J5 Lead vacancy.

According to testimony DFO Batdorf later provided to Congress:

> Once that discovery was done, we met in December. We talked about the items that had been turned over in discovery. Prior to that . . . . Darrell and I talked to our CT [Criminal Tax] counsel. We talked about the items in that discovery, any concerns.[136]

DFO Batdorf's testimony made clear that some of the concerns came from the IRS Office of the Chief Counsel.[137]

On December 7, 2022, SAC Waldon emailed Appellant 1:

> I spoke with David a moment related to Sportsman. He informed me that they're still in the deliberative process and that there were no updates at this time. . . . He and I agreed to touch base in the near future. Also, he informed me of a meeting request made by the team. Let's stand down on that request for now.

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[133] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T110-Shapley-3_Attachment-29_WMRedacted.pdf.
[134] *See* Waldon Transcript at 79, 100.
[135] *See* Batdorf Transcript at 87–90.
[136] *Id.* at 87.
[137] *Id.* at 97.

SAC Waldon did not tell Appellant 1 that USA Weiss had indicated he would no longer be having any contact with Appellant 1.

Appellant 1 emailed SAC Waldon in response:

> We have a team meeting planned and confirmed for tomorrow. Is that the one he doesn't want us to have?
>
> * * *
>
> [I]n all my years I have never heard of this 'deliberative' process that they refer to. Seems like it is their cover up to provide no communication and zero transparency.
>
> * * *
>
> He met with fbi sac and asac right before Thanksgiving I was told by fbi Agent [sic]. . . .
>
> We might want to schedule a meeting with dfo and above soon. I have some serious issues that we should discuss.

Soon thereafter, Appellant 2 emailed DOJ Tax Counsel Daly to confirm the cancellation and that SAC Waldon would be fielding updates. He added: "I wanted to discuss some discovery stuff with the team and our potential case with [redacted] and some stuff I've obtained over the past month. If you want to hold off on these discussions - please let me know how I should proceed."[138] Daly responded: "David [Weiss] and Darryl [sic][Waldon] have been in conversation and that is what they have decided. . . . Let's hold off on [further] discussions for a bit until we hear from David and Darryl [sic]."[139]

On December 8, 2022, Appellant 1 sent SAC Waldon a link to the discovery emails, also noting: "I think I have continually provided updates about their continued unethical conduct as a matter of course."

On December 12, 2022, SAC Waldon wrote Appellant 1: "Mike and I will want to get your perspective again after we've reviewed the emails." Appellant 1 responded in a lengthy email to SAC Waldon, copying DFO Batdorf:

> If you have questions about any emails I would ask you share it in advance so I can look at them and be prepared to put them into context. The USAO was so eager to get my emails (which they already had 95% of)…then surprise…they "might" have a problem with a few of them that memorialized their conduct. If the content of

[138] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/12/Exhibit-604-Email-with-SAC-with-Update-01.09.2023_Redacted.pdf.
[139] *Id.*

what I documented, in report or email, is the cause of their consternation I would direct them to consider their actions instead of who documented them.

* * *

Instead of constant battles with the USAO/DOJ Tax . . . I documented the issues, that I would normally have addressed as they occurred, because of the USAO and DOJ Tax's continued visceral reactions to any dissenting opinions or ideas. Every single day was a battle to do our job. I continually reported these issues up to IRS-CI leadership beginning in the summer of 2020. Now, because they realized I documented their conduct they separate me out, cease all communication and are now attempting to salvage their own conduct by attacking mine. This is an attempt by the USAO to tarnish my good standing and position within IRS-CI. . . . As recent as the October 7 meeting, the Delaware USAO had nothing but good things to say about me/us. Then they finally read the "discovery" items (provided 6 months previous - that are not discoverable) and they are finally beginning to defend their own unethical actions.

Consider the below:

1. I am not a witness – therefore Jencks/Impeachment is not an issue.
2. I am not the receiver of any original evidence nor engaged in any negative exculpatory language against the subject . . . . My documentation only shows the USAO/DOJ Tax's preferential treatment of this subject.
3. I have called into question the conduct of the USAO and DOJ Tax on this investigation on a recurring basis and am prepared to present these issues.

For over a year I have had trouble sleeping; awake all hours of the night thinking about this. After some time, I realized it was because I subconsciously knew they were not doing the right thing. But I could not fathom concluding that the USAO/DOJ Tax were in the wrong. After I wrapped my mind around the fact that they are not infallible, I started to sleep better. My choice was to turn a blind eye to their malfeasance, and not sleep, or to put myself in the crosshairs by doing the right thing. My conscience chose the latter.

I hope IRS-CI applauds the incredibly difficult position I have been put into instead of entertaining the USAO's attacks. If they bring up something legitimate; I am sure we can address it because it was not intentional. Everything I do is with the goal of furthering IRS-CI's mission, protecting the fairness of our tax system and representing IRS-CI with honor.

I look forward to presenting these issues to you. I do have some obligations during my [use or lose leave], but will forfeit some leave if it is to protect my reputation and the agency's interests.[140]

Appellant 1 had no idea that SAC Waldon had concerns with Appellant 1's protected disclosures produced to DOJ, that the IRS Office of the Chief Counsel had concerns with Appellant 1's

[140] Shapley Transcript (Exhibit 9).

protected disclosures, and that DFO Batdorf and SAC Waldon had begun making plans to remove Appellant 1 from the Sportsman investigation. Batdorf later testified in a congressional interview: "[T]he decision to remove Mr. Shapley was made by Darrell and I in December, when we knew there was an issue – potential issue going forward. We just had not expressed that."[141]

The next morning, on December 13, 2022, DFO Batdorf responded in an email to Appellant 1:

> I have not reviewed the emails that were provided to the U.S. Attorney's Office nor had conversation with the prosecuting team regarding them. I plan to do both in the coming weeks. I understand through your emails that you believe the prosecuting team may not have conducted themselves in an ethical or proper manner to include prosecutorial misconduct. I am not the reviewing official, deciding official, or expert on such matters. However, there are routes you could take if you truly believe there are violations of ethical conduct or prosecutorial misconduct. Either way you choose, [departing SAC] Darrell [Waldon], [incoming SAC] Kareem [Carter], and I (along with the Chief and Deputy Chief) will continue to work through any potential issues on this investigation.[142]

On December 14, 2022, Appellant 1 had his J5 Lead interview with Deputy Director of Global Operations Carolyn Williams, Director of International Operations Scott Goodlin, and departing J5 Lead Mazzella. The three-person panel also interviewed Oleg Pobereyko, a candidate with zero experience interacting with the J5. The three-person interview panel's selection had to be approved by the Director of Global Operations (Deputy Director Williams' supervisor) and IRS-CI Deputy Ficco.

On December 22, 2022, USA Weiss had a telephone call with SAC Waldon and DFO Batdorf. In the call, the three discussed removing the Appellants and the ITFC investigative team from the Hunter Biden investigation.[143] When later questioned by Congress about the decision not to inform the Appellants, DFO Batdorf stated: "[W]ith the investigation not having any more investigative activity, we were waiting to see if the [USAO] was going to move forward with a prosecution. It would have been a misuse of my resources to have an investigative team get up to speed and then not have anything to prosecute if they decided not to go forward."[144]

In late December Appellant 1's counsel had a phone call regarding Appellant 1's allegations with the SAC of the Special Investigations Unit at the Treasury Inspector General for

[141] Batdorf Transcript at 94–96.
[142] Shapley Transcript at 172 (Exhibit 9).
[143] Batdorf Transcript at 73.
[144] *Id.* at 115.

Tax Administration ("TIGTA"). Additionally, on December 28, 2022, Appellant 1's counsel sent staff for the House and Senate Judiciary committees an email with the subject "IRS Whistleblower: Highly Sensitive":

> [A] Supervisory Special Agent (criminal investigations) of the Internal Review Service . . . wishes to make protected disclosures as a lawful whistleblower to both the Senate and House Judiciary Committees concerning an ongoing criminal investigative matter. Our client is concerned that a particular investigation of significant notoriety and sensitivity, regarding which he has been in charge since January 2020 and is the best person to provide information and answer questions, is being politicized and that false statements have been publicly released by, in particular, officials of the Department of Justice.

On December 31, 2022, J5 Lead Mazzella retired as a criminal investigator with the IRS. The mystery of her not being at mandatory retirement age was solved when she returned to the IRS-CI J5 on January 1, 2023—but now as a government contractor with Deloitte, which allowed her to keep her government pension while receiving a higher private-sector salary. This arrangement must have been approved by IRS-CI senior leadership, likely either Chief Lee or Deputy Chief Ficco.

VII. PROTECTED ACTIVITY AND FURTHER BACKLASH

In a senior leadership meeting on January 3, 2023, IRS-CI senior leadership announced Pobereyko's selection as J5 Lead. The next day, on January 4, 2023, Director Goodlin contacted Appellant 1 to tell him of Pobereyko's selection. Director Goodlin told Appellant 1 the position would once again be announced in the coming months as an IR-01. However, Appellant 1 informed Director Goodlin that he had retained counsel and would be challenging the selection of Pobereyko as retaliatory.

The same day, Appellant 1's counsel emailed the SAC of TIGTA's Special Investigations Unit:

> I wanted to provide a very important update. Please be advised that our client is Supervisory Special Agent Gary Shapely [sic]. Furthermore, Agent Shapely [sic] was notified today that he was not chosen for the position of Supervisory Special Agent/Joint Chiefs of Global Tax Enforcement (J5) Lead, and we are concerned that this determination may have been retaliatory in nature for his being a protected whistleblower, which his management chain has been aware of for some time. We are not requesting any action from TIGTA at this time as we are still working through the 6e and 6103 issues but we wanted to make you aware of our concern.

On January 6, 2023, Appellant 1 had an approximately 15-minute phone call with DFO Batdorf. Appellant 1 informed DFO Batdorf that Appellant 1 had retained whistleblower counsel and was contacting TIGTA and others to make protected disclosures outside the IRS. Appellant 1 also told DFO Batdorf that while his disclosures would primarily be aimed at DOJ and the Delaware USAO, the IRS would not be immune from criticism.[145]

DFO Batdorf informed Chief Lee and Deputy Chief Ficco that day of Appellant 1's protected activity, and informed SAC Waldon and ASAC Watson soon thereafter.[146] DFO Batdorf also informed the IRS Office of the Chief Counsel close to this time frame.[147]

On January 9, 2023, Appellant 2 emailed SAC Waldon:

> [A]t the end of 2022 . . . I was instructed by DOJ-Tax that I needed to go through you regarding Sportsman. As I sit here today, I've heard nothing further from the prosecutors.
>
> We still have active tax investigations . . . which have essentially stopped (at least on our end) since at least November of 2022. I have more things that I need to talk with the prosecutors about . . . .
>
> As a result of what Mark Daly said below, I need further guidance from you on what to do and how I should proceed.
>
> Are there any meetings planned, an update on charging decisions or anything further that you can provide to me?
>
> Any insight would be much appreciated on what I should do . . . .[148]

SAC Waldon responded: "Mike [Batdorf] and I spoke with David [Weiss] a couple weeks ago. Still no update, as it was explained that they are still reviewing the evidence."[149] SAC Waldon did not tell Appellant 2 that SAC Waldon and DFO Batdorf had, in fact, agreed on that call to remove Appellant 2 from the case.

On January 10, 2023, SAC Waldon and ASAC Watson had a phone call with Appellant 1, Appellant 2, and the Co-Case Agent. SAC Waldon shared for the first time that DOJ did not think the CDCA USAO would be a part of the case, but that it was not a final problem because USA Weiss could still be appointed as a special prosecutor. Appellant 1 raised the fact that the Delaware USAO and DOJ Tax had cut off all communication with the investigative team since

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[145] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T77-Shapley-1_Attachment-7_Redacted.pdf.
[146] Batdorf Transcript at 85–86.
[147] *Id.* at 86.
[148] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/12/Exhibit-604-Email-with-SAC-with-Update-01.09.2023_Redacted.pdf.
[149] *Id.*

the October 7, 2022 meeting. Rather than explaining that USA Weiss had requested to have no more contact with Appellant 1 or that IRS-CI had agreed to remove the investigative team from the case, SAC Waldon claimed USA Weiss indicated in discussions with SAC Waldon that they weren't communicating with the investigative team because the Delaware USAO was in a deliberative process. The Appellants expressed that related cases were suffering because of the inability to get any guidance from the Delaware USAO. The meeting ended with Appellant 2 sharing that he did not believe senior IRS-CI leadership had supported the Sportsman investigative team during the investigation.

After this conversation, Appellant 1 began looking at other opportunities in IRS-CI. Vacancy CO 2023-00091, posted on December 30, 2022, was a non-competitive reassignment or detail/lateral to the IR-01 Deputy Director position in either Global Operations or Cyber and Forensics Services. The vacancy had a close date of January 17, 2023. Had the J5 Lead position remained an IR-01 position and Appellant 1 converted his NTE IR-01 position to a permanent position as Chicago ASAC, he would have been eligible for an IR-01 detail under OPM policy. But despite OPM policy, the IRS had never been strict in its application of the requirement that an applicant need have permanently held an IR-01 position in order to be considered for a non-competitive reassignment.

Thus, on January 12, 2023, Appellant 1 emailed Jarod Koopman, the Cyber and Forensics Services Executive Director, that he "wanted to inquire about the opening." Executive Director Koopman responded:

> I do not have set expectations for the position and will look to hire someone that fits in well with the group, has a great track record of getting the job done and understands the culture I'm looking to build – one that is inclusive and empowering to our team. Happy to have a further discussion around the job and other matters.

Appellant 1 had a phone call with Koopman on January 17, 2023, and submitted his statement of interest for the position that day before the position closed.

On January 18, 2023, Appellant 1 also emailed SAC Waldon requesting to resign his collateral duties on the J5, such as developing governance documents. As the SSA over the ITFC, Appellant 1 still presented the ITFC team's work in the monthly J5 Chief Brief of January 24, 2023. But unbeknownst to Appellant 1, this would be the last Chief Brief he would participate in for nearly two years.

On January 25, 2023, IRS-CI Office of Strategy Executive Director Shea Jones emailed Appellant 1 to inform him that to be considered for the Global Operations Deputy Director position, Appellant 1 had to have held a permanent competitively-selected IR-01 position rather than an NTE. The IRS did not enforce this requirement in other instances of IRS employees being selected non-competitively for details at higher grades longer than 120 days.

That day, Appellant 1 emailed DFO Batdorf:

> As my protected whistleblower information is being delivered to the necessary oversight groups, I ask that I am granted permission to use administrative leave during the process. Instances where I would use administrative leave are as follows:
>
> 1. Testimony provided to various congressional committees
> 2. Meetings with congressional committees
> 3. Meetings with oversight groups to include[:]
>   a. Office of Special Counsel
>   b. Merit Service Protection Board [sic]
>   c. Various Office of Inspector Generals
> 4. Meetings with my legal counsel
> 5. All of the above are in process . . . .[150]

DFO Batdorf would not respond until February 10, 2023. However, around this time in late January, ASAC Watson scheduled a call with Appellant 1. The J5 partners had a conference in Australia scheduled from February 26 to March 3, 2023 to discuss priority tax cases and case development. Australian partners on the J5 were concerned about Christine Mazzella attending the meeting, since she was now a contractor and not a government employee, and they did not believe she should be in the room for sensitive discussions. However, new J5 Lead Oleg Pobereyko had no tax knowledge or experience. Since ASAC Watson had never had a single discussion with Appellant 1 in the past about any of his collateral J5 duties, which worked through a different reporting structure than the typical field office chain of command, Appellant 1 concluded that the request from ASAC Watson to attend the conference originated with Pobereyko.

The hour-long conversation took place on February 1, 2023. Appellant 1 began the call by noting that despite raising certain issues repeatedly with senior IRS-CI leadership, including notifying them of his protected disclosures outside of the IRS, they were no longer responding to his emails or providing guidance. ASAC Watson indicated "the agency has to protect itself." Appellant 1 also informed ASAC Watson that he was preparing a grievance to challenge his non-

[150] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T79-Shapley-1_Attachment-9_Redacted.pdf.

selection for the J5 Lead case, which he stated he believed was in retaliation for his protected disclosures on the Sportsman case.

When ASAC Watson raised the conference in Australia, Appellant 1 noted the challenge facing the J5: he did not believe it was fair for him to work under J5 Lead Pobereyko, who did not know anything about the J5's tax cases or even understand how the J5 worked, and yet foreign partners were contacting Appellant 1 to express that the J5 could not continue without Appellant 1. ASAC Watson indicated she would try to get together a meeting with Pobereyko to discuss transition, and Appellant 1's consulting on J5 cases moving forward. Thereafter Appellant 1 agreed to travel to the conference in Australia—the first of several trips he would take for the J5 because J5 Lead Pobereyko was less qualified than Appellant 1 to fill the J5 Lead role.

In early February 2023, all IRS Senior Executive Service employees gathered at IRS headquarters for "Executive Week," giving DFO Batdorf plenty of opportunity to discuss the information Appellant 1 provided to Batdorf about Appellant 1's protected activity.

In January and early February, the Appellants had been in touch with a large group of IRS-CI senior leaders regarding a large-scale case for IRS-CI field offices across the country being coordinated out of the Chicago USAO (where Appellant 1 had recently concluded his ASAC tenure). On February 9, 2023, DFO Batdorf emailed the Appellants:

> I am getting ready to hit send on an email to everyone that we need to hit pause on these cases for just a minute. The Chief wants a national strategy regarding these investigations. I don't think we have to go that far but I don't think we are there yet as the higher ups in DOJ Tax do not appear to be onboard . . . . We just need to answer a couple questions for the Chief. We will definitely keep you in the loop over the next day or two.

DFO Batdorf then emailed the national group:

> We need to take an intentional, but quick pause on these investigations. The DFO's are actively working to tighten up and deploy a national strategy to move any of these potential cases forward. We intend for this pause to be very short and we will continue working these leads in the near future.

When DFO Batdorf finally responded the next day (February 10, 2023) to Appellant 1's January 25, 2023 email, he apologized for the delay ("I have been traveling and we just finished up exec week here in HQ") and wrote:

> There is no need for you to incur admin leave as this is your duty to file and support your claim as you see fit. Further, there is no need to provide any updates, written

> or verbal of your meetings, testimony and work being done on this claim. Again, as a federal employee, it is your duty and obligation to answer/support the claim you have made.
>
> However, I can offer assistance if the burden to support your claim and run the day-to-day operations of your assigned group. Should you feel that you will be or are burdened trying to meet your duties as assigned, please let your ASAC and SAC know who will inform me so I can make a timely decision to give you additional flexibility.[151]

Appellant 1 was still unaware at this point that DFO Batdorf and SAC Waldon had already made a deal with USA Weiss to remove the Appellants and the ITFC team from the Sportsman case.

On February 13, 2013, Kareem Carter became the new WDCFO SAC, as SAC Waldon was promoted to become Executive Director of Advanced Analytics and Innovation. As SAC Waldon would later admit to congressional investigators after extensive questioning: "[B]efore I left the special agent in charge position, in February, I recommended to Mr. Batdorf that Gary Shapley be removed as the SSA from the Hunter Biden investigation[.]" Despite the decision to remove Appellant 1 already having been made with DFO Batdorf in conjunction with USA Weiss in December 2022, Waldon claimed the recommendation was "primarily due to what I perceived to be unsubstantiated allegations about motive, intent, bias"[152]—i.e., the protected disclosures Appellant 1 had been making to his IRS-CI chain of command for years. SAC Waldon documented this in an email to incoming SAC Carter and to DFO Batdorf.[153] Given DFO Batdorf's updates to Chief Lee and Deputy Chief Ficco on developments with Appellant 1, it seems quite likely this email would also have been shared with them.

On February 22, 2023, Appellant 1 met with staff from the DOJ OIG. Appellant 1 repeated his disclosures about the handling of the underlying investigation, the unmitigated conflicts of interest in bringing charges, and the conflict between the Attorney General Garland's testimony and the information USA Weiss provided on October 7, 2022.

As Appellant 1 prepared to go to Australia from February 26 to March 3, 2023, Chief Lee suddenly and inexplicably canceled the February J5 Chief Brief call, scheduled for February 28, 2023. IRS-CI leadership offered no explanation for the cancellation. Although the monthly appointment series still showed on Appellant 1's calendar, over the next several months Chief

[151] *Id.*
[152] Waldon Transcript at 135.
[153] Batdorf Transcript at 93–94.

Lee canceled the Chief Brief. Appellant 1 would not be invited to a J5 Chief Brief again for 21 months, and Appellant 1's interactions with Chief Lee went from providing in-depth case briefings to Lee and senior IRS-CI leadership monthly to no contact with Chief Lee whatsoever. Appellant 1 was rarely even able to obtain guidance on his team's cases from his chain of command, leaving the Appellants on an island.

On March 1, 2023, Attorney General Garland appeared before the Senate Judiciary Committee. Senator Chuck Grassley asked Attorney General Garland: "Does the Delaware US attorney lack independent charging authority over certain criminal allegations against the president's son outside of the District of Delaware?"[154] Garland replied:

> [I]f it's in another district, he would have to bring the case in another district. But as I said, I promise to ensure that he's able to carry out his investigation and that he be able to run it. And if he needs to bring it in another jurisdiction, he will have full authority to do that.[155]

That same day, Appellant 1 sent SAC Carter and ASAC Watson an email with the subject line "Sportsman Meetings":

> I would suggest I be included in any and all meetings with prosecutors concerning the SM investigation. I was the main contact for multiple years and to ensure IRS-CI management is fully informed my involvement would be necessary. Even during my Asac details i maintained operational control of this investigation to ensure continuity of leadership. If I was not to be involved now, as final decisions are being made, it would be inappropriate and a deviation from my role as the SSA of the investigation. Please let me know what the decision is concerning my involvement in this case in my group[']s inventory.

ASAC Watson replied on March 3, 2023:

> During the next couple of weeks SAC Carter will be having one on one meetings with several USAO's/AUSA's to introduce himself as the new SAC and discuss the status of our stagnant cases and ongoing working relationships this includes meeting with the Delaware USAO. As the ASAC I would agree that we both need to be involved with all investigative matters as it relates to all your group's investigations. You nor I will be in attendance for these initial meetings, but we will be working together over the next couple of weeks/months to get a resolution on several of the cases in your group including Sportsman. If there is a need for us to deviate from your involvement in any case, we will formally discuss that with you.

[154] https://www.congress.gov/118/meeting/house/116381/documents/HHRG-118-JU00-20230920-SD008.pdf at 12.
[155] *Id.*

That same day, the Appellants and the Co-Case Agent met with ASAC Watson and SAC Carter to brief them on the Sportsman investigation. The Appellants made additional protected disclosures to ASAC Watson and SAC Carter during the meeting.

On April 13, 2023, Appellant 2 emailed ASAC Watson, copying Appellant 1:

> So I wanted to put some stuff in front of you regarding updates I am hearing on the Sportsman Et Al investigation, that I am not hearing through you or Kareem, which is concerning to me. I don't think that you or Kareem have any reason to keep things from me, but I wanted to make you both aware of some of these updates.
>
> So I have heard that Sportsman's counsel is meeting with Main DOJ at the end of this month – I would consider this a significant update[.] I had heard that Sportsman's counsel met with David Weiss in February - I have not heard any update from the result of that meeting. I have heard that David is currently asking for the Pros Memo from DOJ-Tax approving the tax charges – I would consider this a significant update indicating that David is seeking authority to charge. This was right after Merrick Garland's testimony[.] The last we heard about this Pros Memo from DOJ-Tax was in August of 2022, in that it was moving to John Cain's 3rd party review.
>
> Regarding the [redacted] investigation – I have heard that there is a draft of an email search warrant that we are not being included in. The case and information related to [redacted] and information obtained via our tax investigation. It seems as if we are now being completely removed from this investigation where as we used to work as a team with the FBI. The results of an email search warrant matter because [redacted] and Sportsman [redacted], and if in those emails, there is indication that it is not, that would have potential tax implications on Sportsman and [redacted] – This is a risk area to us and why I believe we need to continue our involvement in this investigation. We need to figure out how to fix this issue, so that we can become a team once again with the FBI in Delaware. If our agency doesn't want us involved in this investigation, please let me know and I will back off.
>
> The [redacted] and [redacted] investigations are continuing to move along, but our tax investigation of [redacted] has completely stopped since September of 2022 – With no idea of how were are going to work this investigation and get it to completion.
>
> There are updates happening, and we aren't being notified in one way or another and it appears like there is still a breakdown in communication.[156]

Almost immediately after Appellant 2 sent the email, SAC Carter called Appellant 2 and angrily said the investigative team had been updated on all the Sportsman case updates and that SAC Carter didn't appreciate being accused of withholding information from the Appellants.

[156] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T33-Exhibit-212-HWM-Email-to-ASAC-Re-SM-Investigation-04.13.2023_Redacted.pdf.

SAC Carter did not tell Appellant 2 that IRS-CI had already agreed with DOJ to remove the Appellants and the ITFC team from the Sportsman investigation.

VIII. CONGRESSIONAL DISCLOSURES AND OFFICIAL REMOVAL FROM SPORTSMAN CASE

On April 19, 2023, Appellant 1's legal team sent a letter to several congressional committees indicating that a career IRS-CI supervisory agent would like to make protected disclosures to Congress, but sought information to first share with counsel information protected by 26 U.S.C. § 6103.[157] The letter noted:

> My client has already made legally protected disclosures internally at the IRS, through counsel to the U.S. Treasury Inspector General for Tax Administration, and to the Department of Justice, Office of Inspector General. The protected disclosures: (l) contradict sworn testimony to Congress by a senior political appointee, (2) involve failure to mitigate clear conflicts of interest in the ultimate disposition of the case, and (3) detail examples of preferential treatment and politics improperly infecting decisions and protocols that would normally be followed by career law enforcement professionals in similar circumstances if the subject were not politically connected.[158]

The letter received immediate and widespread public attention.

On April 25, 2023, Chief Lee again canceled the J5 Chief Brief. This was the second cancellation in a row since Appellant 1 had informed IRS-CI of his decision to make protected disclosures outside of the IRS.

On April 26 and 27, 2023, respectively, Chairman Smith and Senate Committee on Finance Chairman Ron Wyden granted counsel for Appellant 1 authorization to review Section 6103 information to assist Appellant 1 in preparing to make his protected disclosures to Congress.

On April 27, 2023, IRS Commissioner Werfel testified before the House Committee on Ways and Means Chairman.[159] Chairman Jason Smith opened the hearing by noting the April 19, 2023 letter from Appellant 1's counsel. During questioning, Chairman Smith asked Commissioner Werfel to commit that there would be no retaliation against Appellant 1. Werfel

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[157] https://empowr.us/wp-content/uploads/2024/04/2023-04-19-Letter-to-Congress.pdf.
[158] *Id.*
[159] https://waysandmeans.house.gov/event/hearing-on-accountability-and-transparency-at-the-internal-revenue-service-with-irs-commissioner-werfel.

responded: "[W]hile I can't comment on a specific case, I can say without hesitation there will be no retaliation for anyone making an allegation or a call to a whistleblower hotline."[160] Yet despite this commitment, the IRS only proceeded to further marginalize and alienate Appellant 1 as he made his protected disclosures to Congress.

On May 5, 2023, Appellant 1's counsel met with the Democrat and Republican staff of the House Ways and Means Committee followed by the Democrat and Republican staff of the Senate Finance Committee. In the meetings, Appellant 1's counsel communicated in detail a number of protected disclosures from Appellant 1, including how IRS leadership had "bur[ied] their heads in the sand."[161]

There is a high likelihood that the seriousness of these protected disclosures was communicated by staff of either committee to the IRS and/or DOJ. The following week of May 8, 2023, DOJ and the IRS apparently made the decision to formally communicate to the Appellants their removal from the Sportsman case. When subsequently questioned by Congress about the removal, DFO Batdorf stated: "We were simply waiting for the [USAO] to make the decision if they were moving forward with the case, and I believe that happened in May[.]" Congressional counsel asked DFO Batdorf: "So it's fair to say, had the whistleblowers not come forward, this case may still be dormant?" Batdorf responded: "It could be."[162]

On May 15, 2023, Appellant 1 received a calendar invite from ASAC Watson for a phone call with her and SAC Carter. In the call, SAC Carter informed Appellant 1 that the Appellants and any other members of the ITFC were being removed from the Sportsman investigation. SAC Carter said he would be sending an email the next day informing Appellant 1 and his team which new investigators would be assigned to the case. SAC Carter said the change was at the request of the Delaware USAO and DOJ, claiming that he had learned late the prior week that in order to move forward with prosecuting the case, IRS-CI needed to assign a new investigative team.[163] SAC Carter made no mention of the fact that he had received an email from SAC Waldon in February 2023 memorializing the agreement Waldon and DFO Batdorf had made with USA Weiss in December 2022.[164]

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[160] https://www.congress.gov/118/chrg/CHRG-118hhrg54350/CHRG-118hhrg54350.pdf.
[161] Shapley Transcript at 89.
[162] Batdorf Transcript at 79.
[163] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T112-Shapley-3_Attachment-31.pdf.
[164] Batdorf Transcript at 73–74.

Appellant 1 asked SAC Carter if the Delaware USAO or DOJ had provided a reason why a new investigative team was needed. SAC Carter said they did not explain why. Appellant 1 made clear to SAC Carter and ASAC Watson his view that it was inappropriate and unethical for IRS-CI to acquiesce to an unprecedented request like this without being told why. Appellant 1 stated that he had been making protected disclosures to IRS-CI leadership since at least June of 2020 that provided specific examples of the Delaware USAO and DOJ being inappropriate, unethical, and providing preferential treatment to Hunter Biden. Appellant 1 further stated that if IRS-CI was nevertheless going to simply do what the Delaware USAO and DOJ requested without taking into consideration whether they were acting appropriately, IRS-CI would be complicit in unethical conduct.[165]

The very same day the Appellants were removed from the case, AUSA Wolf contacted Hunter Biden's defense counsel to offer Hunter Biden a deferred prosecution agreement—an arrangement which would require no further investigative work and no trial testimony from IRS-CI, belying the claim that removing the Appellants and the ITFC was necessary to "move forward with prosecuting the case."[166]

Later on May 15, 2023, Appellant 1's counsel sent a letter to Congress disclosing the ITFC's removal, writing: "Removing the experienced investigators who have worked this case for years and are now the subject-matter experts is exactly the sort of issue our client intended to blow the whistle on to begin with."[167]

On May 16, 2023, House Ways and Means Chairman Smith wrote to Commissioner Werfel demanding an immediate briefing on the removal.[168] That same day, former IRS-CI Chief Don Fort appeared for a hearing before the Senate Committee on Finance. Senator Ron Johnson asked: "In your time in the IRS in the investigatory division or criminal division, was there ever another instance where an entire IRS investigatory team was pulled off a tax case?" Fort testified: "I've spent 30 — almost 30 years with IRS criminal investigation. I'm not aware of a situation such as that."[169]

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[165] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T112-Shapley-3_Attachment-31.pdf.
[166] https://www.nytimes.com/2023/08/19/us/politics/inside-hunter-biden-plea-deal.html.
[167] https://justthenews.com/sites/default/files/2023-05/IRS-WB-Letter-5-15-23.pdf.
[168] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/05/05.16.23-Ltr-to-IRS-Commissioner-re-Whistleblower-Retaliation.pdf.
[169] https://www.finance.senate.gov/hearings/house-republican-supplemental-irs-funding-cuts-analyzing-the-impact-on-federal-law-enforcement-and-the-federal-deficit.

Also on May 16, 2023, Appellant 1's legal team had a phone call with Attorney Deputy Attorney General ("ADAG") Bradley Weinsheimer regarding Appellant 1's removal from the Sportsman case. ADAG Weinsheimer indicated USA Weiss would have to answer any questions about the removal.

On May 17, 2023, counsel for Appellant 1 filed a PPP complaint with OSC.

On May 18, 2023, Appellant 2 sent an email to his entire chain of command up to Commissioner Werfel with the subject "Sportsman Investigation-Removal of Case Agent."[170] The email was addressed to "My Respective IRS Leadership" and read in part:

> First off, I apologize for breaking the managerial chain of command but the reason I am doing this is because I don't think my concerns and/or words are being relayed to your respective offices. I am requesting that you consider some of the issues at hand.
>
> As I am sure you were aware, I was removed this week from a highly sensitive case out of the Delaware USAO after nearly 5 years of work. . . .
>
> * * *
>
> For the last couple years, my SSA and I have tried to gain the attention of our senior leadership about certain issues prevalent regarding the investigation. I have asked for countless of meetings [sic] with our chief and deputy chief, often to be left out on an island and not heard from. The lack of IRS-CI senior leadership involvement in this investigation is deeply troubling and unacceptable. Rather than recognizing the need to ensure close engagement and full support of the investigatory team in this extraordinarily sensitive case, the response too often had been that we were isolated (even when I said on multiple occasions that I wasn't being heard and that I thought I wasn't able to perform my job adequately because of the actions of the USAO and DOJ, my concerns were ignored by senior leadership).[171]

On May 19, 2023, at 1:20 pm, ASAC Watson sent Appellant 2 an email with the subject "Reminder - Chain of Command":

> We acknowledge your email received yesterday morning. You have been told several times that you need to follow your chain of command. IRS-CI maintains a chain of command for numerous reasons to include trying to stop unauthorized disclosures. Your email yesterday may have included potential grand jury (aka 6e material) in the subject line and contents of the email, and you included recipients that are not on the 6e list.

[170] Letter from Tristan Leavitt and Mark Lytle to Daniel Werfel (May 20, 2023), Exhibit A, https://waysandmeans.house.gov/wp-content/uploads/2023/06/June-7-2023-Letter_Redacted.pdf.
[171] *Id.*

> In the future, please follow previously stated directives and this written directive that no information should be sent to the DFO, Deputy Chief, Chief or any other executive without being sent through my office and the SAC office.[172]

The allegedly "potential grand jury (aka 6e material)" in Appellant 2's email was nothing more than the code-name "Sportsman" in the email subject and once in the body of the email. The code-name had been assigned by the FBI, was all over IRS communications, and had nothing to do with grand jury deliberations (the purpose of the restriction in Rule 6(e) of the Federal Rules of Civil Procedure).[173]

About three minutes later, at 1:23 pm, SAC Carter sent an email to WDCFO leadership, including Appellant 1, titled "REMINDER - Field Office Chain of Command":

> As I've previously stated in staff meetings, chain of command is important to the successful communication and operation within a field office. Following chain of command prevents confusion, conflict, and misunderstandings.
>
> There should be no instances where case related activity discussions leave this field office without seeking approval from your direct report (i.e. SA to SSA to ASAC to SAC). By following the chain of command, we can all work together to ensure that our team is successful.[174]

SAC Carter and ASAC Watson's emails were clearly coordinated with each other—and approved by the IRS's leadership, to which Appellant 2 had sent his email. Further, the entire

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[172] Letter from Tristan Leavitt and Mark Lytle to Daniel Werfel (May 20, 2023), Exhibit B, https://waysandmeans.house.gov/wp-content/uploads/2023/06/June-7-2023-Letter_Redacted.pdf.

[173] Rule 6(e), "Recording and Disclosing the Proceedings," protects details surrounding "a matter occurring before the grand jury." The purpose of Rule 6(e) is to "preserve the secrecy of the grand jury proceedings[.]" *In re Sealed Case No 99-3091,* 192 F.3d 995, 1002 (D.C. Cir. 1999). Grand jury materials subject to the rules of secrecy include "the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the [grand jury] investigation, the deliberations or questions of jurors, and the like." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998). However, there is a difference between a *grand jury's investigation* (and the information gathered through it) and the investigation conducted through the prosecutor's office. *In re Sealed Case No 99-3091,* 192 F.3d at 1002 (D.C. Cir. 1999). See, e.g., *United States v. Rioux*, 97 F.3d 648, 662 (2d Cir.1996)("Most of the media surrounding the Rioux investigation . . . discussed federal 'investigations,' without actually discussing matters before the grand jury."); *In re Grand Jury Subpoena*, 920 F.2d 235, 242 (4th Cir.1990) ("[I]nformation produced by criminal investigations paralleling grand jury investigations does not constitute matters 'occurring before the grand jury' if the parallel investigation was truly independent of the grand jury proceedings."); *Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir.1988) ("[T]he agents could not have violated Rule 6(e)(2) merely by allowing the Georgia Power investigators to be present during the questioning of potential grand jury witnesses. . . . To have violated Rule 6(e)(2) . . . the agents must have disclosed to the Georgia Power investigators information revealing what had transpired, or will transpire, before the grand jury.") (emphasis added); *In re Grand Jury Investigation ["Lance"]*, 610 F.2d 202, 217 (5th Cir.1980) ("[T]he disclosure of information obtained from a source independent of the grand jury proceedings, such as a prior government investigation, does not violate Rule 6(e).").

[174] Letter from Tristan Leavitt and Mark Lytle to Daniel Werfel (May 20, 2023), Exhibit C, https://waysandmeans.house.gov/wp-content/uploads/2023/06/June-7-2023-Letter_Redacted.pdf.

IRS chain of command—from Commissioner Werfel down to ASAC Watson—unquestionably knew Appellant 1 had contacted Congress to make protected disclosures. SAC Carter's email, which was disseminated widely, was clearly intended to have a chilling effect on whistleblower disclosures to Congress.

That same day—May 19, 2023—counsel for Appellant 2 contacted DOJ OIG regarding making protected disclosures about the Sportsman case.

The next day, on May 20, 2023, counsel for Appellant 1 emailed Commissioner Werfel a letter, copying OSC:

> Five days ago, you were copied on a letter to various committees of Congress warning that the IRS had removed our client's entire team of investigators from a criminal tax case in an apparent act of retaliation aimed at some of those employees who had expressed concerns about the Department of Justice improperly allowing politics to infect its decisions.
>
> * * *
>
> Yesterday, we became aware that even after receiving the May 15 letter to Congress, the IRS has inexplicably decided to initiate additional reprisals against these special agents, apparently for a protected disclosure directly to you. This is unacceptable and contrary to law, which clearly prohibits it.[175]

The letter specifically identified SAC Carter and ASAC Watson and detailed how their communications appeared to violate 5 U.S.C. § 2302(b)(13) as well as an appropriations restriction that protects federal employees having direct oral or written communication with Congress.[176] The letter also warned that 18 U.S.C. § 1505 makes it a crime to obstruct an investigation of Congress.

According to later correspondence provided to Congress, IRS Deputy Commissioner O'Donnell, "upon conferring with the Commissioner and his staff, I directed that staff delete the email from the Commissioner's mailbox without him reviewing it[.]"[177] Ridiculously, O'Donnell sent the letter "for Rule 6(e) review" to DOJ, which of course "determined that the

[175] Letter from Tristan Leavitt and Mark Lytle to Daniel Werfel (May 20, 2023), at 1, https://waysandmeans.house.gov/wp-content/uploads/2023/06/June-7-2023-Letter_Redacted.pdf.
[176] Consolidated Appropriations Act, 2023, Pub. L. 117–328, Div. E, Sec. 713.
[177] Letter from Douglas O'Donnell to Russell George (May 23, 2023), at 2, https://waysandmeans.house.gov/wp-content/uploads/2023/06/June-7-2023-Letter_Redacted.pdf.

correspondence did not contain Rule 6(e) material[.]"[178] Even as of June 7, 2023, O'Donnell referred to Appellant 1 as a "purported whistleblower."[179]

On May 24, 2023, Appellant 2's legal team sent a letter to the House Committee on Ways and Means indicating that a career IRS-CI SA (Appellant 2) would like to make protected disclosures to Congress but sought authorization to first share with counsel information protected by 26 U.S.C. § 6103.

That same day—May 24, 2023—Appellant 1's identity as an IRS whistleblower became publicly known.[180] Appellant 1 also had his first phone interview with OSC staff, sharing the entire history of his work on and protected disclosures about the Sportsman case, as well as the retaliation since his protected disclosures. Appellant 1 informed OSC in the call that his transcribed interview with Democrat and Republican staff from the House Committee on Ways and Means was scheduled for May 26, 2023.

Appellant 1 also notified his chain of command on May 25, 2023 about his congressional interview scheduled for the next day. And at the urging of OSC, at the end of the day on May 25 IRS Deputy Commissioner Doug O'Donnell emailed all IRS Services & Enforcement employees with a message regarding how IRS employees were allowed to make protected disclosures. Yet in an apparent attempt to chill Appellant 1's testimony, O'Donnell's email *still* omitted any mention of Congress. And not only did the IRS know Appellant 1's testimony was taking place the next day, Appellant 2 had also scheduled his own transcribed interview with House Ways and Means Committee staff for June 1, 2023, which the IRS also likely knew.

IX. IRS SUPERVISOR SABOTAGE

After OSC's contact with the IRS, the repercussions for Appellant 1 quickly multiplied. The IRS had already begun marginalizing Appellant 1, cancelling all Chief Briefs since January 2023. But from this point forward the IRS completely and utterly isolated Appellant 1. He went from having weekly phone calls with ASAC Watson to having no phone calls with her whatsoever. His emails to her went unanswered or received terse replies. Similarly, Appellant 1 went from having biweekly phone calls with SAC Waldon to having no communication.

[178] *Id.*
[179] *Id.*
[180] https://www.cbsnews.com/news/irs-whistleblower-tax-probe-hunter-biden.

The week of May 29, 2023, Chief Lee again canceled the Chief Brief scheduled for June 2, 2023.

On June 2, 2023, ASAC Watson informed the Appellants that the "quick pause" DFO Batdorf had emailed them about on February 9, 2023 had in fact resulted in the national strategy being canceled altogether.

On June 6, 2023, Senator Grassley and Senator Johnson wrote to Commissioner Werfel of Deputy Commissioner O'Donnell's May 25 email: "The Deputy Commissioner's email fails to include the specific anti-gag provision language to fully inform IRS employees about their rights to make protected disclosures of misconduct as required by law. The importance of whistleblowers knowing their rights under the law cannot be understated."[181] In a separate letter they made public, Senator Grassley and Senator Johnson wrote to TIGTA and DOJ OIG: "[W]e urge you to fully investigate the allegations of whistleblower retaliation, and the IRS's failure to include the anti-gag provision in the Deputy Commissioner's email to IRS employees."[182]

On June 19, 2023, counsel for Appellant 2 filed a PPP complaint with OSC.

On June 22, 2023, the House Committee on Ways and Means voted to release the transcript of its interviews of the Appellants, with associated materials.[183] When the Committee posted its interviews with the Appellants on its website, their many protected disclosures became public.[184]

In June 2023, Appellant 1's ITFC team received a referral of a Form 211 tax whistleblower complaint filed in a foreign country. When an SA receives a tax whistleblower referral, they have between 30 and 45 days (determined by IRS headquarters when assigning the referral) to interview the whistleblower and determine whether to open a subject criminal investigation [SCI]. Here, the whistleblower had significant time constraints due to some ongoing issues in their personal life. However, through significant coordination with the whistleblower's attorney, the case agent was able to identify dates that would work for the case agent and a secondary agent to interview the whistleblower in the city where they lived on July

[181] https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_irs_-_protected_whistleblower_disclosure.pdf.
[182] https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_dojoig_tigta_-_whistleblower_retaliation.pdf.
[183] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/06/COMPILED_Votes-06.22.pdf.
[184] https://gop-waysandmeans.house.gov/event/meeting-on-documents-protected-under-internal-revenue-code-section-6103. Appellant 2's name remained redacted on both Appellants' interview transcripts.

24, 2023, then travel to a larger city to show the IRS-CI agents the assets and businesses of the target of the whistleblower complaint. As per usual practice, the case agent contacted the IRS regional attaché with jurisdiction over the foreign country so the attaché could initiate the visa process with the country. On June 23, 2023, the case agent submitted his Form 1321 travel request to Appellant 1. Travel requests to interview foreign whistleblowers received routine approval, so as per usual practice, the case agents made flight and hotel reservations at the time they submitted the travel request.

On June 23, 2023, Appellant 1 also received an anonymous email which read in part:

> I'm a former SABT instructor of yours and still an active 1811 at CI. . . .
>
> * * *
>
> I want you to know that your local leadership is actively working to undermine your credibility and work product. You very recently submitted a SAC LUC [limited undercover] request to SIT [Special Investigative Techniques] via your management chain. Your management team made comments that disparaged your work, called into question your judgment and generally dismissed your request. SIT non-concurred with your management and said the request had more than sufficient information and documentation to warrant the SAC LUC and approved it.

In late June 2023, Chief Lee canceled the Chief Brief scheduled for June 27, 2023.

On June 26, 2023, Appellant 1 forwarded the foreign travel request to ASAC Watson. Appellant 1 noted in his email to ASAC Watson that ITFC had already contacted the IRS attaché with jurisdiction over the foreign country. Yet Appellant 1's email received no response until June 29, 2023, when ASAC Watson emailed: "The attaches are going to see if they can take care of this whistleblower interview for us, I'll keep you posted."

On June 28, 2023, IRS Deputy Associate Chief Counsel Edith Shine issued Appellant 1 a letter stating: "The Office of Special Counsel (OSC) has requested that you respond to interview questions and document requests in connection with the above matter." However, the letter cryptically noted: "You may not testify in response to general questions concerning the current or former positions, policies, procedures, or records of the IRS, except those that are relevant to the matter under investigation."

On July 6, 2023 the anonymous IRS-CI employee who had emailed Appellant 1 previously again contacted Appellant 1, writing:

> From what I've seen, Lola has been subjecting your work to scrutiny and criticism that is not only beyond her level of involvement (historically speaking) but also incorrect in the opinion of others in positions to know. I believe you're already

> aware of her actions to hold you and your work to a standard that others are not being held to.

On July 7, 2023, Commissioner Werfel sent an email to all IRS employees with the subject "Updated Whistleblower Guidance," noting: "This guidance supersedes and replaces the guidance emailed by the Deputy Commissioner of Services and Enforcement to Services and Enforcement employees on May 25, 2023."[185] The email finally included the anti-gag language mandated by 5 U.S.C. § 2302(b)(13) and the appropriations restriction, and also included the following:

> [U]pon belief that a return and/or return information may relate to possible misconduct, maladministration or taxpayer abuse, IRS employees may also disclose such return or return information to the chairman of the House Ways and Means Committee, the chairman of the Senate Finance Committee and/or the chairman of the Joint Committee on Taxation, or the examiners or agents as the chairmen of these committees may designate or appoint.[186]

However, this language was contained in a paragraph about "non-grand jury matter[s]." The paragraph of "grand jury matters" clearly excluded Congress as an avenue for blowing the whistle, and did not attempt to clarify that just because an IRS-CI investigation gathered some evidence through a grand jury does not transform every detail about an entire case into a secret "grand jury matter." Rather, only details about the grand jury proceedings are restricted.

By mid-July, two weeks after ASAC Watson had emailed that she would "keep [Appellant 1] posted," she still had no confirmed whether the two ITFC agents should be prepared to travel on July 24, 2023. On July 12, 2023, Appellant 1 emailed ASAC Watson, copying SAC Carter and DFO Batdorf. His email read in part:

> It has been 13 days with no follow up from you. It is now much too late to meet the operational goals of this scheduled interview and other investigative steps. Because of your inappropriate intervention, failure to seek approvals and no follow up, we need to create a whole new plan to when the whistleblower is available and agents are free. . . .
>
> * * *
>
> IRS-CI has no attaches in [foreign country]. Therefore we would have to ask two attaches to travel there with the result being a cost to the government likely very similar to what it would cost for Appellant 2 and secondary to travel. We would also then be relying on their assessments as to whether ITFC should elevate this

[185] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/12/Exhibit-603-Commissioner-Email-07.07.2023_Redacted.pdf.
[186] *Id.*

> investigation to an SCI. It is common knowledge that attaches are not there to conduct interviews but to coordinate for the agents to accomplish these types of tasks.

Also on July 12, 2023, the ITFC case agent emailed the Deputy Attaché to ask about the status of their visa request. The Deputy Attaché emailed back informing Appellant 2 that the visa process had already been stopped *two weeks earlier*:

> Around end of June, ASAC Lola Watson has reached out . . . and stopped the visa process. She indicated that since it is a only investigative lead at this point, she would prefer the [] Post to handle the interview with the WB in [the country], rather than the Agents. We just assumed that decision has been communicated to you as well. . . . Please let us know if you have any questions or other new arrangement related to this interview request.

The ITFC case agent spoke with Deputy Attaché Tang the next day. In an email to Appellant 1 memorializing the call, the case agent wrote:

> [The Deputy Attaché] told me that our ASAC Lola called them at the end of June and had them stop the visa process. Our visa request had already been submitted, so they had to go back to the [country's] Embassy to withdraw the request. . . . [The attachés] told [ASAC Watson] that they would not be able to conduct the interview until October at the earliest. She said the delay was fine. The attaches were under the impression that Lola had already decided how she wanted this handled before she called. [The Deputy Attaché] was confused because he thought all of this information had been relayed to me as case agent.

Because ASAC Watson did not communicate any of this information to Appellant 1 or the case agent, no one contacted the whistleblower or their attorney to determine whether October would work with the whistleblower's time constraints.

Eventually, Appellant 1 would see from forwarded email correspondence that ASAC Watson emailed the Attaché and Deputy Attaché on July 18, 2023:

> I just wanted to follow up regarding a date of when you may be available to meet with the WB, I will need to request an extension from Financial Crimes to provide us with adequate time to evaluate the WB claim. I know you initially suggested your travel will be later in the year.

The Attaché replied, copying the ITFC case agent for the first time, that they were extremely busy with their travel schedules until November, and unless he was able to combine the travel with another trip he had planned around September 11, it would have to wait until November. The case agent forwarded the correspondence to Appellant 1, who forwarded it to DFO Batdorf, writing: "I attempted to bring this to your attention last week and no one responded to me. Please

see below. ASAC Watson has completely removed me from my role as SSA of the ITFC. This is even after I brought it to your attention."

On July 19, 2023, the Appellants testified in a public hearing before the House Committee on Oversight and Accountability. When asked whether IRS leadership was obstructing the Sportsman case, Appellant 1 testified:

> So my complaints for IRS criminal investigation and senior leadership is not necessarily for blocking this investigation. You know, I do believe that we raised things on a continual basis and they just stuck their head in the sand, and took no action. But in terms of the retaliation, that is when they first reared their head, and, you know, there is no doubt about it after protected disclosures were made, that they took prohibited personnel practices against me.

Appellant 1 testified about the impact of being isolated at the agency since coming forward:

> I mean, we are running undercover operations, we are doing interviews across the world, and when senior leadership really cuts off communication like that, you know, increases the chance of, you know, some officer safety type issue when we can't communicate those types of issues with senior leadership and we have no support from them.

Similarly, Appellant 2 testified:

> It is essentially like being left out on an island. And I don't know if that is done purposefully, but I essentially made disclosures up to the commissioner of the IRS. I said, what happened, and the response I got a few days later was I may have broken the law and don't ever do this again, your emails need to go through your leadership. So to have that come to me was chilling. I can't even put words to it[.]

On July 21, 2023, having received no response from DFO Batdorf to his July 18, 2023 email, Appellant 1 emailed Commissioner Werfel, copying IRS-CI Chief Lee:

> I write to ask you to live up to your sworn testimony to Congress and applicable whistleblower laws by directing IRS-CI senior leadership to stop retaliating against me for making protected disclosures concerning the Hunter Biden investigation. Attached is a file that contains a few emails from the past couple weeks. The topic of the emails is operational in nature, but [i]n these emails I am asking my leadership to simply speak to me, to stop retaliating, and to allow me to exceed in my job duties. **I have received no responses at all.**
>
> I believe you will agree with me that it is inappropriate that IRS-CI is:
>
> 1. Completely isolating me[.]
> 2. Taking over decisions that my job duties require me to make[.]
> 3. Circumventing me without my knowledge[.]
> 4. Speaking about me with animus, disparaging comments and unfounded critiques of my work products[.]
> 5. Not speaking to me since June 1, 2023[.]

> I tried my immediate chain of command first. Then went to the Director of Field Operations Michael Batdorf – even telling him what my next step would be. Now I find myself at the Commissioner of the IRS level. I am at a loss at how this agency, that I have dedicated my career to, could act in this manner.
>
> On August 1, 2023, Deputy Chief Ficco emailed Appellant 1:
>
> I understand your current frustrations . . . . I want to make sure that to the extent possible, everything on your team functions as normal.
>
> You are an effective manager as are your ASAC and SAC. Agents/Supervisors often disagree with investigative direction being provided by leadership. You and I have disagreed in the past and it is part of the normal give and take of our work. I am looking to you and your ASAC and SAC to come together with Mike and I to develop a way forward that allows you to effectively perform your supervisory responsibilities to include discussions regarding case actions in accordance with existing procedures. Communication is a two-way street and we (Lola [Watson], Kareem [Carter], Mike [Batdorf] and I) stand ready to communicate openly with you during what is a complicated and stressful time. . . .

Ficco's email did not acknowledge that a key "existing procedure[]," the Chief Brief, had been canceled by Chief Lee each month since February 2023.

On August 18, 2023, Appellant 1 learned that another undercover operation in a different foreign country was being held up by ASAC Watson, despite Appellant 1 having repeatedly briefed the operation to IRS-CI Chief Lee, SAC Carter, and ASAC Watson, and it having been approved by IRS-CI Special Investigative Techniques and IRS-CI International Operations. Despite ASAC Watson not having communicated any concerns about the operation to Appellant 1, the case agent learned from sources that ASAC Watson was questioning the operation and the travel of agents to support it.

In addition, Appellant 1 continued to learn of ASAC Watson circumventing him. In one instance, an ITFC agent was offered an acting SSA role in another field office, but after initially communicating through Appellant 1, ASAC Watson began communicating directly with the agent, asking them to update Appellant 1. The agent commented to Appellant 1 that it felt like he was the child of two divorced parents. In another instance, ASAC Watson circumvented Appellant 1 to directly approve an ITFC agent's travel request over the phone.

In mid-August 2023, Chief Lee canceled the Chief Brief scheduled for August 22, 2023. Sometime after this, Appellant 1 deleted the series from his calendar, realizing he might not be briefing the IRS-CI Chief ever again.

On September 8, 2023, the House Ways and Means Committee investigators interviewed SAC Darrell Waldon. SAC Waldon categorically denied being involved in the decision to remove the Appellants from the Sportsman case—testimony that was directly contradicted by DFO Batdorf when Committee investigators interviewed him on September 12, 2023.[187]

That same month, ASAC Watson was promoted, and David Meisenheimer became the new ASAC to whom Appellant 1 reported.

On September 27, 2023, the House Ways and Means Committee voted to release a second tranche of documents from the Appellants.[188]

Early the next month, from October 2 to October 5, 2023, Appellant 1 had to travel to another conference with all major J5 partners, this time in Ottawa, Canada, because J5 Lead Pobereyko lacked sufficient knowledge and experience. Appellant 1 would also travel to a bilateral meeting with United Kingdom partners in Puerto Rico from March 13 to March 15, 2024, again because J5 Lead Pobereyko lacked sufficient knowledge and experience.

On December 5, 2023, the Appellants testified at a second congressional hearing, this one a closed ("Executive Session") hearing before the House Ways and Means Committee.[189] The Committee also voted to release a third tranche of documents from the Appellants.[190]

X. PREVENTING CONSIDERATION FOR MANAGEMENT VACANCIES

For the second half of 2023 and the first few months of 2024, Appellant 1 refrained from applying for promotions while he awaited the outcome of OSC's investigation into the changing of the J5 Lead position from an IR-01 to an IR-04 and the non-selection of Appellant 1.

However, by the spring of 2024 it became apparent that OSC was nowhere near completing its investigation. Given the IRS's Tenure Policy, Appellant 1 began looking at other promotions. In mid-April 2024, Appellant 1 heard from a friend in the J5 that a new Assistant Director of International Operations position would soon be advertised both as a non-competitive detail and as a permanent position competitively bid through USAJobs. On April 26, 2024, IRS-CI posted the non-competitive 1-year NTE detail lateral as vacancy CO 2024-GO:IO-4, with a

[187] *Compare* Waldon Transcript at 122–124 *to* Batdorf Transcript at 92–95.
[188] https://waysandmeans.house.gov/event/meeting-on-documents-protected-under-internal-revenue-code-section-6103-2.
[189] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/12/FINAL_Hearing-Transcript-12.5.2023.pdf.
[190] https://waysandmeans.house.gov/event/meeting-on-documents-protected-under-internal-revenue-code-section-6103-3.

close date of May 3, 2024. On April 29, 2024, Appellant 1 submitted his statement of interest to ASAC Meisenheimer. ASAC Meisenheimer forwarded the statement of interest to SAC Carter that day, writing: "I support SSA Shapley's pursuit of this opportunity and he has a lot of relevant experience that he would bring to the position." The next day, SAC Carter forwarded the statement of interest to Director of International Operations Ron Loecker.

On May 9, 2024, Director Loecker called Appellant 1 to tell him IRS human resources had determined Appellant 1 was not eligible for vacancy CO 2024-GO:IO-4 because he had never been a permanent IR-01. Director Loecker reiterated the information Appellant 1 had previously heard that a competitive USAJobs announcement would also be going out for the position. However, despite hearing from two independent sources that IRS-CI had planned to open a competitive vacancy, once Appellant 1 expressed his interest in the position IRS-CI never listed it on USAJobs.

On June 4, 2024, IRS-CI posted vacancy CO 24-12414151C-CIM-1811-01/24-12413405C-CIM-1811-01, a 12-month roster of both permanent and temporary NTE ASAC positions, or posts of duty ("PODs"), around the country. The vacancy had a close date of June 3, 2025. The posting read:

> The Roster ASAC Announcements are LIVE!
>
> * * *
>
> ***All currently approved or <u>potential PODs</u> for ASACs are listed in the USA Jobs Announcements.***
>
> The first cut-off date on the ASAC Roster Announcements . . . is June 17, 2024.
>
> Known vacancies exist for the following Field Offices. It is anticipated that these positions will be filled from qualified applicants who apply prior to this first cut-off date.

(Emphasis added.) IRS-CI knew ASAC Meisenheimer's tenure as a WDCFO ASAC was nearing its end. However, the list of twenty offices on the ASAC Roster Announcement did not include the WDCFO. Appellant 1 alleges this was intentional to keep him from applying for the position.

On June 17, 2024, ASAC Meisenheimer informed Appellant 1 that ***he had known since the beginning of June*** that he would soon be moving into a position at IRS headquarters, but that IRS management had not yet decided which of two positions they would move him into. Unbeknownst to Appellant 1, one of those positions was held by Jaushua Brewer, who in turn also ***knew ASAC Meisenheimer would be vacating the WDCFO ASAC position***. Accordingly,

Brewer applied through the ASAC Roster Announcement—listing the WDCFO as his preferred POD.

On July 22, 2024, ASAC Meisenheimer received formal notice that he would be moving into the IRS headquarters position held by Jaushua Brewer. When ASAC Meisenheimer informed Appellant 1, Appellant 1 began preparing a statement of interest for the WDCFO ASAC position, specifically for a POD in Baltimore (one of the several PODs within the WDCFO). Appellant 1 submitted the statement of interest on August 2, 2025.

Appellant 1 soon learned that SAC Carter conducted ASAC interviews on August 6, 2024. However, Appellant 1 was never contacted to interview for the WDCFO ASAC vacancy. On August 15, 2024, SAC Carter emailed the office: "Please join me in congratulating and welcoming ASAC Jaushua Brewer to the Washington DC Field Office!! Jaushua will report as the Branch B ASAC beginning Monday, October 7th." IRS-CI subsequently sent out a list of all 11 ASACs selected from the first cut-off date on the ASAC roster announcements. The WDCFO was the only ASAC selection for a POD not included in the June 4, 2024 Roster ASAC Announcement.

Appellant 1 shared this information with OSC, which requested that the IRS stay ASAC Brewer's appointment. On September 9, 2024, the IRS agreed to a 45-day stay on permanently filling the WDCFO ASAC position, so when ASAC Brewer began on October 7, 2024, it was not considered permanent.

XI. CONTINUING IRS RETALIATORY ACTIONS

Unsurprisingly, given the circumstances surrounding ASAC Brewer's appointment, Appellant 1 immediately noticed that his requests were delayed under ASAC Brewer, much like they had been in the past under ASAC Watson. Appellant 1 specifically flagged this issue for ASAC Brewer.

In the last week of October 2024, journalist Catherine Herridge contacted the IRS for comment regarding an interview she was preparing to release where the Appellants indicated they had suffered retaliation from the IRS.

Ms. Herridge released her interview on the morning of October 29, 2024.[191] Less than an hour later, the IRS issued a letter to Appellant 1 dated October 15, 2024, two weeks earlier. The

[191] https://catherineherridgereports.com/p/chr-post-title-will-go-here-c8bcaa6da057640a.

letter informed Appellant 1 that since his SSA term would expire April 29, 2025, he was being reassigned to IRS-CI headquarters effective May 4, 2025. Appellant 1's legal team released the IRS letter to the public and, on October 31, 2024, sent Congress a detailed letter explaining the issue.[192]

On November 13, 2024, Appellant 1 sent ASAC Brewer a memo requesting approval to contract forensic accounting support from outside the IRS for a particular case ("SPAR Request"). Appellant 1's email noted the DOJ Tax attorney on the case had previously used a forensic accounting support contract from the provider, and the DOJ Tax attorney was very interested in such a contract to quickly further this case. ASAC Brewer forwarded the SPAR Request for approval to SAC Carter, who ignored the request for nearly two months.

On December 3, 2024, Appellant 1 emailed ASAC Brewer a series of documents requesting approval to execute an international undercover operation ("Undercover 1"). In the following weeks, Appellant 1 inquired verbally with ASAC Brewer multiple times about the request's status.

On December 18, 2024, Appellant 1 emailed ASAC Brewer a request package for a different international undercover operation ("Undercover 2"). Over the next three weeks, Appellant 1 verbally inquired with ASAC Brewer multiple times about the status of the operation's approval. Each time, ASAC Brewer told Appellant 1 that the undercover request was awaiting approval from various offices within the IRS.

On January 8, 2025, Appellant 1 forwarded ASAC Brewer correspondence with the embassy staff local to Undercover 2, writing: "FYI. This UCO is tentatively approved by the [embassy]. We sent up the request with CT concurrence on 12/18. Would you mind checking the status?" ASAC Brewer responded, "Checking[.]" After further correspondence, Appellant 1 also emailed ASAC Brewer: "There is another one for [Undercover 1] sent up on 12/3. I followed up in [m]id-December and you said you knew it was at SIT on 12/20. I haven't seen anything since." ASAC Brewer responded: "I am following up on the [Undercover 1] one."

On January 13, 2025, at 1:47 pm, Appellant 1 forwarded his December 18, 2024 Undercover 2 request again to ASAC Brewer, writing:

> I am a bit lost for words. We are still waiting for approval for this operation [Undercover 2]. . . . I have mentioned to you before the delay on most of my

[192] https://justthenews.com/sites/default/files/2024-10/2024-10-31%20EO%20to%20House%20-%20IRS%20retaliation%20re%20Shapley.pdf.

> requests the past several months. I have sent multiple emails asking for updates. It is having a negative impact on our ability to execute these time sensitive enforcement actions to further these complex investigations and is materially altering my ability to do my job.
>
> I will have to raise the issues to the appropriate level if I do not see the urgency I deem appropriate in the short term.
>
> It always feels weird writing an email like this that will be dismissed by senior leadership as if I'm doing something wrong. Then I remind myself that I am simply doing my job and senior leadership should be assisting not hindering those efforts.
>
> Please advise on what I have to do to get these items the urgency they require. If I went about it wrong by asking for updates multiple times, and then resorting to this email, please advise.

At 1:51 pm, ASAC Brewer emailed back: "I will follow-up today to see where they're at." At 1:56 pm, ASAC Brewer forwarded Appellant 1's underlying email with the Undercover 2 request to the Acting SAC that day, Cynthia Hearn. Yet unbeknownst to Appellant 1 at the time, ASAC Brewer ***deleted Appellant 1's January 1, 2025, 1:47 pm email chain and headers down to the substance of the December 18, 2024 email***. ASAC Brewer thus altered the record presented to the Acting SAC, falsely making it appear as if Appellant 1 made the Undercover 2 request on January 13—well after the necessary deadlines—rather than a month earlier on December 13 when Appellant 1 actually had submitted it with ample time for approval. ASAC Brewer's alteration of the email chain also had the effect of hiding his own failure to timely forward the request for approval.

On the morning of January 14, 2025, Appellant 1's Undercover 2 package was approved at the DFO level. ASAC Brewer texted Appellant 1 implying the delays had been above his level: "Found out [Undercover 2] is at global ops and I made a call this morning to push . . . . [O]nce processed I'll circle back with them on why and what happened but first priority is getting the signatures."

On January 14, 2025, Appellant 1 also heard from International Operations about the Undercover 1 request since it was submitted on December 3, 2024, suggesting ASAC Brewer may not have approved and forwarded the Undercover 1 request until January 13, 2025.

On January 15, 2025, ASAC Brewer texted Appellant 1: "I'm still working on getting an answer for when signatures will occur for [Undercover 2] and [Undercover 1]. Will call again this afternoon if no response." Appellant 1 texted back: "Copy. Not sure why [Global

Operations] would take this long. Attaché already got approval from embassy weeks ago. But that's all part of the mystery here." ASAC Brewer's response specifically blamed another office: "Well [Global Operations] has the new FTR to approve the change adding the agent. ***The hold up at SIT [Special Investigative Techniques] was the actor leading into holidays and new person thinking actor had handled for ops.*** They are all now moving and I'll continue to press." (Emphasis added.)

On January 17, 2025, SIT approved the Undercover 2 package and emailed it to IRS-CI International Operations for approval. When International Operations didn't respond by January 23, 2025, the SIT agent forwarded it again, this time adding Appellant 1. This is how Appellant 1 happened to discover that ASAC Brewer had altered the email chain upon forwarding it to hide the true date of the original request. Had the SIT agent not copied Appellant 1, allowing him to read down the chain to see how ASAC Brewer had altered it, he would not have known.

In early February, DOJ asked about the status of the SPAR Request Appellant 1 had submitted on November 13, 2024. Appellant 1 inquired with ASAC Brewer on February 7, 2025, who, in turn, emailed SAC Carter. On February 10, 2025, SAC Carter responded that he had not even begun processing the SPAR Request and would only now be forwarding the request to DFO Batdorf for approval.

Meanwhile, a similar process played out with the J5, where Appellant 1 continues to be marginalized. On approximately January 7 or 8, 2025, J5 Lead Pobereyko sent a Microsoft Teams message to Appellant 1 asking about his availability to present in a Chief Brief on Monday, January 13, 2025. Appellant 1 responded, identifying his availability outside of a doctor's appointment and some previously scheduled meetings. Pobereyko did not respond that day.

On January 9, 2025, Appellant 1 ran into an IRS-CI colleague who mentioned to Appellant 1 that he had seen on a Chief Brief agenda that Appellant 1 would be presenting in the January 13 meeting. When Appellant 1 expressed surprise, since he had only recently heard of the meeting and still didn't have a time for the meeting, the colleague said the invite and agenda had been sent out weeks earlier. The colleague checked the calendar invite and saw it had not been sent to Appellant 1. When his colleague forwarded the meeting invite, Appellant 1 saw that the meeting was during his doctor's appointment—something Appellant 1 could have worked

around had he been informed of the date and time of the meeting at the time it was scheduled and the agenda was sent out to all other attendees.

On January 10, 2025, Appellant 1 received the Chief Brief invite from IRS-CI Deputy Chief Guy Ficco along with the message: "Adding a few additional attendees to this meeting who were erroneously left off initial invitation."

On February 10, 2025, OSC transmitted a PPP report to the IRS regarding the Appellants' removal from the Sportsman case.

LEGAL ANALYSIS

In order to establish whistleblower retaliation in an IRA appeal before the Board, an appellant must show the following:

(1) That he engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8) or engaged in protected activity under section 2302(b)(9);
(2) That he suffered a personnel action as defined in 5 U.S.C. § 2302(a)(2)(A); and
(3) That the protected disclosure or protected activity was a contributing factor in the personnel action(s).

See Briley v. National Archives & Records Administration, 236 F.3d 1373, 1378 (Fed. Cir. 2001).

Additionally, under 5 U.S.C. § 1214(a)(3) and 5 C.F.R. § 1209.5, in order for the Board to have jurisdiction over an IRA appeal, an appellant must have exhausted their administrative remedies by seeking corrective action from OSC at least 120 days before seeking corrective action from the Board. The substantive requirements of exhaustion are met when an appellant has provided OSC with a sufficient basis to pursue an investigation. *Chambers v. Department of Homeland Security*, 2022 MSPB 8, ¶ 10. The purpose of the exhaustion requirement is to give OSC the opportunity to take corrective action before involving the Board in the case. *Id.*

The protected disclosures, personnel actions, and contributing factor allegations outlined below were all provided to OSC over the past 21 months. An appellant may demonstrate exhaustion through an initial OSC complaint or correspondence with OSC. *Id.*, ¶ 11. Both forms of evidence are attached to this complaint as exhibits, and the Appellants also affirm with their filings that they have exhausted their administrative remedies with OSC.

I. PROTECTED DISCLOSURES AND ACTIVITY

To be protected, an employee must "reasonably believe[]" that a "disclosure of information" "evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). The test for determining whether an employee had a reasonable belief that his disclosures revealed wrongdoing is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined in Section 2302(b)(8).

The April 19, 2023 letter Appellant 1's counsel sent to Congress noted Appellant 1 had "already made legally protected disclosures internally at the IRS, through counsel to the U.S. Treasury Inspector General for Tax Administration, and to the Department of Justice, Office of Inspector General."[193] The letter broke Appellant 1's disclosures into three categories:

> The protected disclosures: (l) contradict sworn testimony to Congress by a senior political appointee, (2) involve failure to mitigate clear conflicts of interest in the ultimate disposition of the case, and (3) detail examples of preferential treatment and politics improperly infecting decisions and protocols that would normally be followed by career law enforcement professionals in similar circumstances if the subject were not politically connected.[194]

Appellant 1 also subsequently disclosed to Congress the IRS's failure to abide by anti-gag restrictions at 5 U.S.C. § 2302(b)(13) and in appropriations restrictions.

Finally, the Appellants also engaged in protected activity which 5 U.S.C. § 2302(b)(9) prohibits from serving as the basis for personnel actions.

Preferential Treatment and Politics Infecting Decisions and Protocols

As outlined in the above section, almost from the time Appellant 2 initiated his investigation in November 2018 and Appellant 1 was assigned to supervise the Sportsman case in January 2020, they disclosed to their IRS-CI chain of command "examples of preferential treatment and politics improperly infecting decisions and protocols that would normally be

[193] https://empowr.us/wp-content/uploads/2024/04/2023-04-19-Letter-to-Congress.pdf.
[194] *Id.*

followed by career law enforcement professionals in similar circumstances if the subject were not politically connected."[195]

For example, Appellant 1 made this disclosure up to the DFO level in a June 16, 2020 phone call, noting the unprecedented delaying of investigative steps and overt action in the Sportsman case because the subject's father was running for President.

Through the remainder of 2020 and into 2021, the Appellants continued to disclose the arbitrary limiting of the scope of investigative actions, such as removing Hunter Biden's name from search warrants and document requests in September 2020 and prohibiting asking witnesses on the December 8, 2020 day of action about Hunter Biden's financial relationship with his father. Appellant 1 also disclosed to his IRS-CI chain of command in May 2020 AUSA Wolf's refusal to allow agents to investigate campaign finance allegations, which Appellant 1 characterized as obstruction.

In the spring of 2022, Appellant 1 produced to DOJ communications which included some of these disclosures. Thereafter, Appellant 1 also began making similar disclosures personally to DOJ, particularly in the October 7, 2022 meeting. This resulted in DOJ abusing the discovery process as a pretext to learn what other protected disclosures Appellant 1 made to his IRS-CI chain of command.

The U.S. Court of Appeals for the Federal Circuit has defined "abuse of authority" as "an arbitrary and capricious exercise of authority that is contrary to the agency's mission." *Smolinski v. Merit Systems Protection Board*, 23 F.4th 1345, 1351-52 (Fed. Cir. 2022).

A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that decisions the Delaware USAO and DOJ Tax made to vary from standard investigative practice were arbitrary and capricious. As Appellant 1 noted, he had never seen a situation where an intentional decision was made to only conduct "most" of an investigation.[196] A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could also reasonably conclude that the cumulative effect of these actions and investigative inactions—benefiting Hunter Biden and limiting investigation into former Vice President and then-Democrat presidential nominee Joe

[195] https://empowr.us/wp-content/uploads/2024/04/2023-04-19-Letter-to-Congress.pdf.
[196] Shapley Transcript at 15; *see also* Ziegler Transcript at 25–26.

Biden—was contrary to DOJ's mission "to uphold the rule of law"[197] and the IRS's mission to "enforce the law with integrity and fairness to all."[198] Thus, the Appellants had a reasonable belief that they were disclosing an abuse of authority.

The Federal Circuit and the Board have defined "gross mismanagement" as "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Lopez v. Department of Housing and Urban Development*, 98 F.3d 1358 (Fed. Cir. 1996) (Table) (quoting *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 395 (1993)).

A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that, given the very public status of Hunter and Joe Biden, DOJ's seeming preferential treatment of the Bidens created a substantial risk of significant adverse impact on the public perception that DOJ upheld the rule of law. Thus, the Appellants also had a reasonable belief that they were disclosing gross mismanagement.

Failure to Mitigate Clear Conflicts of Interest

As evidenced by letters from Congress to DOJ almost immediately after President Biden took office on January 20, 2021, the public harbored serious questions about the potential for conflicts of interest in the President's DOJ and IRS investigating and prosecuting the President's son.

Various rules and regulations should have prevented such a conflict of interest. The "Principles of Ethical Conduct for Government Officers and Employees" state that a basic obligation of public service is that "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual." 5 CFR § 2635.101(b)(8). Chapter 28 CFR § 45.2(a) states in part:

> No employee shall participate in a criminal investigation if he has a personal or political relationship with . . . [a]ny person or organization substantially involved in the conduct that is the subject of the investigation or prosecution, or [a]ny person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

[197] https://www.justice.gov/doj/organization-mission-and-functions-manual.
[198] https://www.irs.gov/about-irs.

The regulation defines "political relationship" as "a close identification with an elected official . . . arising from service as a principal advisor or official[.]" 28 CFR § 45.2(c). The regulation further states:

> An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section shall report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he shall relieve the employee from participation unless he determines further, in writing, after full consideration of all the facts and circumstances, that:
>
> (1) The relationship will not have the effect of rendering the employee's service less than fully impartial and professional; and
> (2) The employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

28 CFR § 45.2(b).

A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the Appellants could reasonably conclude that both DC USA Matthew Graves and CDCA USA Martin Estrada had a "political relationship" with a "person"—President Bident—which "ha[d] a specific and substantial interest that would be directly affected by the outcome of . . . prosecuti[ng]" the President's son. Further, these officials' participation clearly creates an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution. Thus, the Appellants reasonably believed these two USAs should have recused themselves from this charging decision and that their failure to do so violated rules and regulations.

Again, gross mismanagement is "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Lopez v. Department of Housing and Urban Development*, 98 F.3d 1358 (Fed. Cir. 1996) (Table) (quoting *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 395 (1993)).

A disinterested observer with knowledge of the essential facts about the Hunter Biden case known to and readily ascertainable by the public—such as Attorney General Garland's description of how the case was being handled—would very likely have concluded that no political appointees besides USA Weiss, publicly touted as a "Trump appointee," were a part of

any decision-making process on charging the President's son. The Appellants knew the key fact that the public rhetoric creating this perception contradicted the internal realities.

Further, essential facts made known to the Appellants by DOJ Tax were that the Delaware USAO's presentation of the Sportsman case to career staff went well and was going to result in bringing the case—but that, around the time the White House Communications Director restated President Biden's belief that Hunter Biden had done nothing wrong, USA Graves overruled his career staff and declined to bring charges. A disinterested observer with knowledge of these essential facts could easily conclude that they created a substantial risk of significant adverse impact upon DOJ's ability to accomplish its mission.

Therefore, the Appellants reasonably believed that they were disclosing gross mismanagement.

Contradiction of Sworn Statements to Congress

Attorney General Garland's April 26, 2022 testimony before the Senate Committee on Appropriations received significant public attention. Senator Hagerty specifically raised the White House Communications Director's statement, and the concern that it could impact officials who had been appointed by President Biden—and were subject to his removal. And yet, when Attorney General Garland testified, "There will not be interference of any political or improper kind," he did not disclose that USA Weiss had presented the Hunter Biden charges to the Biden-appointed DC USAO, or that—apparently right after the White House Communications Director's statement—Biden appointee Matthew Graves overruled his career staff and declined to bring the case.

The Appellants knew the reality of how the case was being handled contradicted the perception the Attorney General had sold to Congress and the public. That became undeniable in the October 7, 2022 meeting, where Appellant 1 learned for the first time that USA Weiss had requested from DOJ special charging authority to bring charges in DC—and not been granted it. As USA Weiss told the group on October 7, 2022, he was "not the deciding person on whether charges are filed." Appellant 1 disclosed both in person to SAC Waldon after the meeting and in

writing to DFO Batdorf that this news was "a huge problem – inconsistent with DOJ public position and Merrick Garland testimony."[199]

Again, the Federal Circuit has defined an "abuse of authority" as "an arbitrary and capricious exercise of authority that is contrary to the agency's mission." *Smolinski v. Merit Systems Protection Board,* 23 F.4th 1345, 1351-52 (Fed. Cir. 2022). Gross mismanagement is "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Lopez v. Department of Housing and Urban Development,* 98 F.3d 1358 (Fed. Cir. 1996) (Table) (quoting *Nafus v. Department of the Army,* 57 M.S.P.R. 386, 395 (1993)). Further, under 18 U.S.C. § 1001(a), it is a crime to "knowingly and willfully" "make[] any materially false, fictitious, or fraudulent statement or representation" to Congress.

The Appellants were not privy to USA Weiss's interactions with DOJ or the Attorney General. But based on the essential facts known to and readily ascertainable by Appellant 1 as he walked into the October 7, 2022 meeting, and the information provided by USA Weiss in that meeting, it was reasonable for Appellant 1 to believe the Attorney General might have violated the law. Whether or not the Attorney General knew all that the Appellants knew when he made his statements to Congress, it was reasonable for the Appellants to believe that DOJ's failure to give USA Weiss the independence and charging authority he needed to bring the tax charges against Hunter Biden was both an abuse of authority and gross mismanagement.

Gag Orders

Appellant 1 made further disclosures of violations of "law, rule, or regulation" when his counsel wrote to Commissioner Werfel and Congress indicating that ASAC Watson and SAC Carter had violated appropriations restrictions and 5 U.S.C. § 2302(b)(13) when they issued gag emails that did not contain required language making clear that such orders did not "supersede, conflict with, or otherwise alter" rights related to "communications to Congress" or "the reporting to an Inspector General or the Office of Special Counsel" violations.

Appellant 1's belief was reasonable, as a disinterested observer with knowledge of the essential facts known to and readily ascertainable by Appellant 1 could reasonably conclude that

[199] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T76-Shapley-1_Attachment-6_Redacted.pdf at 3.

the IRS's actions evidenced a "violation of any law, rule, or regulation." The reasonableness of this disclosure was reinforced by OSC requiring that the IRS send communications superseding the improper gag orders.

Protected Activity

Under 5 U.S.C. § 2302(b), "Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority":

> (9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
>
> (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation[; or]
>
> * * *
>
> (C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law[.]

On December 13, 2022, DFO Batdorf emailed Appellant 1: "[T]here are routes you could take if you truly believe there are violations of ethical conduct or prosecutorial misconduct."[200] Appellant 1 informed the IRS when he engaged counsel and began taking those additional routes. Appellant 1's counsel contacted TIGTA in late December 2022 and again in early January 2023. On January 6, 2023, Appellant 1 disclosed this to DFO Batdorf of this fact, who informed IRS-CI leadership and SAC Carter. On January 25, 2023, Appellant 1 also provided DFO Batdorf with further details about his protected activities. And Appellant 1 repeated to ASAC Watson on February 1, 2023 that he was in the process of blowing the whistle outside of the agency.

When counsel for Appellant 1 filed a PPP complaint with OSC, it publicly advertised the fact, putting the IRS on notice. OSC also shortly engaged with the IRS directly regarding its finding in late May or early June 2023 that the IRS had violated 5 U.S.C. § 2302(b)(13).

Further, a key purpose of Appellant 1's communications with TIGTA and OSC after January 4, 2023 was to "remedy[] a violation of [5 U.S.C. § 2302 (b)](8)" (5 U.S.C. § 2302(b)(9)(A)(i)).

[200] Shapley Transcript, Exhibit 9.

All of this activity is protected by Section 2302(b), and is appealable to the Board under

II. PERSONNEL ACTIONS

As described above, in retaliation for his protected disclosures (section 2302(b)(8)) and protected activity (section 2302(b)(9)(C)), Appellant 1 suffered a number of adverse actions. Appellant 1's non-selection for the J5 Lead detail ("Personnel Action 3") clearly constitutes a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iv).

The other actions the Appellants suffered are covered by 5 U.S.C. § 2302(a)(2)(A)(xii), "any other significant change in duties, responsibilities, or working conditions." In determining whether an appellant has suffered a "significant change" in his duties, responsibilities, or working conditions, the Board must consider the alleged agency actions both collectively and individually. *See Holderfield v. Merit Systems Protection Board*, 326 F.3d 1207, 1209 (Fed. Cir. 2003). These actions are organized below by the agency taking action (IRS versus DOJ) and by whether the actions were taken because of disclosures largely internal to the IRS versus disclosures external to the IRS: a significant increase in duties and responsibilities from the IRS ("Personnel Action 1"); marginalization and removal from the Sportsman case by DOJ ("Personnel Action 2"); non-selection for the J5 Lead position by the IRS ("Personnel Action 3"); and a cascading series of other retaliatory actions by the IRS, including removal from the Sportsman case ("Personnel Action 4").

Personnel Action 1: IRS Increase in Duties and Responsibilities

When the Appellants brought their protected disclosures to their IRS-CI chain of command in the summer of 2020, the WDCFO leadership reacted by distancing themselves and becoming less involved in the case. This was evidenced in such IRS actions as SAC Jackson declining to take a call with USA Weiss and telling Appellant 1 that she "[did] not want to know anything I don't need to know"—even though Sportsman was one of the larger and more high-profile cases in the WDCFO and USA Weiss's equivalent in seniority was the SAC, not an SSA two levels below the SAC in the chain of command.

Appellant 1 followed SAC Jackson's instruction that he should be the one communicating about the case with USA Weiss going forward. In addition to Appellant 1 being the point of contact for all Delaware USAO and DOJ Tax interactions on the case, he was eventually forced to add to his typical management interactions with his ASAC and SAC regular

meetings and communications with the DFO, the next-highest IRS-CI official who was willing to provide meaningful guidance on the Sportsman case.

This situation did not change when Darrell Waldon became the SAC of the WDCFO. As indicated above, in SAC Waldon's first briefing on the Sportsman case, held March 2, 2021, SAC Waldon visibly disengaged when he realized the Appellants were discussing the need for blowing the whistle. After that point, SAC Waldon played a minimal role in the Sportsman case, other than attending a couple of meetings. Congressional investigators later asked DFO Batdorf: "Mr. Shapley testified that he became the day-to-day contact or the regular contact for the U.S. attorney and interacted directly with U.S. Attorney Weiss on a regular basis rather than the special agent in charge. Is that your understanding of what happened procedurally in this case?" DFO Batdorf answered: "Procedurally in this case, yes." When investigators asked Batdorf why, he responded: "I think David Weiss had a more hands-on approach to this investigation than a normal U.S. attorney would with a hundred AUSAs and a thousand criminal cases. I think this was his focus and his AUSAs that were working this investigation, and he attended the meetings regularly."[201] Yet when asked how often SAC Waldon (DFO Batdorf's own direct report) attended these meetings, DFO Batdorf said he did not know.[202]

Collectively, the lack of involvement from IRS-CI leadership in the Sportsman case had practical and significant effects on the overall nature and quality of Appellant 1's duties and responsibilities. *Skarada v. Department of Veterans Affairs*, 2022 MSPB 17, ¶ 16. Thus, this was a significant change in Appellant 1's duties, responsibilities, and working conditions under 5 U.S.C. § 2302(a)(2)(A)(xii).

Personnel Action 2: DOJ Marginalization and Removal from Case

The legislative history of the 1994 amendment to the Whistleblower Protection Act indicates that "any other significant change in duties, responsibilities, or working conditions" should be interpreted broadly, to include "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system and should be determined on a case-by-case basis." 140 Cong. Rec. H11,419, H11,421 (daily ed. Oct. 7, 1994)

[201] Batdorf Transcript at 17–18.
[202] *Id.*

(statement of Rep. McCloskey); see *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 23 (2015); *Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶ 24 (1999).

When the Appellants made protected disclosures to the Delaware USAO, they and DOJ Tax soon realized the Appellants had been making protected disclosures about them to their IRS-CI chain of command for years. DOJ then retaliated against Appellant 1 by demanding more of his internal management communications without legitimate cause, as supervisory case communications are not normally part of discovery preparations. Although the FBI rebuffed a similar request, IRS-CI leadership acquiesced to the Delaware USAO's demands. When the USAO read the further protected disclosures the Appellants had made to IRS-CI leadership, USAO demanded the IRS remove the Appellants altogether.

These changes had practical and significant effects on the overall nature and quality of the Appellants' working conditions, duties, and responsibilities. The Appellants went from spending a large portion of his time working on the Sportsman case to being isolated, lied to by their leadership, and left in the dark with steps being taken to bring the case to a conclusion without their knowledge or professional judgment being considered. The Appellants also went from having a stellar reputation within IRS-CI to having their reputation sabotaged by DOJ.

Taken together, DOJ's marginalization and isolation of the Appellants was a second significant change in their duties, responsibilities, and working conditions under 5 U.S.C. § 2302(a)(2)(A)(xii).

Personnel Action 3: IRS Non-Selection for J5 Lead Position

At the same time as the Delaware USAO and DOJ Tax were contacting IRS-CI and putting increasing pressure on them about Appellant 1, the IRS passed over Appellant 1 for the J5 Lead position, for which he was clearly more qualified than the selectee. The IRS's non-selection of Appellant 1 for the J5 Lead detail was a clear personnel action under 5 U.S.C. § 2302(a)(2)(A)(iv).

Personnel Action 4: Other Changes in IRS Duties, Responsibilities, and Working Conditions

In determining whether an appellant has suffered a "significant change" in his duties, responsibilities, or working conditions, the Board must consider the alleged agency actions both collectively and individually. See *Holderfield v. Merit Systems Protection Board*, 326 F.3d 1207, 1209 (Fed. Cir. 2003). As indicated above, OSC found that the IRS's removal of the Appellants

from the Sportsman case alone constituted a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xii). However, the removal was only one of many ways the IRS significantly changed the Appellants' duties, responsibilities, and working conditions.

These changes began in the fall of 2022 as the Appellants continued their protected disclosures outside of the IRS, including to DOJ, the DOJ OIG, TIGTA, and Congress. In the ensuing two and a half years, the IRS subjected the Appellants to various actions that had major practical and significant effects on the overall nature and quality of the Appellants' working conditions, duties, and responsibilities. These actions included:

(A) Marginalization and isolation of the Appellants: The IRS marginalized the Appellants when it became aware that USA Weiss requested to no longer have communications with Appellant 1 but did not inform Appellant 1 of USA Weiss's request. The IRS participated in isolating the Appellants from the Sportsman case even before agreeing to remove them, and continued to marginalize and isolate the Appellants *after* it agreed to remove them by never telling him of this development. Once Appellant 1 came forward to Congress, Appellant 1's immediate supervisors cut off almost all contact with him, while also "working to undermine [Appellant 1's] credibility and work product," "disparage[ing] [his] work" and "call[ing] into question [his] judgment[.]"

(B) Reduction of the J5 Lead detail from an IR-01 to an IR-04 position: Amid USA Weiss's retaliatory sabotage of Appellant 1's reputation, the IRS changed the vacancy listing for the J5 Lead position, which IRS-CI management knew Appellant 1 was interested in. This further resulted in Appellant 1 not converting into the permanent IR-01 Chicago ASAC position, which would have cascading effects on the positions the IRS would allow Appellant 1 to apply for.

(C) Removal of the Appellants and their team from the Sportsman case: DOJ did not control the IRS's investigative assignments—the IRS did. The IRS effectuated the removal of the Appellants from the Sportsman case, which OSC found was a significant change in duties, responsibilities, and working conditions in and of itself.

(D) Preventing Appellant 1 from being considered for various vacancies: After allowing Appellant 1 to miss the opportunity to convert into a permanent IR-01 position, the IRS selectively enforced against Appellant 1 in January 2023 and May 2024 the

requirement that he have held a *permanent* IR-01 position in order to apply for other IR-01 vacancies, despite his excelling for an entire year in a competitively-selected IR-01 position. The IRS also avoided listing the WDCFO ASAC position to prevent Appellant 1 from being considered for it.

(E) Reductions in Appellant 1's J5 duties and responsibilities: The IRS began canceling the J5 Chief Brief in February 2023 and having other officials brief the IRS-CI chief on the J5 cases Appellant 1 and his team were working. Even when the IRS put Appellant 1 on a J5 Chief Brief agenda in January 2025, it did not inform him until the last minute, when his schedule would not permit him to attend.

(F) Unreasonable scrutinization of and unreasonably delaying or reversing approvals for Appellant 1's investigative requests: At least two of Appellant 1's immediate supervisors delayed requests like international travel and undercover operation requests.

(G) Altering communications from Appellant 1: Appellant 1's immediate supervisor changed the date of Appellant 1's emails to give the false impression that Appellant 1 sent them late (in January 2025, contrary to IRS guidelines on the timeliness of requests) when, in fact, Appellant 1 had sent the request timely in December 2024.

Taken together, the IRS's change in its treatment of the Appellants beginning in the fall of 2022 was a significant change in his duties, responsibilities, and working conditions. Under 5 U.S.C. § 2302(a)(2)(A)(xii), this constitutes a personnel action.

III. CONTRIBUTING FACTOR

To satisfy the contributing factor criterion at the jurisdictional stage of an IRA appeal, Appellant 1 only needs to raise a nonfrivolous allegation that the fact of, or the content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 13 (2016). The protected disclosure need not be the only factor that tended to affect the personnel action. *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

The most common way of establishing contributing factor is the knowledge/timing test outlined in 5 U.S.C. § 1221(e)(1), which states that the employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through

circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure or protected activity, and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

In addition to the knowledge/timing test, contributing factors can be shown by other circumstantial evidence, such as "the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against Appellant 1." *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 156 (1995) (internal citations deleted). Disclosures reflecting poorly on an agency, such as on its capabilities and performance, can provide retaliatory motive even for agency officials not directly implicated by the disclosures. *Robinson v. Department of Veterans Affairs*, 923 F.3d 1004, 1008-09, 1018–19 (Fed. Cir. 2019); *Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012); *Smith v. Department of the Army*, 2022 MSPB 4, ¶ 28.

Personnel Action 1: IRS Increase in Duties and Responsibilities

Appellant 1's increase in duties and responsibilities began within approximately six months of his first protected disclosures to his IRS-CI chain of command. This satisfies the knowledge/timing test.

There is also significant evidence that Appellant 1's protected disclosures tended to affect the personnel action. Immediately after attempting to make protected disclosures about the Sportsman case in an October 2020 call with SAC Jackson, Appellant 1 was instructed to increase his duties and responsibilities by beginning to communicate directly with USA Weiss. When Appellant 1 attempted to involve SAC Jackson, she appeared displeased.

Similarly, SAC Waldon's lack of engagement with the case started almost from the outset, when Appellants first briefed Waldon on Sportsman in March 2021 and visibly reacted to their discussion of the possible need to blow the whistle on DOJ's handling of the case.

Personnel Action 2: DOJ Marginalization and Removal from Case

The Appellants made some protected disclosures to DOJ in an August 16, 2022 meeting. After the October 7, 2022 meeting where Appellant 1 confronted USA Weiss with his protected

disclosures, DOJ's treatment of the Appellants clearly changed. This satisfies the knowledge/timing test.

USA Weiss also personally communicated to IRS-CI his displeasure with Appellant 1's communications. Whatever discovery concerns DOJ had, by December 2022 all investigative activity on the Sportsman case had long been completed, and there was no reason to remove the Appellants and their team from the case. USA Weiss failed to address this matter in his final report as Special Counsel.[203]

Personnel Action 3: IRS Non-Selection for J5 Lead Position

Appellant 1's non-selection for the J5 Lead position, which he was clearly most qualified for, was well within the timeframe of protected disclosures at the IRS to satisfy the knowledge/timing test. Although the selecting officials for the J5 Lead position were not in Appellant 1's chain of command, it is quite likely that the selecting officials (or at least outgoing J5 Lead Christine Mazzella) had constructive knowledge of Appellant 1's protected disclosures.

An appellant may establish an official's constructive knowledge of a protected disclosure by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Bradley v. Dept. of Homeland Security*, 2016 MSPB 30, ¶ 15; *Marchese v. Dept. of the Navy*, 65 M.S.P.R. 104, 108 (1994). As the Board has noted, "The Supreme Court has adopted the term 'cat's paw' to describe a case in which a particular management official, acting because of an improper animus, influences an agency official who is unaware of the improper animus when implementing a personnel action." *Dorney v. Dept. of the Army*, 2012 MSPB 28, ¶ 11. Thus, "an appellant can demonstrate that a prohibited animus toward a whistleblower was a contributing factor in a personnel action by showing by preponderant evidence that an individual with knowledge of Appellant 1's protected disclosure influenced the deciding official accused of taking the personnel action." *Aquino v. Dept. of Homeland Sec.*, 2014 MSPB 21, ¶ 23.

Here, Appellant 1 was well known within IRS-CI as the supervisor of the criminal investigation into President Biden's son. Appellant 1's non-selection occurred just as USA Weiss was repeatedly contacting IRS-CI management, expressing his displeasure with Appellant 1 over his protected disclosures. USA Weiss's retaliatory sabotage of Appellant 1's reputation included

[203] *See* https://www.justice.gov/storage/Report-of-Special-Counsel-Weiss-January-2025.pdf.

communicating about Appellant 1 to SAC Waldon, DFO Batdorf, and IRS-CI Deputy Chief Ficco in at least three separate interactions. It is highly likely that IRS-CI Chief Lee was informed of at least some of these interactions. And because of USA Weiss's pressure, Appellant 1's protected disclosures spurred concerns at the IRS.

In turn, these IRS-CI officials likely influenced outgoing J5 Lead Mazzella, and possibly the entire selection panel, to steer the selection of the J5 Lead away from Appellant 1. This would constitute constructive knowledge of Appellant 1's disclosures whether or not Ms. Mazzella or the selection panel knew the full extent of Appellant 1's disclosures. Ms. Mazzella was indebted to IRS-CI management for approving her contract to return to the J5 with Deloitte, a decision that likely would have been made before the J5 Lead vacancy was announced.

Contributing factor can also be inferred from the weakness of the agency's reasons for taking the personnel action. *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 156 (1995). Appellant 1 developed, served as a case agent for, and supervised countless tax investigations (brought under Title 26), the focus of the J5. Pobereyko worked primarily on cyber-related cases (brought under Title 18), with almost no experience in international tax investigations. Appellant 1 had helped to stand up the J5 in 2018 and had led operational activities in the J5 ever since. When he became the SSA over the ITFC in January 2020, Appellant 1 also became in charge of most of the operational decisions related to the J5. Pobereyko had never been involved in the J5 or the Organization for Economic Cooperation and Development, with which the J5 Lead also worked. Appellant 1 had been an ASAC for a total of 16 months, receiving "Outstanding" ratings for both the 2021 and 2022 rating cycles. Pobereyko had never served as an ASAC or Acting ASAC. For 12 of his months as an ASAC, Appellant 1 had been an IR-01, and on October 21, 2022, an IRS-CI DFO and SAC outside of Appellant 1's chain of command noted in Appellant 1's Leadership Succession Rating that he was "Ready for Senior Management" in every one of the IRS's leadership core qualifications and competencies. Pobereyko had never even held an IR-01 position. Thus, the IRS's case for selecting Pobereyko over Appellant 1 was extremely weak.

Appellant 1's superior qualifications over Pobereyko became obvious in the following months, and IRS-CI tacitly admitted as much by requesting that Appellant 1 travel internationally to represent the J5 when Pobereyko was incapable of doing so due to his lack of experience with the organization and the tax cases it developed with international partners.

Personnel Action 4: Other Changes in IRS Duties, Responsibilities, and Working Conditions

As described above, beginning in the fall of 2022 the IRS took a series of actions against the Appellants that constituted a significant change in duties, responsibilities, and working conditions, including:

(A) Marginalization and isolation of the Appellants;

(B) Reduction of the J5 Lead detail from an IR-01 to an IR-04 position;

(C) Removal of the Appellants and their team from the Sportsman case;

(D) Preventing Appellant 1 from being considered for various vacancies;

(E) Reductions in Appellant 1's J5 duties and responsibilities;

(F) Unreasonable scrutinization of and unreasonably delaying or reversing approvals for Appellant 1's investigative requests: and

(G) Altering communications from Appellant 1.

These changes unfolded close in time to the Appellants' protected disclosures, satisfying the knowledge/timing test. In addition, a mass of circumstantial evidence points to the Appellants' disclosures being a factor that tended to affect the IRS's various actions against the Appellants.

The IRS's marginalization and isolation of the Appellants appears to have started after Appellant 1 informed DFO Batdorf that the Appellants made protected disclosures to DOJ on August 16, 2022—and that Hunter Biden's counsel had said charging their client would be career suicide. DFO Batdorf indicated he would discuss the matter with Chief Lee and Deputy Chief Ficco, ostensibly for them to express support to DOJ Tax Principal Associate Deputy Attorney General Stuart Goldberg "during their next meeting."[204] The Appellants have no insight into what communications took place between Chief Lee and Deputy Chief Ficco, such as whether Goldberg shared with them his view of the protected disclosures the Appellants made in the August 16, 2022 meeting to DOJ Tax prosecutors overseen by Goldberg.

The Appellants expanding their protected disclosures beyond their IRS-CI chain of command to DOJ likely put new pressure on IRS-CI leadership, especially when President Biden commented personally on *60 Minutes* about the case in late September. Later that week, when prosecutors suddenly decided that charging Hunter Biden before the November 2022 election would be "shoot[ing] [them]selves in the foot," Appellant 1 did everything in his power to flag to

[204] https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T101-Shapley-3_Attachment-20_WMRedacted.pdf.

his IRS-CI chain of command the impropriety of prosecutors being influenced by political timing. And as Appellant 1 was indicating to his IRS-CI chain of command during the same time frame (between August and October 2022) his interest in applying for the J5 Lead position, Chief Lee or Deputy Chief Ficco likely approved Christine Mazzella's contract to work with the J5 after departing the agency, and approved the decision to list the J5 vacancy as an IR-04 instead of an IR-01.

The IRS's marginalization and isolation of the Appellants only increased after Appellant 1's disclosures to USA Weiss in the contentious October 7, 2022 meeting, which SAC Waldon attended and discussed with DFO Batdorf afterwards. When USA Weiss told SAC Waldon that Weiss would no longer communicate with Appellant 1, Waldon chose not to share this information with the Appellants, contributing to their marginalization and isolation—and providing evidence of Waldon's retaliatory animus.[205] Similarly, as Weiss communicated with DFO Batdorf and Deputy Chief Ficco, no one in IRS-CI was telling the Appellants the full story of the communications. DFO Batdorf and SAC Waldon met with the IRS Office of the Chief Counsel to discuss the protected disclosures the Appellants made in the discovery IRS-CI produced to DOJ—but didn't inform the Appellants of their concerns. And when Batdorf and Waldon agreed with USA Weiss on December 22, 2022, the IRS-CI chain of command deliberately withheld this information from the Appellants despite a host of communications from the Appellants questioning their marginalization and isolation.

Circumstantial evidence of SAC Waldon's retaliatory motive in removing the Appellants from the Sportsman case can be found in his attempt to hide his involvement from Congress. When initially asked by congressional investigators whether he was involved in the removal of the Appellants and their team being removed from the Sportsman case, SAC Waldon testified: "In the decision happening in May? No."[206] When asked whether he was consulted about the decision, SAC Waldon testified: "No."[207] When asked whether he knew who was involved in the decision, SAC Waldon testified: "I would be speculating."[208] When asked whether he had ever been involved in a decision to reassign an entire case team, SAC Waldon didn't answer the question ("I've certainly reassigned investigations"), and when asked whether he had ever

[205] Batdorf Transcript at 96.
[206] Waldon Transcript at 122.
[207] *Id.* at 122–23.
[208] *Id.* at 123.

reassigned a group of agents, he testified: "I personally have not."[209] Throughout this entire line of questioning, SAC Waldon made no mention of the December 22, 2022 phone call with USA Weiss in which SAC Waldon and DFO Batdorf agreed to remove the Appellants and their team from the Sportsman case. Only after a later break and consultation with agency counsel did agency counsel indicate that "Mr. Waldon has just a point of clarification."[210] The clarification pointed directly to Appellant 1's disclosures of information:

> So before I left the special agent in charge position, in February, I recommended to Mr. Batdorf that Gary Shapley be removed as the SSA from the Hunter Biden investigation, primarily due to what I perceived to be unsubstantiated allegations about motive, intent, bias.[211]

Congressional investigators would only learn of Waldon's full involvement and of the discussions with USA Weiss from DFO Batdorf's unhesitating testimony four days after Waldon's:

> I recall having discussions on December 22nd of 2022 about removing Gary Shapley's investigative team from the investigation. . . . [w]ith Mr. Weiss and Mr. Waldon. . . . [o]n the same phone call, and then following up with Darrell Waldon. . . . [T]he decision to remove Mr. Shapley was made by Darrell and I in December[.][212]

SAC Waldon communicated directly to SAC Carter and ASAC Watson in February 2023 his view that Appellant 1's "allegations about motive, intent, bias" were "unsubstantiated." By that time, the Appellants' entire IRS-CI chain of command had undoubtedly been informed that Appellant 1 had indicated his intent to file a grievance against the agency over his non-selection for the J5 Lead position. DFO Batdorf acknowledged to Congress he definitively informed the Appellants' IRS-CI chain of command (Chief Lee, Deputy Chief Ficco, SAC Waldon, and ASAC Watson) as well as IRS Office of the Chief Counsel that Appellant 1 had retained counsel and had said that the IRS would not be immune from criticism in his whistleblower disclosures. All of this gave the IRS-CI chain of command (including after the transition from SAC Waldon to SAC Carter) additional motive to further marginalize and isolate the Appellants, such as by reducing the Appellant's J5 responsibilities when they cancelled the Chief Brief.

[209] *Id.* at 124.
[210] *Id.* at 134.
[211] *Id.* at 135.
[212] Batdorf Transcript at 92–95.

If Commissioner Werfel and Deputy Commissioner O'Donnell were not informed of the Appellants' protected disclosures prior to April 18, 2023, they certainly were on that date. As indicated above, disclosures reflecting poorly on an agency, such as on its capabilities and performance, can provide retaliatory motive even for agency officials not directly implicated by the disclosures. *Robinson v. Department of Veterans Affairs*, 923 F.3d 1004, 1008-09, 1018–19 (Fed. Cir. 2019); *Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012); *Smith v. Department of the Army*, 2022 MSPB 4, ¶ 28. Each new misstep by the IRS and response from the Appellants gave IRS leadership additional motive for animus against the Appellants.

For example, on May 15, 2023, when SAC Carter and ASAC Watson finally informed Appellant 1 that the team was being removed from the Sportsman case, they pretended it was a recent decision. They also claimed it was for the purpose of prosecuting a case the Delaware USAO was still actively working *not* to prosecute. When SAC Carter and ASAC Watson issued gag orders thereafter, Appellant 1 disclosed the violation of law to both Commissioner Werfel and Congress, giving SAC Carter and ASAC Watson (not to mention the IRS leadership they were sending the communications on behalf of) additional motive to retaliate.

Finally, in addition to all of the aforementioned, Jaushua Brewer also had *additional* motive to retaliate against the Appellants when he began as ASAC in October 2024 because OSC obtained a stay from the IRS in September 2024 on Brewer's appointment as ASAC being permanent.

PLEA FOR CORRECTIVE ACTION

The Appellants request discovery and a hearing on the issues described in this complaint, and that the Board ultimately order all appropriate corrective action from the IRS and DOJ. Because the Appellants' cases contain identical issues, they request that their cases be consolidated pursuant to 5 C.F.R. § 1201.36.

EMPOWER OVERSIGHT
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