EPSTEIN – POINTS FOR UNSEALING RESPONSE:

**Introduction**

The Affirmation of Attorney John Browning with its compendium of articles provides a misleading and unnecessary context for the Court's evaluation of the legal merits of the Motion to Unseal. The documents attached to his Affirmation do not "state facts that are relevant to this motion" but instead constitute a series of tabloid articles offered with the apparent purpose of creating the appearance that Mr. Epstein has been a beneficiary of prosecutorial benefits – federal or state –due to improper political influence. These media attachments with their false suggestions that Mr. Epstein benefited from prosecutorial wrongdoing are irrelevant to the purely legal issue of whether there is any principled justification for the continued sealing of appellate briefs to this Court. Mr. Epstein, however, does want to provide the facts that demonstrate the distortions of the media (Appendices "A"-"C") and that the pleadings of the Movant themselves draw false and unsupportable conclusions that go beyond even their media sources. For instance, no one in the judiciary has ever to the undersigned's knowledge "voiced" suspicion that prosecutors gave Epstein "preferential treatment because of his wealth and his political connections" as asserted in Memorandum of Law, pg 1, 5. Further, there has never been a shred of evidence that any of the persons named by the Movant in their Memorandum of Law, pg 5-6, influenced or participated in anyway in the resolution of Mr. Epstein's legal cases. Further, The Movants claim that Mr. Epstein plead guilty in the federal court is also provably untrue; his plea was solely in the state court as he was never for principled reasons charged with the violation of the federal criminal law.

**Allegations of favoritism by the New York City District Attorney based on the New York Post's own tabloid articles, Appendices "B" and "C" are both misleading and irrelevant**

Appendices B and C are attached to falsely insinuate that the Manhatten District Attorney's Office went "easy" on Epstein when their view of the law and in particular the proper criteria for assigning a classification for sex offender registration should focus on the elements of the specific offense of conviction which is the prevailing federal legal requirement and represented a principled legal position before the NY Supreme Court. These Appendices do not further this Court's evaluation of the merits of the Motion to Unseal. The Post claims that the unsealing of the appellate briefs is essential to its ability to

explore whether the District Attorney's Office, in advocating Mr. Epstein's classification as a level one offender, was improperly motivated by favoritism toward a wealthy individual with prominent connections. The content of the appellate briefs may provide further grist for the Post's titillation of its readers, but the plain fact of the matter is that there is nothing in the appellate briefs that the Post seeks to unseal nor in the underlying recommendation by the District Attorney's Office that has any capacity to elucidate the accusation which the Post claims it wishes to investigate.

In advocating for a level one classification, the District Attorney's office was acting consistent with the determinations of two jurisdictions with considerably greater interest in the matter than New York, the Virgin Islands where Mr. Epstein resides and spends comparably greater amounts of time,, and Florida, the locus of the offense, each of which has determined that Mr. Epstein was properly classified only as a level one offender. This was not a question of "lenient treatment" for Epstein, *see* Post Memorandum at 2, but instead a principled legal position taken after a full investigation of the underlying circumstances, including the fact that Mr. Epstein was never charged with any additional offense, which showed that, in the ADA's estimation, the evidence fell short of that required to support a higher classification. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7 ("[T]he fact that an offender was not indicted for an offense may be strong evidence that the offense did not occur."). That the District Attorney's Office on appeal argued in favor of the judge's decision to impose a higher classification is not indicative of sinister machinations below. And the written decision in Mr. Epstein's appeal from his classification tells the Post all it would find in the sealed briefs—that the District

Attorney's Office took the position on appeal that the ADA below had been mistaken in her interpretation of the applicable law while supporting the decision of the judge below. *See* Post Memorandum at 5.

Importantly, in the intervening years since the classification hearing, federal SORNA law has largely adopted the position taken by the ADA at the classification hearing that the relevant consideration is the elements of the offense of conviction, providing further demonstration that the level one recommendation was not improperly motivated. For example, in *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016), the defendant pled guilty to failing to register as a sex offender after a New Jersey conviction for endangering the welfare of the child. In sentencing the defendant, the court found the defendant to be a tier III offender based on the circumstances underlying the offense as outlined in the presentence report. The Court rejected the "circumstance- specific" approach advocated by the government in favor of the categorical approach, which focuses solely on the elements of the offense of which the defendant was convicted, without reference to any extraneous factors. Under the categorical approach, the court concluded, the defendant was only a tier I offender.

*Berry* drew on the Tenth Circuit's earlier decision in *United States v. White*, 782 F.3d 1118 (10th Cir. 2015), in which the defendant had failed to keep his registration current after conviction of taking indecent liberties with a child. In vacating the defendant's sentence based on a tier III classification, the court adopted the categorical approach focusing on the elements of the offense of conviction and found that the defendant was only a tier I offender. Other circuits have also concluded that the categorical approach must be used in determining a defendant's SORNA tier. *See, e.g.,*

*United States v. Barcus*, 892 F.3d 228, 231-32 (6th Cir. 2018); *United States v. Morales*, 801 F.3d 1, 5 (1st Cir. 2015); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014). Indeed, the government has in recent years conceded that the categorical approach applies in determining the defendant's SORNA tier. *See, e.g., United States v. Young*, 872 F.3d 742, 745 (5th Cir. 2017); *United States v. Phillips*, No. 8:16-CR-117-T-33MAP, 2016 WL 5338711, at *2 ([redacted]. Fla. Sept. 23, 2016).

Under the SORNA categorical approach, Mr. Epstein's SORNA classification would not be a tier III offender. His offense of conviction for which registration was required, Procuring a Person Under 18 for Prostitution, Fla. Stat. § 796.03, is not remotely comparable to the federal offenses that would qualify for tier III treatment.

**Allegations of any favoritism by Florida Authorities based on Appendices A is equally misleading and irrelevant**

Appendice A has even less relevance to this Court's decision. Whether or not Mr Epstein received a favorable overall disposition of a criminal investigation 11-13 years ago that was being conducted by separate sovereigns (the Federal Government and the State of Florida) which ended with a plea of guilty under terms agreed to by both is utterly irrelevant to whether this Court should unseal the appellate briefs of a prior appeal relating to the proper classification for sex offender registration. Both the characterization of the prior case as involving a federal plea of guilty (Memorandum of Law, pg 1) and an incorporation of the contents of the Miami Herald article which was saturated with inaccuracies and false innuendos about the decision-making of then-United States Attorney Alex Acosta has no place in this Court's deciding of a Motion to Unseal. Appendix A should be ignored if not stricken. Without rebutting each assertion within that Appendix, this Court should be aware that:

a) Mr. Epstein did not plead guilty in the federal court as asserted by counsel for the Movants
b) The Miami Herald article unfairly maligned former United States Attorney Acosta, ignoring that his decisions were made on behalf of the largest and one of the most respected United States

Attorney's Offices in the country and were fully supported by a significant number of well respected and experienced federal prosecutors including some who held senior positions in the United States Attorney's Office and included the specific prosecutors who investigated Mr. Epstein and the head of the Criminal Division of that Office;

c) The Miami Herald article omits the fact that the decisions by the United States Attorney's Office were carefully and fully reviewed by the Department of Justice's Child Exploitation and Obscenity Division (CEOS) and thereafter by the Office of the Deputy Attorney General. Each review endorsed the exercise of prosecutorial discretion by Mr. Acosta's United States Attorney's Office. The Agreements criticized by the Miami Herald as being "sweetheart deals" were determined at multiple levels of local and nationwide federal prosecutorial review as being in the best interests of the federal government rather than being "sweetheart deals" favoring Mr. Epstein over the interest of the Government;

d) The Miami Herald article completely ignored the many benefits to the Government that resulted from *and would not have been achieved* but for the negotiated federal resolution of the ongoing investigation:

    1) Mr. Epstein was required to convince State prosecutors to bring a felony charge of procurement after a State Grant Jury had decided instead that the only appropriate charge should be limited to Solicitation of Prostitution. While the latter charge would not require lifetime sex offender registration, the procurement charge did as a result of which Mr. Epstein was required and did register as a sex offender;
    2) Mr. Epstein was required to agree to a 30-month state sentence that would include both an 18 month term of imprisonment and a 12 month term of community control (probation);
    3) Mr. Epstein was required to pay for a distinguished Florida attorney to represent the under-aged victims who elected to bring suit under the provisions of 18 USC 2255 which carried with it a minimum damage restitution award that did not require any individual proof of actual damages;

4) Mr. Epstein was required to agree to not contest either subject matter jurisdiction or, more important, liability as to any claims brought by the attorney representing the victims;
5) Mr. Epstein had to agree to compensate the victims and waive his right to contest liability many months before he was provided notice of their identity – a list was only given to him many months after the federal agreement was finalized;
6) That this unorthodox if not unprecedented restitution requirement was subject to the supervision of a respected retired federal judge;
7) As a result, Mr. Epstein was imprisoned for 13 months subject to the same conditions as other inmates, given no special consideration or early release, engaged in work release under the same guidelines applicable to other similarly situated county prisoner who requested it, fully funded litigation against himself and came to monetary settlements with each and every under-aged victim who made a claim

e) The Miami Herald article in its attempt to personalize its criticism on now Secretary of Labor Acosta also utterly ignored:
    1) That the offenses under investigation were quintessential local and state offenses centered on sexual solicitation that have traditionally been prosecuted by state not federal authorities. Mr. Epstein's counsel contended that federal nexus was lacking in that the offense was either outside the scope of federal criminal statutes or, at best, at their heartland. For instance, although Mr. Epstein did engage in interstate travel it was to travel to his home in Florida and not to travel elsewhere to commit a crime. Accordingly, a prosecution under the interstate travel statute, 18 USC 2423(b), would have conflicted with Supreme Court decisions and been without precedent. Mr. Epstein was not shown to have economically trafficked or profited from any of the investigated offenses, nor to have used force or fraud, nor to have used drugs or alcohol, thus placing his conduct at or outside the outer reaches of 18 USC 1591 (as it had been applied at the time), the federal statute which ordinarily was

applied to acts of commercial sex trafficking or slavery. And Mr Epstein did not use the internet (or even the telephone) to persuade anyone to engage in illegal sexual conduct with him– the basis of most of the prosecutions brought under 18 USC 2422b. In short, the common characteristics of the offenses under investigation in Florida 11, 12, 13 years ago were paradigmatic state offenses where Mr. Epstein paid young women, some under 18, some over, and were properly the subject of state criminal prosecution under its solicitation statutes;

2) The Miami Herald was critical of the failure to fully notify or consult with certain potential victims and witnesses but omits that it was the nationwide practice of the Department of Justice at the time, as memorialized in a legal memoranda authored by its well respected Office of Legal Counsel which was filed by the Government in Case 9:08-cv-80736-KAM Doc 90-1, to only confer Crime Victim Rights when a federal prosecution had commenced "by the filing of a criminal complaint or information, or by the return of an indictment, and {that such rights would} cease to be guaranteed if all charges in the case are declined or dismissed either voluntarily or on the merits", see pg 16. In short, the Herald's criticism of the decision of the federal prosecutors not to provide its witnesses with notice of Mr. Epstein's state plea or of the decision of the United States Attorney to decline to federally prosecute Mr. Epstein completely ignores that these decisions were in conformity with the national position of the Department of Justice and not the result of favoritism shown to Mr. Epstein or his counsel;

3) The Miami Herald also ignored that Mr. Epstein fully conformed to the obligations of his Agreement, received the same treatment as to work release as others, fully compensated the Court appointed attorneys, settled each and every monetary lawsuit brought against him, registered as a sex offender in full compliance with both federal and state statutes, and has, since the offenses at issue – for well over 10 years – lived within the law, with no further violations, and, even more, has lived a life filled with charity and good deeds, giving selflessly and

generously to a myriad of scientific research projects and other charitable causes. At a time when Congress is passing criminal law reform aimed at reducing recidivism, when America is focused on giving felons back their right to vote and welcoming them back to society, and when crime victims have independently and nationwide established their right to a voice, to be heard, attaching the Herald article to a legal pleading along with the tabloid attachments and factual misstatements is to distort this Court's principled decision-making on an issue at the intersection of the First Amendment and the common law.