IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Case No. 1:24-cv-00700-TJK
(Consolidated Cases)

HERITAGE FOUNDATION, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

CABLE NEWS NETWORK, INC., *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

PLAINTIFF JUDICIAL WATCH'S COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT U.S. DEPARTMENT OF JUSTICE'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this combined memorandum of points and authorities in opposition to Defendant U.S. Department of Justice's Motion for Summary Judgment and in support of Judicial Watch's Cross-Motion for Summary Judgment.[1]

I. INTRODUCTION.

Special Counsel Robert Hur interviewed President Joe Biden about his handling of classified information. The interview was recorded and subsequently transcribed. The transcript, which DOJ has officially disclosed, contains both the questions and the answers from the interview. Nonetheless, DOJ is withholding the audio recordings that contain the voice of the President of the United States, who has been an elected federal officeholder for more than 50 years, speaking the same substantive information contained in the transcript.

DOJ asserts FOIA Exemptions 5, 6, 7(A), and 7(C) to withhold President's Biden's voice. The law – as currently written and applied – does not support such assertions, however. The law enforcement privilege component of executive privilege not only has never been recognized in a FOIA case but also only applies to the withholding of information in an ongoing law enforcement proceeding. DOJ does not identify the information it seeks to withhold. Nor does the audio recording relate to an ongoing investigation, which is fatal to DOJ's executive privilege and Exemption 7(A) claims. Finally, President Biden has little – if any – privacy interest in his voice, especially after his long public career and the fact that his answers are already public. Yet, a substantial public interest exists in the audio recordings because the disclosure of them would enable the public to test the veracity of Special Counsel Hur's decision not to recommend

[1] As DOJ's claims are entirely without merit, Judicial Watch believes that no oral hearing is necessary. If, however, the Court schedules a hearing, Judicial Watch respectfully requests an opportunity to be heard under Local Rule 7(f).

criminal charges against President Biden. The balancing test under Exemptions 6 and 7(C), therefore, favor disclosure. For all these reasons, the Court should order DOJ to produce the audio recordings within 14 days.

II. BACKGROUND.

Judicial Watch does not dispute DOJ's factual recitation of the Hur Investigation, the congressional requests for the audio recordings, the processing of Plaintiffs' FOIA's requests, or the status of this case. *See* Defendant U.S. Department of Justice's Memorandum of Law in Support of Motion for Summary Judgment at 2-5. Defendant, however, fails to address the facts underlying the public interest in the audio recording.

In his final report to the Attorney General, Special Counsel Hur declined to recommend prosecution of President Biden for his retention of certain classified records because he concluded, in part:

> We have also considered that, at trial, Mr. Biden would likely present himself to a jury, as he did during our interview of him, as a sympathetic, well-meaning, elderly man with a poor memory. Based on our direct interactions with and observations of him, he is someone for whom many jurors will want to identify reasonable doubt. It would be difficult to convince a jury that they should convict him-by then a former president well into his eighties-of a serious felony that requires a mental state of willfulness.

Plaintiff Judicial Watch's Counter-Statement of Disputed Material Facts at ¶ 44. In response to the report, White House Counsel and President Biden's personal counsel wrote several letters disputing the accuracy of Special Counsel's report. *Id*. at ¶ 45.

Congress subsequently held a hearing about the Special Counsel's investigation and his conclusions. *Id*. at ¶ 46. When asked about his conclusion that President Biden came across as a "sympathetic, well-meaning, elderly man with a poor memory" during the interview, the Special Counsel testified, "Chair, what I can tell you is that my assessment that went into my conclusions

that I described in my report was based not solely on the transcripts. It was based on all the evidence, including the audio records." *Id*. at ¶ 47. In response to a follow-up question, he reiterated, "What I will tell you is that the audio recordings were part of the evidence, of course, that I considered in coming to my conclusion." *Id*. at ¶ 48.

III. STANDARD OF REVIEW.

The standards governing summary judgment are well established and need no explication. Unlike in most litigation, the defendant in a FOIA lawsuit (*i.e.*, the government) bears the burden of sustaining its action. *Wolf v. Central Intelligence Agency*, 73 F.3d 370, 374 (D.C. Cir. 2007). In addition, FOIA requires that an agency disclose records, unless they fall within one of nine exemptions that Congress "explicitly made exclusive and [therefore] must be narrowly construed." *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011).

IV. ARGUMENT.

DOJ asserts Exemptions 5, 7(A), and 6/7(C) to withhold two audio recordings of President Biden's voice speaking substantive information that it has officially disclosed.[2] None of the claims have any merit, and DOJ fails to satisfy its burden concerning each claim. Judicial Watch addresses each in turn.

A. Exemption 5.

Exemption 5 generally protects against the disclosure of those records normally privileged in the civil discovery context, including records protected under the executive privilege doctrine. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004).

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[2] Although DOJ suggests only one audio recording is at issue in this case, Judicial Watch requested all audio recordings of all interviews of President Biden conducted by Special Counsel Robert Hur. To the extent each recording contains different information, DOJ is obligated to produce each recording. To date, DOJ has not proven that the two audio recordings are identical.

DOJ asserts that the audio recordings fall under Exemption 5 because they are protected under the law enforcement component of the executive privilege doctrine. Def's Mem. at 11. DOJ's claim fails for at least five reasons.

First, DOJ has not attempted to prove – let alone actually prove – that the law enforcement privilege applies to the withholding of the audio recordings.[3] "For the government to assert the law enforcement privilege '(1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.'" *Sulemane v. Mnuchin*, No. 16-cv-01822 (TJK), 2019 U.S. Dist. LEXIS 5, *14 (D.D.C. Jan. 2, 2019) (quoting *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988)). Focusing on the privilege's third element, DOJ does not identify what "information" it seeks to withhold.[4] It merely asserts that the audio recordings are exempt from production under the law enforcement privilege. *See e.g.,* DOJ's Mem. at 10 ("As Attorney General Garland explained in his letter requesting that the President assert executive privilege over the audio recording, the law enforcement component of executive privilege can be asserted to avoid the potential damage to

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[3] Although DOJ claims the law enforcement privilege is a component of executive privilege, the D.C. Circuit has stated otherwise. In *Association for Women in Science v. Califano*, the D.C. Circuit explained that the law enforcement privilege is just another type of privilege that has "been claimed exclusively by the government" and that it is based "primarily on specific governmental interests, rather than on constitutional principles." 566 F.2d 339, 343 (D.C. 1977). Regardless, as the Fifth Circuit has noted, "[h]owever it is labeled, a privilege exists to protect government documents relating to an ***ongoing criminal investigation***." *In Re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569 (5th Cir. 2006) (emphasis added).

[4] While DOJ identifies President Biden's voice as the information it seeks to withhold with respect to its Exemption 6/7(C) claims, it does not do so for the executive privilege and Exemption 7(A) claims.

proper law enforcement that would be caused by disclosure, including the chilling effect on sources of information." (internal quotations and citations omitted)). And, obviously, an audio recording is a "record," not "information." *See N.Y. Times Co. v. Nat't Aeronautics & Space Admin.*, 920 F.2d 1002, 1005 (D.C. Cir. 1990). DOJ's failure to identify what "information" it seeks to withhold is fatal to its assertion.

Second, even if DOJ identified "information," the law enforcement privilege only applies to ongoing criminal investigations. *See In Re U.S. Dep't of Homeland Sec.*, 459 F.3d at 569 (collecting cases from the Second, Fifth, Seventh, Tenth, and D.C. Circuits). As DOJ admits, the criminal investigation into the "possible unauthorized removal and retention of classified documents [by President Biden]" is now closed. *See* Def's Statement of Facts at ¶¶ 7-8; *see also* Declaration of Bradley Weinsheimer at ¶ 6. Therefore, the law enforcement privilege no longer applies to any "information" DOJ seeks to withhold.

Third, DOJ has not cited a single case in which the law enforcement privilege has been recognized under Exemption 5. Nor has Judicial Watch been able to locate one. The only court within this circuit that has addressed whether the law enforcement privilege falls under Exemption 5 explicitly chose not to recognize it. *Citizens for Responsibility & Ethics in Washington*[5] *v. U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 232 (D.D.C. 2009) ("[I]f this Court were to consider whether to recognize a law enforcement privilege under Exemption 5, it would not be inclined to do so.") The court concluded, "[T]he fact that Exemptions 6 and 7 already protect the law enforcement interests that are traditionally of concern in the civil litigation

[5] Citizens for Responsibility & Ethics in Washington will be hereinafter referred to as CREW.

context weighs heavily against recognizing the law enforcement privilege under Exemption 5." *Id*.

Fourth, to the extent that the law enforcement privilege is a component of executive privilege and that the historical application of the privilege is relevant to the court's determination,[6] history does not support DOJ's privilege claim. *See* Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations, 13 Op. O.L.C. 77, 80-81 (1989) ("[T]he policy and practice of the executive branch throughout our Nation's history has been to decline … to provide committees of Congress with access to, or copies of, open law enforcement files. No President . . . has departed from this position affirming the confidentiality and privileged nature of open law enforcement files."); *see also* Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252, 267 (1984) ("The policy of the Executive branch throughout this Nation's history has been generally to decline to provide committees of Congress with access to, or copies of, open law enforcement files."). As then-Assistant Attorney General Theodore B. Olsen wrote about the law enforcement privilege, "Disclosure of open investigatory files would undercut the government's efforts to prosecute criminals by disclosing investigative techniques, forewarning suspects under investigation, deterring witness from coming forward, and prematurely revealing facts supporting the government's case." Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 499-500 (1982). In other words, releasing law enforcement files would harm an ongoing investigation. Which is why Olsen also wrote, "As is apparent

[6] As the D.C. Circuit recently reaffirmed, "OLC's views are not binding, nor are they entitled to deference." *Ctr. for Biological Diversity v. U.S. Int't Dev. Fin. Corp.*, 77 F.4th 679, 689 (D.C. Cir. 2023). If relied upon, courts only "look to them for their persuasive value." *Id*.

from the reasons underlying the privilege, the law enforcement investigatory files privilege does not apply to files pertaining to investigations which have been closed." *Id*.

Similarly, a few years later, then-Assistant Attorney General Charles J. Cooper explained:

> There are, of course, circumstances in which the Attorney General may decide to disclose to Congress information about his prosecutorial decisions. Once an investigation has been closed without further prosecution, many of the considerations previously discussed lose some of their force. Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution; likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear. Still, such records should not automatically be disclosed to Congress. Obviously, much of the information in a closed criminal enforcement file, such as unpublished details of allegations against particular individuals and details that would reveal confidential sources, and investigative techniques and methods, would continue to need protection (which may or may not be adequately afforded by a confidentiality agreement with Congress). In addition, the Department and the Executive Branch have a long-term institutional interest in maintaining the integrity of the prosecutorial decision-making process.

Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 77 (1986). Not only did Cooper reinforce the notion that the law enforcement privilege principally protects ongoing criminal investigations, but he also elaborated on why some information from closed investigations should continue to be withheld. None of those concerns is present here. DOJ does not assert – nor could it – that the release of the audio recordings would disclose unpublished details of allegations against individuals, reveal confidential sources, expose investigative techniques or methods, or interfere with the Special Counsel's decision-making process. It has already officially disclosed the transcript containing the substantive information.

Fifth, and finally, the mere fact that Congress subpoenaed the audio recordings and that the President has subsequently claimed executive privilege over them is of little relevance here. That process of negotiation and accommodation is a political, not a legal, process. *See* Assertion

of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) ("In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each branch to accommodate the legitimate needs of the other. The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation, of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." (internal citations omitted)). FOIA, on the other hand, is "a law passed by Congress and signed into law by the President." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 57 F. Supp. 3d 48, 53 (D.D.C. 2014). This Court therefore cannot not act or "ignore forever" DOJ's (and now the Court's) obligations under FOIA. *Id*.

In short, DOJ has entirely failed to satisfy its burden of demonstrating that the audio recordings are protected by Exemption 5.

B. Exemption 7(A).

In addition to asserting that the audio recordings fall within the law enforcement component of executive privilege, DOJ also argues that the audio recordings are protected from disclosure under FOIA Exemption 7(A), which allows the government to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. §552(b)(7)(A).[7]

[7] Like its law enforcement privilege claim, DOJ does not argue that it is withholding "information" pursuant to Exemption 7(A). It only seeks to protect a particular type of record, which consists of substantive information already disclosed in another format.

Fifteen years ago, CREW submitted a FOIA request seeking copies of records relating to an interview of Vice President Richard B. Cheney by Special Counsel Patrick Fitzgerald in a closed investigation into the leak of a covert CIA officer. *CREW*, 658 F. Supp. 2d at 222. The specific records at issue were an FBI 302 report summarizing the interview and two sets of contemporaneous notes taken by FBI agents during the interview. *Id*. DOJ failed to disclose the records, and CREW subsequently sued. During litigation, DOJ asserted various claims of exemption, including Exemption 7(A). *Id*. at 223. To support its claim, DOJ argued that the disclosure of the withheld records could reasonably be expected to interfere with enforcement proceedings because "(1) there are likely to be future law enforcement investigations requiring the participation of senior White House officials, and (2) disclosure of Vice President Cheney's interview could have a chilling effect and deter such officials from voluntarily cooperating in those investigations." *Id*. The Court rejected DOJ's claims. Even though the law has not changed in 15 years, DOJ again tries to withhold similar records, relying on the same arguments. In addition, 15 years of investigations have shown that DOJ's fears were unfounded.

As DOJ admits (Def's Mem. at 28), Exemption 7(A) only protects law enforcement records that "(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *Mapother v. U.S. Dept' of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993). It also admits (Def's Mem. at 30) that the D.C. Circuit has held that "pending or reasonably anticipated" is "temporal in nature." *CREW v. U.S. Dep't of Justice*, 746 F.3d 1082, 1097 (D.C. Cir. 2014). "[R]eliance on Exemption 7(A) may become outdated when the proceeding at issue comes to a close." *Id*. In other words, if a law enforcement investigation is closed, Exemption 7(A) most likely no longer applies.

Even though Special Counsel Hur's investigation is closed and no charges were brought, DOJ asserts that disclosing the audio recordings will harm unspecified and undefined "ongoing" investigations. *See* Weinsheimer Declaration at ¶¶ 34 ("[T]he Department currently is engaged in ongoing investigations for which there is or could be substantial public interest, and release of the audio recording here could make witnesses or potential witnesses in these investigations reasonably fear that a recording of their interview with law enforcement may become public after the investigation closes."). Tellingly, DOJ does not identify any specific investigations or even the topics of the investigations. For ongoing investigations to fall within the scope of Exemption 7(A), they must concern substantially similar issues as the closed investigation. DOJ cites to *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) for the proposition that it may withhold records from a closed investigation because the release of the records could interfere with separate, ongoing investigations. Def's Mem. at 31. Yet, in that case, the closed investigations concerned detainees related to the September 11 attacks and future, potential terrorist attacks, and the D.C. Circuit held that "the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928. In other words, the ongoing investigations were also related to terrorism and the September 11 attacks. Here, DOJ merely asserts that the ongoing investigations are or could be of substantial public interest. There is no limiting principle. The argument should be rejected.

Like it did 15 years ago, DOJ also asserts that the release of the audio recordings "could reasonably be expected to chill cooperation with reasonably anticipated future high-profile law enforcement investigations." Def's Mem. at 34. However, this assertion ignores at least 40 years of binding precedent in which the D.C. Circuit has held that Exemption 7(A) cannot justify

withholding unless the records relate to a "concrete prospective law enforcement proceeding." *Carson v. U. S. Dep't of Justice*, 631 F.2d 1008, 1018 (D.C. Cir. 1980). DOJ does not identify any prospective law enforcement proceeding – let alone a "concrete" one – to justify its withholding. It rests on a fallacy because it merely asserts the obvious: DOJ will conduct high-profile investigations in the future. Such contemplated proceedings are not "concrete, prospective, or otherwise reasonably anticipated" in any way whatsoever. As Judge Sullivan stated:

> Adopting the vague category of hypothetical proceedings urged by DOJ in this case would not only be inconsistent with [precedent], but would also be in direct contravention of the basic policy of FOIA itself. Indeed, the dramatic and far-reaching extension to the current reach of Exemption 7(A) that DOJ urges this Court to adopt is more properly directed to Congress to consider and, in its discretion, to enact if it sees fit. This Court, however, is bound by the law in its current state, which does not sanction such an expansive reading of the statute.

CREW, 658 F. Supp. 2d at 230.

In addition, DOJ's concerns from 15 years ago proved to be unfounded. Although the records concerning the Special Counsel's interview with Vice President were made public, Presidents, Vice Presidents, and other high level government officials have continued to voluntarily agree to be interviewed by special counsels and other law enforcement officials. *See* JW's Counter-Statement at ¶¶ 49-50. The instant matter only exists because President Biden voluntarily agreed to such an interview. The basic fact that past Justice Department concerns were baseless suggests that this Court should not abandon precedent to protect DOJ's current speculative concerns.

Lacking precedential support, DOJ asserts that existing case law is wrong. Def's Mem. at 34-36. This argument should be disregarded as well. First, this Court cannot ignore binding precedent of the D.C. Circuit. C*ritical Mass Energy Project v. Nuclear Regul. Comm'n*, 975 F.2d

871, 876 (D.C. Cir. 1992). Second, existing precedent is consistent not only with the statutory text but also the purpose of FOIA. As Judge Sullivan stated in *CREW v. U.S. Dep't of Justice*:

> The Court's conclusion that the hypothetical proceedings described by DOJ do not meet the standard for withholding pursuant to Exemption 7(A) is further bolstered by the long line of cases … that have recognized the necessity of identifying a "concrete prospective law enforcement proceeding." Such a requirement is consistent with the principal purpose of the exemption, which is to prevent disclosures that might prematurely reveal the government's cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence.

658 F. Supp. 2d at 229-230 (citations and quotations omitted). Unlike how the courts interpreted Exemption 2 prior to *Milner*, courts have repeatedly construed Exemption 7(A) narrowly to allow for "broad disclosure" and insisted that the exemptions be "given a narrow compass." 562 U.S. at 571-572. This Court should not be the first to reject precedent and expand Exemption 7(A) beyond its "narrow compass." Doing so "would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than a withholding statute." *Id*. at 578.

Finally, *Pike v. U.S. Dep't of Justice*, 306 F. Supp. 3d 400 (D.D.C. 2016), relied upon by DOJ, is of no avail. In that case, now-Justice Kentanji Brown Jackson concluded:

> Although the transcript excerpts that have been publicly quoted contain words that are identical to the words spoken in the audio version of those same excerpts, DOJ asserts that the voice inflection in the audio version reveals additional information; specifically, the identity of the individual source who created the recording. This information is entitled to be withheld under Exemption 7(A) [because] revealing the source's identity would lead to possible harm to, or intimidation of, the source and other potential witnesses, which would impede their continued cooperation, forever eliminate that source as a future means of obtaining information, and ultimately severely hamper law enforcement efforts to detect and apprehend the suspects of their investigation.

306 F. Supp. 3d at 409, 412 (internal citations omitted). None of those concerns have been articulated here. DOJ does not claim that the disclosure of the audio recordings will reveal an unidentified source. Nor could it. The Special Counsel created the audio recordings, and they

contain the identifiable, known voices of the Special Counsel (and other interviewers) and President Biden (and his representatives). *Pike*, if anything, demonstrates the proper use of Exemption 7(A).

C. Exemptions 6 and 7(C).

Judicial Watch does not disagree with DOJ that the analysis under Exemption 6 is substantially similar to the analysis under Exemption 7(C). Def's Mem. at 14-15. To withhold information under Exemption 7(C), an agency must demonstrate that the disclosure of information or records "could reasonably be expected to constitute an unreasonable invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) "turns on a balance of the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *CEI Wash. Bureau, Inc. v. U.S. Dep't of Justice*, 469 F.3d 126, 128 (D.C. Cir. 2006). "[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Washington Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982). The responding agency must demonstrate that disclosing the requested information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Both exemptions "turn[] on a balance of the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *CEI Wash. Bureau, Inc.*, 469 F.3d at 128. Exemption 6's "clearly unwarranted invasion of personal privacy" presents a higher standard than Exemption 7(C)'s "reasonable expectation of an invasion of personal privacy" standard. DOJ fails to satisfy Exemption 6's "clearly unwarranted invasion of personal privacy" for the same reasons it fails to satisfy Exemption 7(C)'s "reasonable expectation of an invasion of personal privacy" standard.

i. Privacy Interest.

DOJ has not identified a single case in which any court has concluded that the audio of an interview in which the transcript has already been released is protected from disclosure for personal privacy concerns. In the one case in which such audio recording was withheld, it was being withheld not because of privacy concerns but because the disclosure of the audio would have revealed the identity of a law enforcement source and would have put both the source and the government's investigation in jeopardy. *See Pike*, 306 F. Supp. 3d at 406. *Pike* does not apply.

While DOJ's argument is novel, it makes little sense. It appears that DOJ is arguing that President Biden has a "substantial privacy interest" in his "pauses, hesitations, mannerisms, [] intonations[,]" and "tone" when responding to the Special Counsel's questions. Def's Mem. at 19 and 23. The D.C. Circuit, however, has unequivocally held that a "a claim to exemption from disclosure based … upon a fear that the taped voice inflections of a person delivering a speech would reveal that person's emotional state, would involve such [a] trivial privacy interest[] that the claim simply could not rise to the level of 'a clearly unwarranted invasion of personal privacy.'" *N.Y. Times Co.*, 920 F.2d at 1009.[8]

Although not explicit, DOJ seems to suggest that *N.Y. Times* should not be controlling because the audio recordings were made during a law enforcement proceeding – namely, President Biden speaking with the Special Counsel. *See, e.g.,* Def's Mem. at 22-23. However, audio recordings are not booking photos or mug shots. *Id*. at 22. Photos do not depict substantive information already available to the public. The transcripts already officially

[8] The audio recordings here are more like the audio of a speech than the audio of the crew of the Challenger "during the last seconds of their lives." *Id*. at 1005.

disclosed by DOJ, however, reveal the "probing questions designed to elicit information about whether a crime was committed and [President Biden's] response." *Id*. These arguments simply do not hold water.

DOJ also goes beyond FOIA, apparently hoping to find an argument that sticks. Protective orders by judges presiding over criminal or civil cases are not relevant in the FOIA context. *See generally Stonehill v. Internal Revenue Serv.*, 558 F.3d 534 (D.C. Cir. 2009). Similarly, arguments that the audio recordings cannot be released because of dangers of modern technology are facile. If government records could not be disclosed because of the concern for manipulation, no record would ever be made public under FOIA. Even a printed record – like a letter, memorandum, or transcript – can be altered. JW's Counter-Statement at ¶ 53. In other words, DOJ's "concerns about malicious manipulation of audio files" (Def's Mem. at 23) have no limiting principle. They would apply to any record. In addition, it is not entirely clear why the fear of manipulation falls within FOIA's personal privacy exemption.

ii. Public Interest.

Even if President Biden had more than a "trivial privacy interest" in his voice speaking substantive information that has already been made public, the public interest far outweighs any such privacy interest. Contrary to DOJ's assertion, Judicial Watch seeks access to the audio recording not out of "general public curiosity" (Def's Mem. at 27), but because an open question remains about whether Special Counsel Hur's conclusion that President Biden should not be prosecuted for his mishandling of classified records is supported by the evidence. Releasing the audio recordings would shed light on the Special Counsel's performance of his duties. *CREW*, 746 F.3d at 1093. Stated another way, "the relevant public interest is not to find out what

[President Biden] himself was 'up to' but rather how the [Special Counsel] and the DOJ carried out their respective duties to investigate and prosecute criminal conduct." *Id*.

DOJ's assertion that the release of the audio recordings "would do little to meaningfully advance the public's understanding of Special Counsel Hur's investigation and his declination decision" "[i]n light of the voluminous information already available to the public" is contradicted by Special Counsel Hur himself. *See* Def's Mem. at 26. Special Counsel Hur declined to recommend the prosecution of President Biden because, in part, he concluded that President Biden would "likely present himself to a jury, as he did during our interview of him, as a sympathetic, well-meaning, elderly man with a poor memory." JW's Counter-Statement at ¶ 44. When asked during a Congressional hearing about that conclusion, Special Counsel Hur testified that he made his assessment and drew his conclusion based not only on the transcripts, but also on the audio recordings. *Id*. at ¶¶ 46-47. The public, therefore, has strong interest in hearing for themselves the evidence upon which the special counsel relied. This interest alone outweighs any privacy interest President Biden has.

However, there is more. White House Counsel and President Biden's personal counsel have publicly challenged the Special Counsel's report, including the above-described assessment and the Special Counsel's determination based on his assessment. In fact, White House counsel and President Biden's personal counsel have jointly sent at least three letters in which they dispute the accuracy of the Special Counsel's report. *Id*. at ¶ 45. The release of the audio recordings will, therefore, assist the public in determining whether the president's or the special counsel's assessment was most accurate, and whether Special Counsel's conclusions were supported by the evidence. *CREW*, 746 F.3d at 1093 ("Disclosure of the records would likely reveal much about the diligence of the FBI's investigation and the DOJ's exercise of its

prosecutorial discretion: whether the government had the evidence but nevertheless pulled its punches."). President Biden himself therefore has highlighted the public's need for the audio recordings.

Similarly, Congress has held Attorney General Merrick Garland in contempt over his refusal to produce the audio recordings in response to two Congressional subpoenas. JW's Counter-Statement at ¶ 51. This political dispute also highlights the public interest in the audio recordings. As part of its legislative oversight function, Congress seeks the audio recordings for much of the same reason as Judicial Watch. As the report accompanying the contempt resolution explained, "The transcripts provided to the Committee are insufficient to arbitrate this dispute as to President Biden's mental state, an issue which goes directly to his culpability and whether Special Counsel Hur appropriately pursued justice by declining to bring an indictment." *Id*. at 52. In short, the Court does not have to take Judicial Watch's word that the audio recordings will provide the public with invaluable insight into whether Special Counsel Hur's conclusions are supported by evidence. Congress says so too.

Whether Special Counsel Hur appropriately pursued justice by recommending to the attorney general that criminal charges should not be brought against President Biden concerning his mishandling of classified materials is of even more import these days because another special counsel (with approval by the attorney general) is currently prosecuting President Trump for allegedly engaging in similar actions. In addition to President Trump being both President Biden's former political opponent and the current Republican nominee in the upcoming Presidential election, President Trump is the only former president or vice president to be prosecuted for such actions. JW's Counter-Statement at ¶ 54. The public therefore has a significant public interest in knowing whether DOJ "had the evidence but nevertheless pulled its

punches" when it came to its boss, the current president. *U.S. v. Penn*, No. 16cr1695-BEN, 2018 U.S. Dist. LEXIS 213898, *6 (S.D. Cal. Dec. 18, 2018) ("[T]he President retains the authority to prosecute a criminal case acting through his subordinates . . . and their prosecutorial acts are, in terms of the law, acts of the President.").

iii. *N.Y. Times Co.* does not support DOJ's claims.

DOJ asserts that the D.C. Circuit's decision in *N.Y. Times Co.* supports its personal privacy claims. Def's Mem. at 21-22. DOJ is mistaken for three reasons. First, a special counsel's interview of a sitting president about actions he took related to his vice-presidency and presidency is not "an event of extreme sensitivity" (Def's Mem. at 22) like "the last seconds of [the Challenger's crew's] lives" before their shuttle exploded. *N.Y. Times Co.*, 920 F.2d at 1005. Such a comparison is repugnant. The District Court found a substantial privacy interest in the sound of the astronauts' voices because "[e]xposure to the voice of a beloved family member immediately prior to that family member's death … would cause the Challenger families pain." *N.Y. Times Co. v. Nat'Aeronautics & Space Admin*., 782 F. Supp. 628, 631 (D.D.C. 1991). Such consideration does not exist here.

Second, the *N.Y. Times* court concluded that even if "some voice inflection or some background noise on the tape" "indicate[d] that the astronauts knew they were going to die," such information "sheds absolutely no light on the conduct of any Government agency or official." *Id* at 633. Here, in sharp contrast, the audio recordings will shed light on Special Counsel Hur's conclusions and his recommendation not to press charges against President Biden. The public interest is not comparable in the slightest.

Third, "NASA has provided the public with a transcript of the tape[,] which "reveals to the public every word that was spoken in the cabin." *Id*. Here, DOJ admits that the transcripts

created from the audio recordings do not contain every word that was spoken during the interview. Weinsheimer Declaration at ¶¶ 14 ("The interview transcripts are accurate transcriptions of the words of the interview contained in the audio recording, except for minor instances such as the use of filler words … when speaking that are not always reflected on the transcripts, or when words may have been repeated when spoken . . . but sometimes was only listed a single time in the transcripts."). Therefore, unlike the *N.Y. Times* transcript, the accuracy of the transcript here is at issue. *N.Y. Times*, 782 F. Supp. at 633.

iv. *Judicial Watch, Inc. v. Nat'l Archives and Rec. Admin.* and *Elec. Priv. Info. Ctr. v. U.S. Dep't of Justice* do not apply.

In *Judicial Watch, Inc. v. Nat'l Archives and Rec. Admin*, the D.C. Circuit concluded that Hillary Clinton's privacy interest in withholding a draft indictment outweighed the public interest in its release. 876 F.3d 346 (D.C. Cir. 2017). The Court reached its conclusion after determining that "Mrs. Clinton's privacy interest is heightened in the context of a draft indictment" because "[a]n unissued draft indictment by definition contains unproven allegations that were never adopted by the Independent Counsel much less by a grand jury." *Id*. at 349-350. The Court explained that the disclosure of the draft indictment would require Mrs. Clinton to defend her conduct "outside of the procedural protections normally afforded the accused in criminal proceedings" and that "the release after so many years also means the defunct Office of Independent Counsel would be unavailable to explain its decision not to seek an indictment against her." *Id*. at 350. None of those concerns is present here. The audio recordings do not contain unproven allegations against President Biden. They simply contain the voice of President Biden answering questions of which the questions and answers have already been officially disclosed by DOJ. In addition, the White House and President Biden personally have already defended themselves through letters and public statements. Special Counsel Hur's report

and testimony are also public. In other words, disclosing the audio recordings will not "threaten the presumption of innocence at the heart of the justice system." *Id*. If anything, the release will strengthen the justice system by showing that the Special Counsel did not treat the President any differently from any other citizen investigated for committing a crime. *Judicial Watch* simply does not support withholding.

*Elec. Priv. Info. Ctr. v. U.S. Dep't of Justice, 1*8 F.4th 712 (D.C. Cir. 2021), also does not support DOJ's position. In that case, the Court decided whether DOJ could lawfully withhold "an unredacted version of the report prepared by Special Counsel Robert S. Mueller III on his investigation into Russian interference in the 2016 United States presidential election." *Electronic Privacy Information Center*, 18 F.4th at 714. In other words, the FOIA requesters sought substantive information not already available. Here, the substantive information has already been disclosed in the form of the transcript. Judicial Watch does not seek any substantive information that has not already been officially disclosed. It only seeks the audio of the interview to determine whether the Special Counsel correctly satisfied his duties when he determined not to recommend criminal proceedings against President Biden. *Elec. Priv. Info. Ctr. simply does not apply.*

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In short, President Biden has minimal, if any, privacy interest in the sound of his voice as he answers questions asked by the Special Counsel when both the questions and answers have already been officially disclosed in the form of a transcript. In addition, the public interest in determining whether the Special Counsel "pulled any punches" (or even "swung too far") when investigating President Biden is of substantial public interest. *CREW*, 746 F.3d at 1093. The public interest, therefore, outweighs any privacy interest. DOJ has failed to prove that the

disclosure of the audio recordings could reasonably be expected to constitute an unreasonable invasion of personal privacy.

D. Foreseeable Harm and Segregability.

DOJ also asserts that disclosing the audio recordings would foreseeably harm the interests protected by the claimed exemptions, and that there is no reasonably segregable, non-exempt information in those recordings. Def's Mem. at 36-38. Since DOJ has not come close to satisfying its burdens of demonstrating that the audio recordings are properly being withheld under FOIA Exemptions 5, 6, 7(A), and 7(C), it also fails to satisfy the foreseeable harm and segregability components of the statute. In addition, the assertion that "[b]ecause the President formally asserted executive privilege over the audio recording in response to a congressional subpoena, release of the record here would harm an interest protected by Exemption 5 … by entirely vitiating the purpose of the privilege assertion, since Congress could have simply sought the record under FOIA rather than by subpoena" (Def's Mem. at 36-37) is risible. Since FOIA is a duly enacted law, placing certain obligations on DOJ, this Court cannot simply ignore the mandatory disclosure requirements because DOJ wants the Court to do so. *Judicial Watch, Inc.* 57 F. Supp. 3d at 53.

V. CONCLUSION.

For the reasons stated above, Judicial Watch respectfully requests that the Court deny Defendant's Motion for Summary Judgment, grant Judicial Watch's Cross-Motion for Summary Judgment, and order the audio recording to be produced within 14 days.

Dated: June 21, 2024

Respectfully submitted,

/s/ Michael Bekesha

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