

2. Factual findings in Chapter 15 of the Report, titled “Classified Documents Found at the University of Delaware,”² contradict representations by the University of Delaware (the “University”) in the Supplemented Affidavit of Jennifer M. Becnel-Guzzo, Esq., University FOIA Coordinator and Deputy General Counsel, dated July 22, 2022 (the “Supplemented Affidavit”),³ on which the Court relied in determining that the University had “met its burden of creating a record from which the Court can determine that the University performed an adequate search for responsive documents.” Mem. Op. at 6.

3. The Supplemented Affidavit provides, in relevant part, that no consideration was paid to President Biden, “*State funded or otherwise*,”⁴ in connection with the Senatorial Papers. To the contrary, the Special Counsel Report found that “Mr. Biden asked two of his former longtime Senate staffers to review his boxes in courtesy storage,” and that “[t]he staffers were paid by the University of Delaware to perform the pre-gift review.” Ex. 1 at 313 & n.1247. “These former staffers reviewed and catalogued the boxes and recommended to him which papers to donate.” *Id.* at 313. One staffer emailed President Biden: “I have not forgotten about the boxes and files at your house. I am looking to start on those just after Thanksgiving”—another email notes that a staffer was “looking through about 20-

² Chapter 15 of the Report is attached as **Ex. 1**.

³ D.I. 25, attached hereto as **Ex. 2**.

⁴ Ex. 2 at ¶ 8 (emphasis added).

25 boxes in the garage ... From that group, he has about 2 boxes of Senate material so far.” *Id.* n. 1251. The search for Senate documents took place at Mr. Biden’s direction, required the participation of many, and was paid for by the University. Even the University General Counsel was involved in coordinating with Mr. Biden’s Chief of Staff. *Id.* n. 1246.

4. In sum, the Report shows that President Biden directed his former staffers’ work in reviewing and cataloguing the Senate Papers, received the benefit thereof—and the University paid for it. Such payments constitute consideration paid on President Biden’s behalf in connection with the donation of Senatorial Papers to the University—contrary to the representations in the Supplemented Affidavit.

5. On February 20, 2024, Petitioners wrote to counsel for the University seeking clarification and additional information regarding the discrepancies between the Special Counsel Report and the Supplemented Affidavit. *See* **Ex. 3.**

6. On March 13, 2024, University counsel responded, dismissing Petitioners’ concerns and doubling down on the representation that “no consideration was paid to Mr. Biden for the gift of his Senate Papers.” **Ex. 4** at 1. University counsel continued: “[y]our apparent assertion that payment for services provided to the University by *former* Biden staffers who were independent contractors, constitutes a payment of consideration to Mr. Biden for the gift of his Senate Papers, is simply false.” *Id.* at 2 (emphasis in original). Counsel’s assertion, however,

directly contradicts the Special Counsel Report, which found that Mr. Biden (1) solicited and directed his former staffers' work, (2) the former staffers performed the work for Mr. Biden—rather than the University, and (3) that the University paid the former staffers. Ex. 1 at 313 & n.1247.

LEGAL ARGUMENT

A. The Court Should Grant Petitioners Relief from Judgment Under Rule 60(b)(2) in Light of Newly Discovered Evidence.

7. Delaware Superior Court Civil Rule 60(b)(2) provides that a party may be relieved from a judgment or order in the event that there is “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).” Delaware courts consider five factors when considering a motion to vacate or amend a final judgment under Rule 60(b)(2):

(1) the newly discovered evidence has come to his knowledge since the judgment; (2) that it could not, in the exercise of reasonable diligence, have been discovered for use before the judgment; (3) that it is so material and relevant that it will probably change the result; (4) that it is not merely cumulative or impeaching in character; and (5) that it is reasonably possible that the evidence will be produced at the trial.⁵

8. The findings of the Special Counsel Report constitute “newly discovered evidence,” as the underlying facts existed, but were hidden, when the Memorandum Opinion was issued.⁶ No amount of diligence could have allowed

⁵ *Levine v. Smith*, 591 A.2d 194, 202 (Del. 1991) (cleaned up), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

⁶ *Bachtle v. Bachtle*, 494 A.2d 1253, 1255-56 (Del. 1985).

Petitioners to independently find the facts set forth in the Special Counsel Report, as the Report had not been released when Memorandum Opinion was issued in October 2022, and Petitioners have had no opportunity to take discovery in this proceeding. These findings only came to light after a special counsel with governmental authority was able to uncover these facts. Had petitioners been permitted discovery, the University's omissions may have been discovered.

9. The Report's factual findings are material, relevant, and may change the holding of the Memorandum Opinion, as they directly contradict representations in the Supplemented Affidavit. The Supplemented Affidavit was the sole basis for the Court's holding—which was upheld on appeal—that the University had satisfied its “burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.”⁷ The contradictions alone cause great concern, but more importantly, they call into question the veracity of *all* of the representations in the Supplemented Affidavit, and thus undermine the factual grounds for Court's holding that the University's denial of Petitioners' requests did not violate FOIA.⁸ As to the final factors, the Special Counsel Report is not merely cumulative or impeaching, and it is suitable for

⁷ Mem. Op. at 6; *Judicial Watch, Inc. v. University of Delaware*, 267 A.3d 996, 1012-13 (Del. 2021).

⁸ See *Taylor v. Taylor*, 102 A.3d 151, 154 (Del. 2014) (reversing default judgment and noting that “[j]ust like attorneys have duties of candor to the tribunal, so too do parties themselves”).

production at an evidentiary hearing in this matter.

B. The Court Should Grant Relief from Judgment Under Rule 60(b)(6).

10. Rule 60(b)(6) incorporates equitable principles of fairness by calling for the Court to grant relief for “any other reason justifying relief from the operation of the judgment.” Super. Ct. Civ. R. 60(b)(6). Although not specifically identified in the rule, “[e]quitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b).”⁹ “The decision of whether to grant vacatur under Rule 60(b)(6) lies in the sound discretion of the trial court and will be disturbed only on an abuse of that discretion.”¹⁰

11. Petitioners submitted their requests nearly four years ago. After multiple bites at the apple, the University provided only the bare minimum information necessary to satisfy its burden of proof, and some of that information is now in question. In light of the University’s obfuscation as to its use of funds to acquire the Senatorial Papers, the Court should vacate the judgment and order the University to produce all documents—including all agreements and emails—cited in Chapter 15 of the Special Counsel Report, and/or reopen the record to permit Petitioners to take discovery to vet the University’s representations in the Supplemented Affidavit.

⁹ 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed.) Westlaw (database updated Apr. 2022).

¹⁰ *Cox v. Gen. Motors Corp.*, 239 A.2d 706, 707 (Del. 1967).

CONCLUSION

Petitioners respectfully request that the Court grant relief from the Court's Memorandum Opinion and enter the form of order filed herewith.

Dated: March 21, 2024

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/s/ DRAFT

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CERTIFICATE OF SERVICE

I, William E. Green, Jr. (DE Bar No. 4864), certify that on March 21, 2024, I caused copies of the foregoing PETITIONERS' MOTION FOR RELIEF FROM JUDGMENT to be served on the following counsel of record in the manner indicated below:

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