IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5643

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CALVIN ZASTROW,

Defendant-Appellant

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

UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR RELEASE PENDING APPEAL

A jury convicted defendant-appellant Calvin Zastrow for conspiring to violate federally protected rights and for physically obstructing access to reproductive health services. As relevant here, he was sentenced to a six-month term of imprisonment and three years of supervised release. The district court denied Zastrow's motion for release pending appeal and motion to extend the report date. More than two months later and just 12 days before he is scheduled to report to serve his sentence, Zastrow filed the instant Motion for Release Pending Appeal. As explained below, this Court should deny Zastrow's motion.

BACKGROUND

1. On March 5, 2021, Zastrow and ten codefendants 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. Zastrow's conduct included sitting in front of the staff entrance and refusing to stop blocking the door. Defendants, who sought to disrupt carafem's abortion-related services, livestreamed their conduct, which persisted for three hours.

A grand jury indicted Zastrow and six of his codefendants on 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. Indictment, R. 3, PageID # 4-11. Zastrow and five of his codefendants proceeded to trial before the district court.[1]

[1] Caroline Davis entered a guilty plea. Davis Judgment, R. 591, PageID # 3744. The district court severed the cases of the four remaining codefendants, who were tried before a magistrate judge. Order Severing Misdemeanor Codefendants, R. 340, PageID # 1212.

2. Voir dire occurred over two days. On the first day, the parties conducted individual voir dire, which consisted of bringing in certain jurors one at a time for follow-up questions to their answers on a questionnaire because of the "sensitive" or "embarrassing" nature of the questions. Transcript 1 (Tr. 1), R. 729, PageID # 5652-5655, 5660-5661. These issues included, among other things, individual beliefs about the morality of abortion, family members' criminal history, and reproductive health experiences, including experiences with abortion procedures. *See, e.g.*, *Id.* at PageID # 5665, 5740-5742, 5776.

During individual voir dire, the district court closed the courtroom and the corridor outside the courtroom to members of the public. Tr. 1, R. 729, PageID # 5650-5651. The court indicated concern about the potential for "confusion" because of the 150 people in the jury pool who would be moving "back and forth between . . . courtrooms." *Id.* at PageID # 5650. The government also raised a concern about the potential for jury tampering, given events taking place at the courthouse. *Id.* at PageID # 5649-5650. No party objected to the closure of the courtroom based on the public-trial right. *Id.* at PageID # 5650-5651. Although Zastrow's counsel represented his client's desire to have his family nearby in the corridor, he did not object to the closure, including the exclusion of Zastrow's family members from the courtroom. *Id.* at PageID # 5651. Instead, he explained

to the court that he had advised Zastrow that "nothing will happen in voir dire of any consequence legally." *Id.* at PageID # 5651.

On the second day of voir dire, the parties conducted general voir dire of all prospective jurors together. Transcript 2-A, R. 730, PageID # 5949. The court indicated that the courtroom remained closed to the general public because of the size of the jury pool, and the government raised a concern that the closure might violate the right to a public trial. *Id.* at PageID # 5951. Of the defendants, only Paul Vaughn objected to the closure of the courtroom. *Id.* at PageID # 5952. In response to this objection, the court took a recess to set up a remote courtroom for the public to view the proceedings. *Id.* at PageID # 5952-5953.

3. The jury convicted Zastrow on both counts in the Indictment. Jury Verdict, R. 517, PageID # 2646-2647. The United States Probation Office calculated his recommended Guidelines sentence as 27 to 33 months' imprisonment and one to three years' supervised release. Presentence Report, R. 694, PageID # 5357. At sentencing, the district court adopted the Probation Office's calculations and, after considering the 18 U.S.C. 3553(a) sentencing factors, granted a downward variance. Statement of Reasons, R. 678, PageID # 5225, 5227; Sentencing Transcript, R. 678-1, PageID # 5238. Zastrow's below-Guidelines sentence was a six-month term of imprisonment and three years'

supervised release. Judgment, R. 677, PageID # 5219-5220. Zastrow is scheduled to report to serve his prison sentence on October 15, 2024. *Id.* at PageID # 5219.

4. After sentencing, Zastrow moved for release pending appeal in the district court. Motion, R. 681, PageID # 5251-5257. As to his FACE Act conviction, Zastrow argued that 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)—raised substantial questions likely to result in reversal or a new trial. Motion, R. 681, PageID # 5254-5255. Additionally, he asserted his conviction was invalid under the First Amendment and based on selective prosecution. *Id.* at PageID # 5255-5256.

The district court denied Zastrow's motion. Order, R. 704, PageID # 5444. The court rejected outright Zastrow's challenges to his FACE Act conviction because it "already considered at length and rejected virtually identical arguments, raised in the context of motions to dismiss the Indictment." *Id.* at PageID # 5448. The court also noted that "every other court [in the country] that has considered the[se] same arguments regarding the unconstitutionality of the FACE Act . . . has likewise rejected them." *Ibid.* (collecting district court cases); *see also* Memorandum, R. 282, PageID # 943-974.

Zastrow subsequently moved to delay execution of his sentence based on difficulties presented by a separate case in the Eastern District of Michigan in which he also has been convicted of FACE Act violations. Motion to Delay, R. 737, PageID # 6675-6676.[2] The district court also denied this motion. Order, R. 739, PageID # 6682.

In his motion before this Court, Zastrow renews the arguments in his motion for release before the district court and raises a new argument regarding the courtroom's closure during voir dire. Motion for Release Pending Appeal (Mot.) 4-15.

DISCUSSION

This Court should deny Zastrow's Motion for Release Pending Appeal.

This Court should deny Zastrow's Motion for Release Pending Appeal because he has not identified a substantial question of law or fact sufficient to warrant a stay of his sentence. Under the Bail Reform Act, 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).

[2] Zastrow was convicted on August 20, 2024, in *United States v. Zastrow*, No. 2:23cr20100 (E.D. Mich.). He has not yet been sentenced in that case.

Here, Zastrow has not shown that his appeal raises a substantial question likely to result in reversal or a new trial, and the district court properly rejected his motion. Order, R. 704, PageID # 5449.[3]

An appeal raises a substantial question of law or fact if it meets two requirements. First, the question must 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 the defendant's favor." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985) (quoting *United States v. Powell*, 761 F.2d 1227, 1233-1234 (8th Cir. 1985) (en banc)). Second, even if such a question exists, the question is substantial only if it presents a "close question or one that could go either way." *United States v. Kincaid*, 805 F. App'x 394, 395 (6th Cir. 2020) (quoting *Pollard*, 778 F.2d at 1182). Other circuits have described this latter requirement as presenting issues that are "novel," have "not been decided by controlling precedent," or are "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.

[3] The district court analyzed Zastrow's claims by considering whether he would have a likelihood of success on the merits based on the factors for a stay. Order, R. 704, PageID # 5448. The court ultimately viewed this analysis as equivalent to the "substantial question" standard under the Bail Reform Act. *Id.* at PageID # 5449 (providing alternative holdings based on both standards).

1985) (collecting cases)). While the questions Zastrow raises meet this first requirement, none present the close question necessary to satisfy the second.

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

Zastrow has failed to identify any substantial questions regarding his FACE Act conviction that are "close" or "could go either way." *Pollard*, 778 F.2d at 1182 (citation omitted). First, his constitutional challenges to the FACE Act based on the Commerce Clause and the Free Speech Clause are "decided by controlling precedent" in *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002). *Smith*, 793 F.2d at 88. Second, Zastrow offers no legal precedent or explanation showing his free exercise claim is a close one or could go either way. Finally, Zastrow fails to raise a substantial question regarding his selective prosecution claim and points to no specific error in the district court's analysis to suggest the question could go either way.

1. Controlling precedent in *Norton* decides two of Zastrow's challenges to the FACE Act.

Zastrow questions whether Congress can regulate reproductive health services, including abortion services, under the Commerce Clause and whether the FACE Act violates the Free Speech Clause of the First Amendment. Mot. 5-9. These challenges do not amount to substantial questions under the Bail Reform Act

because they are "decided by controlling precedent" in *Norton*, which remains good law post-*Dobbs*.

a. In *Norton*, this Court held that the FACE Act is valid Commerce Clause legislation regulating activities "disrupt[ing] the national market for" reproductive services, including "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)). This Court then concluded that the FACE Act survived intermediate scrutiny as a content-neutral regulation. *Ibid.*

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, 584-588 (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, 1519-1520 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995). Zastrow cites no case to the contrary (*see* Mot. 6-9), nor does such case exist.

b. *Dobbs* does not undermine this Court's decision in *Norton*. 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 "likewise rejected them." Order, R. 704, at PageID # 5448 (citing *United States v. Williams*, No. 1:22-cr-00684, 2023 WL 7386049, at *1 (S.D.N.Y. Nov. 8, 2023); *United States v. Freestone*, No. 8:23-cr-25, 2023 WL 4824481, at *6 (M.D. Fla. July 27, 2023); *United States v. Handy*, No. 22-096, 2023 WL 4744057, at *2-4 (D.D.C. July 25, 2023)).

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 "sole[]" legislative purpose of the Act is as Zastrow claims (Mot. 5-6), and it is not, 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 validity under the Commerce Clause or the First Amendment.

Because *Norton* disposes of Zastrow's arguments, Zastrow has not raised a "close" question of law amounting to a substantial question under Section 3143(b).

2. Zastrow's challenge to the FACE Act based on the Free Exercise Clause does not raise a substantial question.

Zastrow argues that the FACE Act violates the Free Exercise Clause of the First Amendment because it is "utilized solely to prosecute those who peacefully choose to exercise their religious beliefs." Mot. 10. This challenge also does not raise a substantial question because it does not involve a "close," "novel," or "fairly doubtful" question that could go either way.

As this Court has explained, the FACE Act does not target the content of speech (like religious beliefs); rather it targets specific forms of *conduct*, including "use of force, threat of force, and physical obstruction[,] which are not protected by the First Amendment." *Norton*, 298 F.3d at 552. Moreover, as the district court aptly recognized when it previously rejected this argument, the Free Exercise Clause does not grant individuals acting based on their religious beliefs the "freedom to commit actions that otherwise would be crimes against the person or property of others through physical invasion, intimidation, or threat[.]" Memorandum, R. 282, PageID # 964 (citing *Reynolds v. United States*, 98 U.S.

145, 167 (1878)); *see* Order, R. 704, PageID # 5448 (incorporating this order when denying Zastrow's motion for release pending appeal). Zastrow cites no case to the contrary. Instead, he invokes several Supreme Court cases without explaining how they call into question the district court's conclusion (or this Court's decision in *Norton*). Mot. 10-11.[4] This is not sufficient to raise a substantial question under 18 U.S.C. 3143(b)(2)(B).[5]

[4] Zastrow claims the district court did not analyze his free exercise claim. Mot. 10. He is wrong. *See* Memorandum, R. 282, PageID # 963-965.

[5] Zastrow also makes incorrect factual assertions about the government's enforcement of the FACE Act. The government has pursued criminal charges under the Act (and the civil rights conspiracy statute) against defendants for targeted threats to pregnancy resource centers counseling abortion alternatives. *See, e.g.*, *United States v. Freestone*, No. 1:23mj2108 (S.D. Fla. 2023); Off. of Pub. Affs., Dep't of Just., *Three Defendants Plead Guilty to a Civil Rights Conspiracy Targeting Pregnancy Resource Centers* (June 14, 2024), https://www.justice.gov/opa/pr/three-defendants-plead-guilty-civil-rights-conspiracy-targeting-pregnancy-resource-centers. Private parties have also brought similar cases under the statute's civil provision, which rests on the same statutory showing; *United States v. Durant*, No. 3:23mj8003 (N.D. Ohio); Off. of Pub. Affs., Dep't of Just., *Ohio Woman Pleads Guilty to FACE Act Violation for Damaging Pregnancy Center* (Dec. 8, 2023), https://www.justice.gov/opa/pr/ohio-woman-pleads-guilty-freedom-access-clinic-entrances-face-act-violation-damaging. *See, e.g.*, *Greenhut v. Hand*, 996 F. Supp. 372 (D.N.J. 1998) (involving threats to staff member at pregnancy resource center). And the government has consistently enforced the Act since its enactment in 1994, as the many federal criminal prosecutions and civil cases under the Act show.

3. Zastrow's claim of selective prosecution does not raise a substantial question of law or fact.

Zastrow also argues that a substantial question exists as to selective prosecution. Mot. 11-12. But selective prosecution is a highly fact-dependent claim, and Zastrow has done no more than assert that he "more than met the standard" for a selective prosecution. 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. 11-13; Memorandum, R. 282, PageID # 956-960. This is insufficient to meet his burden to identify a substantial question.

B. Zastrow has not raised a substantial question of law or fact regarding individual voir dire likely to result in reversal of or a new trial for his convictions.

Zastrow argues that whether the district court violated his right to a public trial under the Sixth Amendment raises a substantial question warranting his release pending appeal.[6] Not so. Zastrow argues that this type of error is "subject to automatic reversal." Mot. 24 (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). He is wrong. "[A]lthough the public-trial right is structural, it is subject

[6] Zastrow failed to raise this issue in his motion for release before the district court. *See* Motion, R. 681, PageID # 5251-5257. When an argument "was not raised [below] at the district court, Sixth Circuit precedent requires application of the plain error standard." *United States v. Bacon*, 884 F.3d 605, 610 (6th Cir. 2018) (citation and internal quotation marks omitted).

to exceptions" so "not every public-trial violation results in fundamental unfairness" warranting reversal. *Weaver v. Massachusetts*, 582 U.S. 286, 298 (2017). Courts, including this one, have also applied a "triviality" exception to the denial of a defendant's public-trial rights. *United States v. Arellano-Garcia*, 503 F. App'x 300, 305 (6th Cir. 2012); *United States v. Patton*, 502 F. App'x 139, 142 (3d Cir. 2012) (holding closure due to space constraints trivial).

The district court's one-day closure of the courtroom for individual voir dire does not raise a substantial question warranting release pending appeal. A defendant's public-trial right under the Sixth Amendment is not absolute and may "give way in certain cases to other rights or interests." *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam) (citation omitted). Protecting against the "disclosure of sensitive information" is one such interest. *Ibid.* (citation omitted); *United States v. Simmons*, 797 F.3d 409, 412 (6th Cir. 2015). The record in this case supports finding that the disclosure of sensitive information would justify the courtroom's closure during individual voir dire. *See* Tr. 1, R. 729, PageID # 5652-5655, 5660-5661, 5740-5742, 5776.

The Supreme Court has found that even a two-day closure of a courtroom during jury selection does not automatically require a new trial. *Weaver*, 582 U.S. at 304. Although the Court assumed without deciding that the closure violated the Sixth Amendment, the Court held that the trial was not fundamentally unfair for

several reasons, including that the trial was not conducted "in secret or in a remote place"; the courtroom "remained open during the evidentiary phase of the trial"; and "there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself." *Ibid.* These same reasons apply to the closure in this case, which lasted for just the first day of jury selection.

Additionally, no party raised an objection to the courtroom's closure for individual voir dire based on the Sixth Amendment's public-trial right.[7] A defendant's "fail[ure] to object to [the] closure of the voir dire proceeding" may "waive the public trial right guarantee." *Momah v. Uttecht*, 699 F. App'x 604, 607 (9th Cir. 2017) (citing *Peretz v. United States*, 501 U.S. 923, 936-937 (1991)); *see also United States v. Reagan*, 725 F.3d 471, 488 (5th Cir. 2013) (finding waiver where defendants, with knowledge of the closure of the courtroom during voir dire, failed to object). Indeed, had a defendant objected to the closure during individual voir dire, the district court may have arranged for the public to visually observe the proceedings from an overflow courtroom as it did for the second day of voir dire, even though public access to prospective jurors' answers to the more sensitive questions during day one still would be limited.

[7] Zastrow's counsel indicated that Zastrow wanted his family nearby in the corridor leading up to the courtroom, but did not object to the closure of the courtroom or suggest that it violated his client's public-trial rights.

Finally, Zastrow has not identified any fundamental unfairness that might raise a close question as to whether reversal is likely in this case. He has not argued "that any juror lied during voir dire"; "[any] misbehavior by the prosecutor, judge, or any other party"; or that "any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands." *Weaver*, 582 U.S. at 304.

CONCLUSION

For the foregoing reasons, this Court should deny Zastrow's Motion for Release Pending Appeal.

Respectfully submitted,

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CERIFICATE OF COMPLIANCE

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s/ Barbara A. Schwabauer
BARBARA A. SCHWABAUER
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Date: October 11, 2024

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2024, I electronically filed the foregoing UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR RELEASE 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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