IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5615

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PAUL VAUGHN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO STAY SENTENCE PENDING APPEAL

A jury convicted defendant-appellant Paul Vaughn for conspiring to violate federally protected rights and for physically obstructing access to reproductive health services. As relevant here, he was sentenced to three years' supervised release with the special condition of six months' home detention subject to certain exceptions. After the district court denied Vaughn's motion to stay his supervised release, Vaughn filed the instant stay motion under Federal Rule of Appellate Procedure 8 and Federal Rule of Criminal Procedure 38. As explained below, this Court should deny Vaughn's motion.

BACKGROUND

1. A jury convicted Vaughn of one count each of conspiring to violate federally protected rights, in violation of 18 U.S.C. 241, and violating the Freedom of Access to Clinic Entrances Act (FACE Act), 18 U.S.C. 248(a)(1), for intentionally interfering with the provision of reproductive health services, and for intimidating persons seeking and providing such services, by physical obstruction. More specifically, on March 5, 2021, Vaughn and his co-defendants executed a planned blockade of carafem Health Center (carafem) in Mt. Juliet, Tennessee. Defendants crowded the hallway outside the clinic and blocked its doors; approached and questioned a patient and her companion as the patient arrived for an appointment; ignored an employee's instructions for defendants to leave; and disregarded police commands for defendants to disband or face arrest. Defendants, who sought to disrupt carafem's abortion-related services, livestreamed their conduct, which persisted for three hours.

2. Following a jury trial, the United States Probation Office calculated his recommended Guidelines sentence as 15 to 21 months' imprisonment and one to three years' supervised release. Statement of Reasons, R. 668, Page ID # 5111. Relying on the sentencing factors under 18 U.S.C. 3553(a)(6), Vaughn sought a downward variance from his Guidelines sentence to probation with community service. Sentencing Memorandum, R. 625, Page ID # 4647.

3. At sentencing, the district court adopted the Probation Office's calculations and, after considering the sentencing factors, granted a downward variance. Statement of Reasons, R. 668, Page ID # 5111, 5113; Sentencing Tr., R. 668-1, Page ID # 5128. Vaughn's below-Guidelines sentence was a term of imprisonment for "[t]ime [s]erved" and three years' supervised release. Judgment, R. 667, Page ID # 5106. Although he was sentenced to "time served," Vaughn has never been in federal custody for his offense, whether pre-trial or post-conviction.

As special conditions of his supervised release, the district court ordered that Vaughn not enter any building containing a reproductive health services facility or approach within 100 feet of such building absent the Probation Office's approval. Judgment, R. 667, Page ID # 5109. The court further ordered that Vaughn serve his first six months of supervised release under home detention. *Ibid.* During this time, Vaughn may still leave his home for "gainful employment, community service, religious services, medical care, and such other times as may be authorized by the U.S. Probation Office." *Ibid.*

4. After sentencing, Vaughn moved for release pending appeal in the district court. Motion, R. 666, Page ID # 5099-5104. He requested that the court "stay imposition of his sentence pending resolution of his appeal," relying on the standard in the Bail Reform Act, 18 U.S.C. 3143(b). *Id.* at Page ID # 5099. Vaughn primarily argued that his FACE Act conviction raises a substantial

question of law or fact likely to result in reversal because the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022)—which overturned the federal constitutional right to abortion as articulated in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)—rendered the FACE Act unconstitutional. Motion, R. 666, Page ID # 5102. He also argued that his conspiracy conviction under 18 U.S.C. 241 was impermissible in light of *Fischer v. United States*, 144 S. Ct. 2176 (2024), a case about the Sarbanes-Oxley Act. Motion, R. 666, Page ID # 5102-5103. The government opposed Vaughn's motion, arguing (1) that the Bail Reform Act did not apply to Vaughn's non-custodial sentence; and (2) that even if it did, Vaughn had not raised a substantial question of law or fact under Section 3143(b). Opposition, R. 672, Page ID # 5164-5166.

The district court denied Vaughn's motion. Memorandum & Order (Order), R. 693, Page ID # 5327. First, the court held that Section 3143(b) did not apply because that provision "applies only when a defendant has been sentenced to a term of imprisonment" and not "where the defendant received a type of probationary sentence." *Id.* at Page ID # 5329. Thus, the court analyzed Vaughn's request under Rule 38(d) of the Federal Rules of Criminal Procedure, under which a court may stay a sentence of probation pending appeal. *Id.* at Page ID # 5330.

The court interpreted this provision as requiring application of the four factors from *Nken* v. *Holder*, 556 U.S. 418, 434 (2009):

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Order, R. 693, Page ID # 5330-5331 (citation omitted).

The district court held that Vaughn had not "made a strong showing that he is likely to succeed on the merits of his appeal." Order, R. 693, Page ID # 5332. (And although the court had held Section 3143(b) inapplicable, it also stated that Vaughn had not raised "a substantial question of law or fact likely to result in reversal or an order for a new trial" under 18 U.S.C. 3143(b)(1)(B). Order, R. 693, Page ID # 5332 n.3.) The court rejected outright almost all of Vaughn's challenges to his FACE Act and conspiracy convictions because it "already considered at length and rejected . . . identical arguments, raised in the context of motions to dismiss the Indictment." *Ibid.* The court also noted that "every other court in the country that has considered the[se] same arguments regarding the constitutionality of the FACE Act on its own and as a basis for a conspiracy charge under [Section 241] has likewise rejected them." Order, R. 693, Page ID # 5332-5333 (citing district court cases). The court separately rejected Vaughn's argument that *Fischer*

called into question his conspiracy conviction. *Id.* at Page ID # 5333-5336. Without addressing the other *Nken* factors, the court denied Vaughn's motion.

DISCUSSION

This Court should deny Vaughn's motion to stay his sentence—in particular, his three-year term of supervised release and accompanying special conditions, including six months' home detention—because he has not identified a substantial question of law or fact sufficient to warrant a stay.

A. This Court should apply the standard for release pending appeal in 18 U.S.C. 3143(b) to Vaughn's request to stay his sentence.

A request for a stay pending appeal in a criminal case is governed by Rule 38 of the Federal Rules of Criminal Procedure. Fed. R. App. P. 8(c). Rule 38 describes the scope of a court's authority to stay sentences involving death, imprisonment, fines, probation, restitution, and forfeiture. Fed. R. Crim. P. 38(a)-(f). Because Vaughn seeks to stay his supervised release following a sentence of "time served," his motion is best understood as seeking a stay of a prison sentence for purposes of Rule 38(b). Rule 38(d), on which the district court relied, cannot apply because supervised release is not a standalone punishment like probation—rather, supervised release accompanies a defendant's sentence to a term of imprisonment. *See* 18 U.S.C. 3583(a); *United States v. Reese*, 71 F.3d 582, 587

(6th Cir. 1995) (describing "[s]upervised release [a]s a new form of post-imprisonment supervision").[1]

Accordingly, this Court should analyze his motion using the standard for a person "sentenced to a term of imprisonment" seeking release pending appeal. 18 U.S.C. 3143(b). Under that standard, a defendant must serve his sentence pending appeal unless a court finds that (1) the defendant is not a flight risk or danger to the community; (2) the appeal is not for the purpose of delay; and (3) the appeal "raises a substantial question of law or fact likely to result in[] (i) reversal[] or (ii) an order for a new trial." 18 U.S.C. 3143(b)(2)(A)-(B). Here, Vaughn has not shown that his appeal raises a substantial question likely to result in reversal or a new trial. And although the district court analyzed Vaughn's likelihood of success on the merits relying on *Nken*, it also stated that Vaughn did not satisfy the "substantial question" factor under the Bail Reform Act. Order, R. 693, Page ID # 5332 n.3.[2]

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[1] The district court also analyzed Vaughn's request for a stay of his sentence under Rule 38(d) using *Nken*'s four-factor test. But this Court has recognized that the traditional stay factors "do[] not apply to stays pending review in criminal proceedings pursuant to Rule 38 of the Federal Rules of Criminal Procedure." *Ohio ex rel. Celebrezze v. Nuclear Regul. Comm'n*, 812 F.2d 288, 291 (6th Cir. 1987).

[2] There may be no meaningful daylight between *Nken*'s likelihood of "success on the merits" and "substantial question[s] . . . likely to result in reversal or an order for a new trial." Order, R. 693, Page ID # 5332 n.3. But the other

An appeal raises "a substantial question" of law or fact if it concerns a "close question or one that could go either way." *United States v. Kincaid*, 805 F. App'x 394, 395 (6th Cir. 2020) (quoting *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985)). A substantial question must also be "so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in defendant's favor." *Pollard*, 778 F.2d at 1182 (quoting *United States v. Powell*, 761 F.2d 1227, 1233-1234 (8th Cir. 1985) (en banc)). Other circuits have held a substantial question to be "novel," "not been decided by controlling precedent," or "fairly doubtful." *United States v. Smith*, 793 F.2d 85, 88-89 (3d Cir. 1986) (quoting *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985) (collecting cases)). No such questions exist here.

B. Vaughn has not identified a substantial question of law or fact likely to result in reversal of his FACE Act conviction or a new trial.

Vaughn's challenge to his FACE Act conviction boils down to two overarching questions. First, he argues that there is a substantial question of law as to whether this Court's decision in *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002), upholding the constitutionality of the FACE Act survives post-*Dobbs*. Motion to Stay (Mot.) 6-9. Second, Vaughn asserts a substantial factual question

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considerations under Section 3143(b), which are not contested here, do not as obviously align with the remaining *Nken* factors (*i.e.*, irreparable harm, injury to other parties, and the public interest). And this Court stated in *Celebrezze* not to apply the traditional stay factors to a Rule 38 motion in a criminal case.

exists as to whether his FACE Act conviction was based on "vindictive prosecution and viewpoint discrimination." Mot. 7. But neither question is a close one that "could go either way" to warrant granting the relief he seeks. *Kincaid*, 805 F. App'x at 395 (quoting *Pollard*, 778 F.2d at 1182).

1. *Norton* still controls whether the FACE Act is constitutional post-*Dobbs*.

Vaughn does not raise a substantial legal question as to the FACE Act's constitutionality because *Dobbs* did nothing to disturb this Court's controlling precedent on that question. In *Norton*, this Court held that the FACE Act is valid Commerce Clause legislation regulating activities "disrupt[ing] the national market for abortion-related services" and "decreas[ing] the availability of services." 298 F.3d at 555-559. This Court also ruled that the FACE Act is not a content-based restriction on the free-speech rights of abortion opponents under the First Amendment because it "prohibits three types of conduct—use of force, threat of force, and physical obstruction." *Id.* at 552. To the extent that the Act may implicate "protected expression," this Court explained that it did so in a content-neutral manner because it applies to all forms of "reproductive health services." *Id.* at 553 (quoting 18 U.S.C. 248(e)(5) (2002)).

Indeed, all other courts of appeals to consider these questions have ruled that the FACE Act's prohibition on intentional interference by force, threat of force, or physical obstruction with a person's provision or receipt of reproductive health

services is constitutional. *See United States v. Gregg*, 226 F.3d 253, 264-266 (3d Cir. 2000); *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998); *Hoffman v. Hunt*, 126 F.3d 575, 584 (4th Cir. 1997); *United States v. Bird*, 124 F.3d 667, 678-684 (5th Cir. 1997); *Terry v. Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996); *United States v. Soderna*, 82 F.3d 1370, 1373-1374 (7th Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913, 919 (8th Cir. 1996); *United States v. Wilson*, 73 F.3d 675, 680 (7th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995). Vaughn cites no case to the contrary (*see* Mot. 6-9), nor does such case exist.[3]

Dobbs does not undermine the FACE Act's validity. Indeed, as the district court observed, "every other court that has considered the[se] same arguments regarding the unconstitutionality of the FACE Act" post-*Dobbs* has "rejected them." Order, R. 693, Page ID # 5332-5333 (citing *United States v. Williams*, No. 1:22-cr-00684 (JLR), 2023 WL 7386049, at *1 (S.D.N.Y. Nov. 8, 2023); *United States v. Freestone*, No. 8:23-cr-25-VMC-AEP, 2023 WL 4824481, at *6 (M.D. Fla. July 27, 2023); *United States v. Handy*, No. 22-096 (CKK), 2023 WL 4744057, at *2-4 (D.D.C. July 25, 2023)).

[3] Vaughn also argues (Mot. 8) that *Norton* did not properly assess whether the FACE Act is a content-based regulation under the First Amendment. Yet, Vaughn does not explain how the cases he invokes affect this Court's decision in *Norton* (only that they were decided after *Norton*). This argument certainly does not amount to a "close" question justifying a stay of Vaughn's sentence.

To be sure, *Dobbs* overturned earlier precedent establishing a constitutional right to abortion under the Fourteenth Amendment. But the decision in no way concerned the FACE Act's statutory prohibitions. Indeed, it did not even mention the Act. Just as it did pre-*Dobbs*, the FACE Act continues to protect a broad range of "reproductive health services" of which abortion services are just one example. 18 U.S.C. 248(a)(1) and (e)(5). And even if the FACE Act's legislative history supported the particular interpretation that Vaughn asserts (Mot. 6-7), that interpretation would not trump the clear statutory text. In short, whether the Fourteenth Amendment includes a constitutional right to abortion is irrelevant to the FACE Act's constitutionality under the Commerce Clause or the First Amendment.

Because *Norton* controls the outcome here, Vaughn has not raised a "close" question of law amounting to a substantial question under Section 3143(b).

2. Vaughn's claim of vindictive prosecution also does not raise a substantial question of law or fact.

Vaughn also argues that there is a substantial question about whether his FACE Act conviction stemmed from "vindictive prosecution" based on "viewpoint discrimination." Mot. 7. Vaughn argues that this claim raises a substantial question because these issues "were never raised in *Norton* or the other early FACE [Act] cases and thus[,] present novel questions 'without precedent in this circuit.'" Mot. 7 (quoting *United States v. Safavian*, Crim. No. 05-0370 (PLF),

2006 WL 3378479, at *1 (D.D.C. Nov. 16, 2006)). But vindictive (or selective) prosecution is a fact-dependent claim—so the question is no more "novel" or "unprecedented" than any other application of specific facts to a legal claim. Vaughn fails to explain how the facts he marshals regarding this claim create a "close" question that "could go either way." *Kincaid*, 805 F. App'x at 395 (quoting *Pollard*, 778 F.2d at 1182). He simply relitigates the significance of the same facts without identifying any error (legal or factual) in the district court's opinion denying the motion to dismiss the indictment on this ground. *See* Mot. 7 n.6; Memorandum, R. 282, Page ID # 956-960. This is insufficient to meet his burden.

C. Vaughn has not identified a substantial question of law or fact likely to result in reversal of his conspiracy conviction or a new trial.

Vaughn next argues that applying the civil rights conspiracy statute, 18 U.S.C. 241, to his conduct is unconstitutional because it "usurps the power of punishment from Congress." Mot. 18 (internal quotation marks omitted). In essence, Vaughn argues that he should not be convicted of a federal felony for conspiring to violate statutorily protected rights where the substantive FACE Act violation in this case is a misdemeanor.

Yet Vaughn cannot seriously contest that Congress can prohibit conspiracy as a separate offense and attach to it different penalties. Indeed, the Supreme Court has "long and consistently recognized . . . that the commission of [an]

offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946); *see also ibid.* (recognizing "[t]he power of Congress to separate" offenses and "affix to each a different penalty"); *United States v. Felix*, 503 U.S. 378, 389-392 (1992); *United States v. Myers*, 854 F.3d 341, 355 (6th Cir. 2017) (citing *Pinkerton*, 328 U.S. at 643). This is not surprising because criminalizing conspiracy against rights, which necessitates the defendant's agreement with another person to intimidate a person in their exercise of federally protected rights, vindicates a separate, independent harm.

Vaughn admits that he did not "fully develop[]" this argument in the district court (Mot. 18), and he offers little in the way of legal argument before this Court. Rather, he cites just one case—*Fischer v. United States*, 144 S. Ct. 2176 (2024)—to argue this challenge raises a substantial legal question. In *Fischer*, the Supreme Court interpreted the residual clause of 18 U.S.C. 1512(c)(2), a provision of the Sarbanes-Oxley Act prohibiting the obstruction of official proceedings, which provides that a person who "otherwise obstructs" an official proceeding, and who acts corruptly, commits a federal crime. *Fischer*, 144 S. Ct. at 2183. In construing this clause, the Court began with the text of the statute and familiar tools of statutory interpretation: the canons of *noscitur a sociis* and *ejusdem generis*; the

specific context of subsection (c)(2) within the greater obstruction statute; and the broader context of the statute as a whole. *Id.* at 2183-2184.

Before this Court, Vaughn argues that *Fischer*'s interpretation of an entirely different statute somehow governs the *constitutionality* of 18 U.S.C. 241 as applied to his conduct. The only apparent connection between the two is that Vaughn seeks to rely on the "statutory history" (*i.e.*, legislative history) of the FACE Act to make his case (Mot. 15-17), and in *Fischer*, the Supreme Court found reason to rely on legislative history to confirm its interpretation of the statute. *See Fischer*, 144 S. Ct. at 2186, 2189 (referring to the "history of the provision" and the "statutory history," respectively). But one has nothing to do with the other—*Fischer* does not demonstrate that use of the civil rights conspiracy statute in Vaughn's case "violates the separation of powers." Mot. 18. Accordingly, Vaughn has not raised a substantial question about his conspiracy conviction.

* * *

Finally, at various points in his stay motion, Vaughn "incorporate[s] . . . by reference" his district court motion to dismiss his indictment. Mot. 6-7, 10. But this Court has "clearly and repeatedly held that a party shall not incorporate by reference into its appellate briefs any documents or pleadings filed in the court below." *Island Creek Coal Co. v. Maynard*, 87 F.4th 802, 814 (6th Cir. 2023). Such incorporation is not "sufficient to preserve" a claim of error. *Ibid.*

CONCLUSION

For the foregoing reasons, this Court should deny Vaughn's motion to stay his sentence. Should this Court decide otherwise and grant Vaughn's requested relief to stay his supervised release, including his six months' home detention, the Court should remand to the district court for it to impose conditions on Vaughn's release pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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s/ Barbara A. Schwabauer
BARBARA A. SCHWABAUER
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Date: August 9, 2024

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2024, I electronically filed the foregoing UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO STAY SENTENCE PENDING APPEAL with the United States Court of Appeals for the Sixth Circuit using the Court's CM/ECF system, which will automatically serve all parties in this case.

s/ Barbara A. Schwabauer
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