Hearing Before the U.S. House of Representatives
Subcommittee on the Constitution and Limited Government of the Committee on the Judiciary

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## 1. Introduction and Background

My name is Mark Lytle. I have been an attorney for more than 30 years. I started my career in government in 1993 as a Staff Attorney in the Division of Enforcement at the U.S. Securities and Exchange Commission's Los Angeles Regional Office. In Approximately 1998, I became a Special Assistant U.S. Attorney in the Alexandria, Virginia office of the United States Attorney for the Eastern District of Virginia, on Detail from the SEC. Moving to the Department of Justice sparked a lifelong interest for me in doing justice and wearing the white hat. It was some of the most rewarding work I have ever been honored to be a part of, looking out for victims of crimes and providing deterrence to criminals. I spent almost 20 years at the Eastern District of Virginia, first, as a line Assistant U.S. Attorney serving in many roles, including narcotics prosecutions, and later, as Chief of the Financial Crimes and Public Corruption unit. I also served as EDVA's District-wide coordinator for public corruption matters.

I investigated and prosecuted some of the highest profile and most publicly known criminal matters in the Country. Among them, I was the lead prosecutor in the case of *United States v. William J. Jefferson*. Jefferson was a member of the U.S. House of Representatives from Louisiana who was convicted of soliciting bribes from his constituents in 2009 and famously was found to have secreted $100,000 in cash bribe money in his freezer. I was also the lead prosecutor in the case against *Credit Suisse*. Credit Suisse, the second largest bank in Switzerland, admitted to aiding thousands of U.S. citizens in hiding their income from the United States Treasury. Credit Suisse pled guilty and paid a record fine of $2.6 Billion. For my work in these and many other cases, I have received some of the highest honors offered by the U.S. Government:

A. The Attorney General's Distinguished Service Award;
B. The Internal Revenue Service Criminal Chief's Investigative Excellence Award;
C. The EOUSA Director's Award for Superior Performance as an AUSA; and
D. The DEA Administrator's Award for Outstanding Achievement in Prosecuting Illegal Opioid Prescription Distribution.

My long tenure at EDVA didn't always involve widely public and notorious cases. My work also involved criminal investigations of both little and great significance and both low and high-profile individuals and entities, matters which ended up never having been brought and never having seen the light of day because they did not meet the Department of Justice's standards for prosecution. These were not always easy decisions. But I was able to make them because I had been trained by some of the best prosecutors in the country. In EDVA, my colleagues and I followed a creed drilled into us. One that was often passed along from peer to peer and summarized in a passage from a Supreme Court decision, *Berger v. United States*, 295 U.S. 78 (1935). In that decision, Justice George Sutherland aptly wrote about the role of a prosecutor:

> [He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed he should do so. *But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*
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> 295 U.S. 78, 88 (1935) (emphasis added).

I left government service in 2021 and joined an AMLAW 100 law firm's government investigations and white-collar practice. My practice spans a wide variety of matters across the country and internationally. Through this practice, I have been exposed to all kinds of prosecutors (federal, state and local) and other civil regulators. My lengthy experience as a federal criminal prosecutor has helped me to represent private clients and understand the nature of the prosecutor and case that my clients might be facing. I still follow the Justice Manual, now through the lens of a criminal defense attorney. I tend to measure the prosecutors I meet from the standards I was trained on in EDVA and with a strict adherence to the Department of Justice Manuel and long-accepted prosecutorial procedures.

It is with this background and training that I quickly learned there was something desperately wrong with the way Dr. Haim's case was being investigated and later prosecuted in Houston, Texas.

## 2. Dr. Haim, his Whistleblowing, and the Initiation of a Federal Criminal Investigation

In May 2023, Dr. Haim worked with a journalist to blow the whistle on Texas Children's Hospital ("TCH") and reveal that TCH was performing transgender medical procedures on minors. Dr. Haim did this carefully, without disclosing any patient names. TCH had previously stated publicly that it had paused such medical interventions following a Texas Attorney General Opinion advising that those interventions could constitute child abuse under Texas law. Shortly after the story had been published, the Texas legislature voted to make such procedures illegal.

I was first retained to represent Dr. Haim during the summer of 2023. He had been served with a "Target" Letter signed by the lead Assistant U.S. Attorney ("AUSA" or "prosecutor") from the Houston office of the United States Attorney for the Southern District of Texas.[1] I learned that agents from the Health and Human Services Office ("HHS") had showed up at Dr. Haim's residence and attempted to interview him. Dr. Haim's wife was present. She was a newly hired Assistant U.S. Attorney in the Dallas office of the Northern District of Texas. After speaking with his wife, Dr. Haim advised the agents that he

[1] The Justice Manual ("JM") defines a "target" as a person whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. JM § 9-11.151 - Advice of "Rights" of Grand Jury Witnesses.

would like to consult with a lawyer before subjecting himself to an interview. The HHS agents understood, served him with the target letter, and then left the residence.

### 3. Interactions with the Lead AUSA

A. Misuse of the Target Process

Having been retained by Dr. Haim, one of the first things I set out to do was to initiate a dialogue with the AUSA. Almost immediately, I sought an in-person meeting to discuss the case against Dr. Haim. This is routine because when a prosecutor serves a target letter on someone, it usually means they: (1) believe that they have a slam dunk case; and (2) want to negotiate a plea of guilty. Surprisingly, the AUSA was not familiar with the facts of the investigation. She needed to consult with the investigating agents. But she confidently proclaimed that Dr. Haim had violated the Health Insurance Portability and Accountability Act ("HIPAA") through a disclosure of patient records to the media. I knew that did not happen as Dr. Haim's disclosure redacted the reference to any patient names. A fact that was easily discernable by the case agents and the prosecutor, had they looked into it before serving Dr. Haim with the target letter. This was concerning to me. DOJ guidance states that a target is a "putative defendant," or someone who could be charged based on the evidence already gathered. Despite the AUSA's lack of knowledge of the facts of the case, and failure to understand that patient names had been redacted and never disclosed by Dr. Haim, she nonetheless recklessly signed a target letter, a violation of the Justice Manual and an indication that she was not a neutral arbiter of the facts.

B. Threats of Retaliation against Dr. Haim's Wife

The prosecutor also told me her view that Dr. Haim's wife had obstructed justice by merely suggesting that Dr. Haim should consult with an attorney before agreeing to an interview with the HHS OIG agents. This was shocking to me – that a prosecutor would believe an exercise of one's constitutional rights was obstruction. She further offered an implied threat for Mrs. Haim. The prosecutor indicated that she knew that Mrs. Haim was still undergoing a background check for her security clearance as a new AUSA. The prosecutor stated that she and the agents would not mention Mrs. Haim's behavior to the background investigators "unless [Mrs. Haim] becomes difficult." This threatened retaliation raised grave concerns on the defense team and for the Haims.

C. Threat of Prosecution if No Apology by Dr. Haim

After several phone calls with the AUSA, it became abundantly clear that she did not have an understanding of the facts relating to Dr. Haim's whistleblowing. In lieu of meeting with me, she was very interested in interviewing Dr. Haim. I don't fault her for that. But, I reminded her that she had already labeled him a "target" and it would pretty much be malpractice for me to bring a client in for an interview with law enforcement agents under those circumstances. Her response was concerning: "maybe he isn't a "target." This was a "wink and a nod" suggestion for us to just forget her stated conclusion of his criminal culpability in the target letter. I told her that the train had left the station on her views on Dr. Haim. That's when she took her retaliation to yet another level. The AUSA proceeded to tell me that if Dr. Haim comes in and expresses remorse, she will offer him a misdemeanor. But if he did not, she would charge him with a felony and take him to trial, even if it were "on a technicality." This was yet another violation of the Justice Manual. JM § 9-27.220 states that a prosecutor can commence a federal criminal proceeding only if they believe that "the person's conduct constitutes a federal offense, and that

the admissible evidence will probably be sufficient to obtain and sustain a conviction."[2] Taking someone to trial on a "technicality" clearly does not satisfy DOJ's standards for initiating felony criminal charges. I knew that there was no set of facts in this matter that would result in a conviction at trial. The AUSA wanted simply to bully an innocent man into pleading guilty to a crime he was not guilty of committing.

D. The AUSA Obvious Conflict of Interest – Her Overly Close Ties to Families of Transgender Children

The AUSA also vigorously defended the transgender medical interventions on minors. She told me that she had met with the families of the "victims" and that the families were in tears because their children were suicidal, and the interventions represented their "last hopes." She also represented that the families would sue Dr. Haim even if he avoided criminal charges. The AUSA was clearly too close to these families to have any credibility as a prosecutor. I then suggested to her that Dr. Haim believed that he blew the whistle to actually protect the children from being victimized for the rest of their lives by these irreversible procedures. The prosecutor rejected that view, ignoring what would be a significant factor for a prosecutor to overcome at trial.[3] Notably, there was no discussion of the elements of the offense and the specific evidence gathered that would support a conviction.

E. The AUSA Claimed that Dr. Haim had No Right to Blow the Whistle on TCH

During one of the discussions, the AUSA insisted that it was not Dr. Haim's "job" to try to stop the pediatric transgender program and that he should have put up a banner on the highway to express his opinion. But HIPAA regulations permit the disclosure of even protected information (not released here), including to stop egregious medical misconduct. *See* 45 C.F.R. § 164.512. ((ii) A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect); *See also*, 5 U.S.C. 2302(b)(8)-(9); and "The Office of the Whistleblower Ombudsman; Coaching the House on Best Practices" ("Common audiences for protected disclosures include: Congress [and]. . . the media.") -- https://whistleblower.house.gov/sites/evo-subsites/whistleblower-evo.house.gov/files/Whistleblower_Protection_Act_Fact_Sheet.pdf. And that is exactly what Dr. Haim did when he reached out to the Office of the Texas Attorney General and the media, without disclosing the identity of patients.

## 4. Criminal Charges Against Dr. Haim: Legal Shortcomings and Unsupported Factual Allegations

The prosecutor sought the original indictment of Dr. Haim in May 2024. It didn't take long to understand that the misconduct and bias that had permeated the investigation of Dr. Haim had now transformed into a full-blown criminal prosecution. There was a significant problem though. The indictment was premised on major factual errors, easily identified if the AUSA wasn't so conflicted and set upon going after Dr. Haim. The indictment also contained material legal infirmities that were fatal to the government's theory of the case. As these errors were brought to light, the prosecutor refused to dismiss the case, instead seeking a new indictment (also referred to as a "superseding indictment") with

[2] JM § 9-27.220 - Grounds for Commencing or Declining Prosecution.
[3] *United States v. Sherer*, 653 F.2d 334, 337 (8th Cir.) ("Good faith constitutes a complete defense to specific intent crimes.")

minor corrections that caused additional problems. In total, the government presented three different indictments before ultimately agreeing to dismiss the matter with prejudice.

A. The Original Indictment: Premised on False Allegations

As discussed above, the original indictment contained demonstrably false allegations, which the AUSA and the case agents knew or should have known were false from evidence contained in the government's possession. For example, the indictment falsely portrayed Dr. Haim as the equivalent of a trespasser. Per the Indictment: "Haim's last rotation with TCH was from December 2020 to January 2021. After his rotation was completed, Haim did not return to TCH for any pediatric rotations or medical care." *United States v. Eithan Haim*, Criminal No. 4:24-cr-00298 (SDTX); ¶ 9 ECF No. 1. This core misrepresentation of fact was the premise of all four counts contained in the indictment. The various counts alleged that Dr. Haim had accessed the patient records on "false pretenses" (Count 1) and that he "did obtain and/or wrongfully disclose [HIPAA] information with the intent to cause malicious harm to TCH's physicians and patients." ECF No.1, pp. 4-5.

Shockingly, the government's own discovery production proved these core allegations to be false. That evidence showed that Dr. Haim was actively treating patients at TCH during the relevant time period. The government was then required to strip the false allegations from the indictment, by way of a new superseding indictment, gutting the core of its case and leaving little explanation for the "false pretenses" charge. The government was forced to drop the other salacious allegations, including that Dr. Haim intended to cause malicious harm to child patients and do so for his "own personal agenda." ¶ 19. ECF No. 1.

B. The Superseding Indictment: The Rush to Justice (and Errors and Negligence Continue).

Typically, this kind of core mistake would have led to an outright dismissal of the indictment. However, the AUSA's bias against Dr. Haim must have prevented this form happening. The government went back to the Grand Jury and obtained a superseding indictment. Yet the government attorneys exercised no more care after these setbacks. The superseding indictment not only charged Dr. Haim with violations of a non-existent statutory provision (Subchapter XL of the HIPAA law, which does not exist), but it also added a non-existent crime duplicitously by charging that he "did obtain and/or use" protected health information. "Use" does not appear in the statute or HIPAA regulations. In court, the prosecutor admitted on the record that these were errors and moved that the Court simply strike the language from the superseding indictment. The Court refused to do.

And when confronted with the regulatory, statutory, and constitutional infirmities in its legal theories in a motion to dismiss, the prosecution team threw together an opposition in three business days and filed it only hours before election returns on November 5, 2024. The opposition effectively conceded that the Privacy Rule—the true core of HIPAA and a major rulemaking corpus maintained by HHS and authorized by Congress—was defunct. Its interpretation of "without authorization" directly contradicted the position taken by the Solicitor General before the Supreme Court. There is no way possible that the U.S. Attorney's Office consulted, much less cleared, these remarkable departures from DOJ and HHS

positions with the Solicitor General's Office, DOJ's Computer Crime and Intellectual Property Section, or HHS's Office of Civil Rights.[4]

Although the prosecutor represented to the Court that the government would not seek a second superseding indictment, it did so after the Court denied the government's request strike the offensive language.

C. The Third Indictment – The AUSA Withdrawal from the Case

The AUSA was not involved in the second superseding indictment because she withdrew from the matter and was likely terminated from the case without explanation immediately before the next indictment was filed. Previously, the defense had apprised the Court that the prosecutor had been practicing for part of September 2024 with a suspended Texas State bar law license (and no other active license) in violation of Texas Bar ethical rules and DOJ policy. She only regained her good standing with the Texas Bar after the defense notified the Court. The Court did not take any remedial action at that time.

Shortly before the prosecutor withdrew from the case, the defense also sent a letter to the U.S. Attorney's Office informing them that the prosecutor likely had significant financial and personal conflicts of interest because of her apparent ties to TCH and BCM.[5] These included the following:

- The prosecutor's family owns a coffee wholesale company, Fresh Brew Group, which has large contracts with hospitals in the Texas Medical Center including affiliates of BCM (BCM was an interested party in the case). The Texas Secretary of State lists the AUSA as a former Fresh Brew executive, and it is likely that she retains a financial interest in the company.

- The prosecutor's brother and aunt are major fundraisers for TCH. They have sponsored events alongside TCH President and now-CEO, at least one of which raised over $1 million in one night. Some of these fundraisers took place during the investigation and prosecution.

- The prosecutor's aunt is an attorney and former democratic congressional candidate in Houston. While running for office, she called BCM and TCH some of her "favorite causes." She serves on the Harris Health Board of Trustees, which oversees lucrative contracts between BCM and the Harris County, Texas hospital system.

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[4] The Statute that provides for criminal penalties for HIPAA violations, requires that the government prove that the defendant obtained or disclosed the information "without authorization." 42 U.S.C. § 1320d-6. In 2021, the U.S. Supreme Court dramatically narrowed the reach of the Computer Fraud and Abuse Act (CFAA) and its similarly worded definition of "exceeds authorized access." *Van Buren v. United States*, 593 U.S. 374 (2021). The Van Buren Court agreed with critics of the law who stated that if they had taken the government's stance that "the 'exceeds authorized access' clause criminalizes every violation of a computer-use policy," "then [it would make] millions of otherwise law-abiding citizens [] criminals." *Id.* As a result of this decision, the Department of Justice immediately issued guidance on CFAA cases, limiting the circumstances under which such cases could be charged and required pre-charge consultation with the Computer Crimes Section of the Department of Justice before such charges could go forward. *See* JM § 9-48.000 - Computer Fraud and Abuse Act. It would be difficult to discern how such a ruling and policy could not apply to the same charges brought against Dr. Haim.

[5] It is important to note that the last indictment filed by the government no longer alleged that Dr. Haim had caused malicious harm to TCH patients, instead the alleged malicious harm was against TCH and its physicians. With such close ties to TCH, the prosecutor's allegations were a clear conflict of interest.

D. The Government's Seeking of an Unconstitutional Gag Order Against Dr. Haim

Following the withdrawal of the AUSA, and Dr. Haim's social media posts about her removal, the remaining prosecutors immediately moved for an exceptional gag order that would have prevented Dr. Haim and his counsel from making nearly any public statements. Such an order would have been a blatantly unconstitutional prior restraint on Dr. Haim's speech. The timing of their motion - a few days after the prosecutor's removal and a hearing where the judge excoriated the government – belies the retaliatory nature of the gag order motion.

E. The Government Case is Dismissed with Prejudice

On January 24, 2025, the U.S. Attorney's Office dismissed the charges against Dr. Haim with prejudice. The misconduct throughout the investigation and prosecution was truly exceptional. The conflicts of interest and bias displayed against the doctor should never have played a role in the prosecutor's mind. But it did. Once the prosecutor withdrew from the case, these factors, along with the legal and factual errors that permeated the charges, must have played an important consideration in the government's decision to dismiss all of the charges against Dr. Haim.