IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24-5246

ROBERT HUNTER BIDEN,
Plaintiff-Appellee

v.

INTERNAL REVENUE SERVICE,
Defendant-Appellee.

GARY SHAPLEY AND JOSEPH ZIEGLER,
Proposed Intervenors-Appellants.

Appeal from the United States District Court
For the District of Columbia
1:23-CV-2711-RC

APPELLANTS' JOINT RESPONSE TO PLAINTIFF-APPELLEE ROBERT HUNTER BIDEN'S MOTION FOR SUMMARY AFFIRMANCE

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v.	)	
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	)	
APPELLEE.	)	
	)	
GARY SHAPLEY AND JOSEPH ZIEGLER,	)	
	)	
APPELLANTS.	)	

JOINT RESPONSE TO PLAINTIFF-APPELLEE ROBERT HUNTER BIDEN'S MOTION FOR SUMMARY AFFIRMANCE

Appellants Gary Shapley ("Shapley") and Joseph Ziegler ("Ziegler"), by and through undersigned counsel, respectfully submit this response in opposition to Plaintiff-Appellee Robert Hunter Biden's ("Biden") Motion for Summary Affirmance.

At its core, Biden argues that he is entitled to a premature decision from this Court—and the motion pending before this Court attempts to craft a narrative before Shapley and Ziegler have even filed their opening brief raising meritorious issues on

appeal. To that end, Biden would have this Court conclude that because "[t]he issue was thoroughly briefed and conclusively decided" in the District Court, appellate review is not permitted or necessary. (Doc. 2089569 at p.4). However, Biden's position has no basis in law and is belied by his own motion in this appeal. Indeed, after stating that the record below contains everything needed for this Court to issue a summary affirmance, Biden cites substantive case law on intervention separate and apart from the legal authority relied upon at the District Court. (*See, e.g., id.* at p.7 (*citing United States v. Western Elec. Co., Inc.*, 1990 WL 45599 (D.C. Cir. Jan. 30, 1990)); *see also* District Court Docs. 29 and 30).

Ultimately, Shapley and Ziegler should have the opportunity to raise appropriate appellate issues in an opening brief so this Court has the benefit of full briefing and oral argument before deciding this case.

I. RELEVANT BACKGROUND

Following the actions of IRS Criminal Investigation ("IRS-CI") Special Agents Shapley and Ziegler, which include engaging in protected whistleblowing conduct that exposed the preferential treatment provided him by the U.S. Department of Justice, the U.S. Department of Justice Tax Division, and the IRS, Biden brought the underlying lawsuit against the United States Government.[1]

[1] At the outset, Shapley and Ziegler deny the conclusory statement in Biden's motion that their actions were "without authorization and in violation of 26 U.S.C. § 6103." (Doc. 2089569 at p.1). The underlying lawsuit was based on those allegations, and

Because Biden alleged in his lawsuit that Shapley's and Ziegler's disclosures violated federal law, and with their reputations and careers on the line, Shapley and Ziegler observed that the Tax Division's partial defense of the IRS and its failure to raise obvious legal arguments in support of its motion to dismiss this lawsuit would not protect their legal interests. As such, Shapley and Ziegler moved the District Court to intervene in the lawsuit. (District Court Doc. 22). On September 27, 2024, the District Court denied the motion to intervene. (District Court Docs. 38 and 39).

On October 29, 2024, Shapley and Ziegler timely filed their notice of appeal of that denial. (District Court Doc. 42). Soon after this appeal was docketed and prior to the filing of any opening briefs, Biden filed his motion for summary affirmance. (Doc. 2089569).

II. STANDARD OF REVIEW

"A motion for summary affirmance 'will be granted where the merits . . . are so clear that plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision.'" *Cascade Broad. Grp., Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam) (internal quotations and citations omitted). However, summary review by motion is only appropriate "where the moving party has carried the heavy burden of demonstrating that the

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Biden includes them in his motion as established fact. This itself demonstrates why Shapley and Ziegler have a direct interest in the underlying lawsuit.

record and the motions papers comprise a basis adequate to allow the 'fullest consideration necessary to a just determination.'" *Cascade*, 822 F.2d at 1174.

Should this Court find it appropriate to consider this matter for summary review and proceed to a review of the motion to intervene on the merits—which Shapley and Ziegler contend is premature without the benefit of full briefing and oral argument—this Court should find the District Court abused its discretion and permit Shapley and Ziegler to intervene. *See Campaign Legal Ctr. v. Fed. Election Comm.*, 68 F.4th 607, 610 (D.C. Cir. 2023); *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

III. ARGUMENT

A. Biden Has Not Met the Heavy Burden Required for Summary Disposition

The D.C. Circuit Handbook of Practices and Internal Procedures states that "[p]arties should avoid requesting summary disposition of issues of first impression for the Court." U.S. Court of Appeals for the D.C. Circuit, Handbook of Practices and Internal Procedures § VIII.G. (Mar. 1, 2021).

In the motion now pending before this Court, Biden cites four cases in this Circuit that have affirmed summary disposition on appeal and, without more, states that this case is not one of first impression. (Doc. 2089569 at p.5). But not surprisingly, none of the cases cited by Biden even approaches the gravity of this case and its unique circumstances: two federal law enforcement agents are accused

of violating federal law in a civil lawsuit brought by the son of the President of the United States and are seeking to intervene to protect their careers, reputations, and legal interests.

Biden cites *Hudson v. Am. Fed. Gov't Emps.*, No. 24-7077 (D.C. Cir. Sept. 18, 2024), decided by this Court less than six months ago. However, its factual basis is entirely dissimilar from the case currently before this Court. In *Hudson*, the facts involved an attorney who formerly represented a plaintiff attempting to intervene in the same litigation in which she was counsel of record. *Hudson v. Am. Fed. Gov't Emps.*, No. 1:17-CV-1867, Doc. 351 (D.D.C. Feb. 26. 2024). This Court granted summary affirmance of the order denying her motion to intervene. That factual backdrop is hardly comparable to this case in which the plaintiff sued the IRS disingenuously claiming two federal law enforcement agents violated federal law—and it is those two federal agents who seek to intervene.

Similarly, *Jackson v. D.C.*, 2000 WL 1013583 (D.C. Cir. July 19, 2000), *United States v. SBC Comms., Inc.*, 2009 WL 4912812 (D.C. Cir. July 31, 2009), and *Garcia v. Vilsack*, 2014 WL 6725751 (D.C. Cir. Nov. 18, 2014), all cases cited by Biden, fail to provide this Court with any basis for concluding that this case is not a matter of first impression. *Jackson* was a prisoner rights class action case where another former inmate sought to intervene and was denied by the District Court. *See Jackson v. D.C.*, No. 1:99-CV-3276, Doc. 33 (D.D.C. Feb. 17, 2000). *Jackson* is not

even remotely analogous to this case. *SBC* involved a motion to intervene by an individual regarding interchange fees by telecommunications companies which the court denied because "he did not allege an injury sufficient to confer Article III standing." *SBC Comms., Inc.*, 2009 WL 4912812, at *1. To the extent Article III Standing is still a benchmark for intervention, Shapley and Ziegler have alleged sufficient injury to establish the required standing and they have presented issues of first impression for this Court. Finally, *Garcia* does not assist Biden in meeting his heavy burden to support summary affirmance. There, this Court summarily affirmed because the appellant "forfeited all arguments" by failing to prosecute his appeal on the merits. *Garcia*, 2014 WL 6725751, at *1. In stark contrast, Shapley and Ziegler are vociferously defending their rights on appeal, and expressly request that this Court deny the motion for summary affirmance so they can properly raise meritorious issues in their opening brief.

B. The District Court Erred in Denying Shapley's and Ziegler's Motion to Intervene Under Federal Rule of Civil Procedure 24(a)

In its Memorandum Opinion, the District Court correctly stated that "the subject matter of this case has narrowed to whether the IRS agents violated provisions of 26 U.S.C. § 6103, and whether the United States must compensate Biden for any disclosure of his confidential return information." (District Court Doc. 39 at p. 23). However, the District Court then incorrectly determined that "[t]he IRS agents would therefore suffer no financial or other tangible injury as a direct result

of an adverse judgment against the United States in this case." (*Id.*). While Shapley and Ziegler would not be financially responsible for any damages awarded to Biden in the underlying case, a decision that he is so entitled to damages necessarily requires a finding that Shapley and Ziegler violated 26 U.S.C. § 6103, thereby causing grave consequences with respect to their professional lives, reputations, and respective earning potentials. As the Supreme Court has held, "[f]or standing purposes, a loss of even a small amount of money is ordinarily an injury." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017). The District Court incorrectly minimized the actual and real-life injury that would flow to Shapley and Ziegler if any court found that they, as Special Agents of the IRS, violated any provision of federal law, including 26 U.S.C. § 6103.

It is well settled in this District that Rule 24(a) should be interpreted liberally in favor of allowing intervention. *See Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 105 F.R.D. 106, 110 (D.D.C. 1985), *aff'd*, 784 F.2d 1131 (D.C. Cir. 1986) (a "liberal approach to intervention as of right . . . governs disposition of rule 24(a) motions in the District of Columbia"); *United States v. Philip Morris USA Inc.*, No. 99-2496, 2005 WL 1830815, at *1 (D.D.C. July 22, 2005) (quoting *Nuesse v. Camp,* 385 F.2d 694, 701 (D.C. Cir. 1967)) (referencing the D.C. Circuit's view that "Rule 24 (a)(2) was 'obviously designed to liberalize the right to intervene in federal actions'"). Shapley and Ziegler, in their motion to intervene, set forth circumstances

that satisfy the four prongs required to intervene under Rule 24(a): (1) they filed a timely motion to intervene, and that is undisputed by any party and the District Court; (2) the underlying litigation turns, at its core, on whether they violated 26 U.S.C. § 6103 and has real, not ethereal, consequences to their property and reputational rights; (3) an adverse finding in the underlying litigation requires a finding that they violated federal law and, unless Shapley and Ziegler are joined as litigants, they are without ability to protect those interests; and (4) the IRS and Department of Justice are not adequately representing the interests of Shapley and Ziegler, as demonstrated by the Government's limited motion to dismiss and its decision not to defend Shapley's and Ziegler's actions in pre-trial filings. *See Fund for Animal, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). The District Court erred in denying Shapley and Ziegler's motion to intervene under Rule 24(a).

C. The District Court Erred in Denying Shapley's and Ziegler's Motion to Intervene Under Federal Rule of Civil Procedure 24(b)

Permissive intervention under Rule 24(b) requires a proposed intervenor to "advance a 'claim or defense' that shares a common question with the claims of the original parties, with the apparent goal of disposing of related controversies together." *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1045. As the District Court noted, "[t]he D.C. Circuit has adopted a flexible reading of Rule 24(b)'s claim or defense language, allowing intervention even in situations where the existence of any

nominate claim or defense is difficult to find." (District Court Doc. 39, at p.7 (internal quotations and citations omitted)).

The District Court incorrectly concluded that intervention would "risk confusion of the issues." (*Id.* at p.29). As argued in the underlying motion and found by the District Court in its Memorandum Opinion, the precursor issue to damages is whether Shapley and Ziegler violated 26 U.S.C. § 6103. (*Id.* at 23). Permitting their intervention would align their defenses with those of the Government and would add no confusion to the required factual analysis of whether they violated 26 U.S.C. § 6103.

Intervention would, however, give Shapley and Ziegler a seat at the litigation table through which they could raise meritorious legal arguments as to the predicate issue that is the subject of the litigation: whether *they* violated federal law or whether *they* complied with federal law by making protected whistleblower disclosures to the United States House of Representatives precisely pursuant to Section 6103's statutory whistleblower provision.

IV. CONCLUSION

Based on the foregoing, Appellants Shapley and Ziegler respectfully request that this Court deny Appellee Biden's Motion for Summary Affirmance and allow a full briefing and argument of the issues for this Court.

Respectfully submitted,

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Certificate of Compliance

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this motion complies with the limitations of Rule 27(d). Specifically, this motion contains 2045 words, excluding properly exempted sections under Rule 32(f).

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Certificate of Service

I hereby certify that the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

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