No. 24-5643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CALVIN ZASTROW,

Defendant-Appellant.

O R D E R

Before: NORRIS, KETHLEDGE, and LARSEN, Circuit Judges.

Defendant Calvin Zastrow appeals his conviction, following a jury trial, for violating the Freedom of Access to Clinic Entrances Act ("FACE Act"), 18 U.S.C. § 248(a)(1), and conspiring to obstruct access to a clinic providing reproductive health services, in violation of 18 U.S.C. § 241. He moves for release pending appeal. The government opposes his motion.

"The Bail Reform Act, 18 U.S.C. § 3143(b), creates a presumption against release pending appeal." *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002). Generally, a defendant convicted and sentenced to a term of imprisonment must be detained pending appeal unless he shows, (1) by clear and convincing evidence that he "is not likely to flee or pose a danger to the safety of any other person or the community if released," and 2) that his appeal "is not for the purpose of delay and raises a substantial question of law or fact likely to result in" reversal, an order for a new trial, a sentence that does not include imprisonment, or "a reduced sentence to a

term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1).

The government does not assert that Zastrow is likely to flee or poses a danger to the safety of any other person or the community. Accordingly, Zastrow's release turns on whether he has raised a substantial question. "[A]n appeal raises a substantial question when the appeal presents a 'close question or one that could go either way' and . . . the question 'is 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, 1233–34 (8th Cir. 1985) (en banc)).

In this court, Zastrow challenges his conviction on five grounds, namely that the FACE Act is an invalid exercise of congressional authority following *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022); the FACE Act violates the First Amendment rights to free speech and free exercise of religion; the government engaged in selective prosecution; the penalty provisions of § 241 are disproportionate to the offense; and the district court's closure of the courtroom during voir dire violated his Sixth Amendment right to a public trial. Notably, Zastrow did not raise all of these arguments in his motion for release pending appeal before the district court. This is a sufficient basis to deny relief on any newly raised claim. *See* Fed. R. App. P. 9(b); *United States v. Hochevar*, 214 F.3d 342, 344 (2d Cir. 2000) (per curiam). Nevertheless, even if we consider all of Zastrow's arguments, we do not believe he has raised a substantial question at this juncture.

As it relates to Zastrow's first argument that the FACE Act is an invalid exercise of congressional authority following *Dobbs*, the FACE Act reaches well beyond abortion-related reproductive health services. 18 U.S.C. § 248(a), (e). We have already held that the FACE Act is

a constitutional exercise of Congress's power under the Commerce Clause, *see Norton v. Ashcroft*, 298 F.3d 547, 559 (6th Cir. 2002)), and we recently—and, we believe, correctly—concluded that "the Supreme Court's decision in *Dobbs* provides no reason to reconsider that decision." *United States v. Vaughn*, No. 24-5615, 2024 U.S. App. LEXIS 29010, at 6 (6th Cir. Nov. 14, 2024) order); *see also United States v. Williams*, 701 F. Supp. 3d 257, 270–71 (S.D.N.Y. 2023) ("Further, the existence of a constitutional right to abortion is irrelevant because the FACE Act was 'validly enacted under the Commerce Clause.'" quoting *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998) (per curiam))). Moreover, the FACE Act appears to confer a right, violation of which is a sufficient predicate for § 241. *Vaughn*, 2024 U.S. App. LEXIS 29010, at 5–6; *see also United States v. Handy*, No. 22-096, 2023 WL 4744057, at 3–4 (D.D.C. July 25, 2023); *United States v. Freestone*, No. 23-cr-25, 2023 WL 4824481, at 3–6 (M.D. Fla. July 27, 2023).

As it relates to Zastrow's second argument that the FACE Act violates the First Amendment rights to free speech and free exercise of religion, we have already held that the FACE Act is not an unconstitutional content-based regulation. *Norton*, 298 F.3d at 552–53 (noting that "[a]ll . . . circuits to address First Amendment facial challenges to the Act have upheld the Act," and holding that "[t]o the extent the Act implicates protected expression, . . . it does so in a content-neutral manner . . . [and] easily passes muster"); *see Vaughn*, 2024 U.S. App. LEXIS 29010, at 6 ("Vaughn argues that the FACE Act is a facially unconstitutional content-based regulation of speech. We have already held that it is not."). And Zastrow points to no case in which the FACE Act has been held to violate the First Amendment right to free exercise of religion; meanwhile, at least two courts of appeals have reached the opposite conclusion. *See Cheffer v. Reno*, 55 F.3d 1517, 1522–23 (11th Cir. 1995) ("We concur with the Fourth Circuit that

the Act is generally applicable and neutral toward religion and, therefore, does not offend the First Amendment's Free Exercise Clause . . . [and] [w]e hold that the Act survives appellants' challenge under the RFRA . . ." citing *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654–56 (4th Cir. 1995))). Nor does Zastrow offer any explanation as to how the Supreme Court's decisions in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617 2018), *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), and *Kennedy v. Bremerton School District*, 597 U.S. 507 2022), render the FACE Act unconstitutional. *See McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (stating that we need only consider arguments to the extent that they are accompanied by "some effort at developed argumentation" (citation omitted)).

Zastrow's third argument that the government engaged in selective prosecution fares no better. "Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" *United States v. Texas*, 599 U.S. 670, 678 2023) quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021)). The Attorney General and United States Attorneys generally have wide latitude in enforcing criminal laws "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *United States v. Armstrong*, 517 U.S. 456, 464 1996) (quoting U.S. CONST., art. II, § 3). However, "[s]electivity in the enforcement of criminal laws is subject to constitutional constraints" and "may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608 1985) (cleaned up) citation omitted). Thus, selective prosecution occurs where (1) the state actor "single[s] out a person belonging to an identifiable group . . . for prosecution even though he has decided not to prosecute persons not belonging to

that group in similar situations," (2) the state actor "initiate[s] the prosecution with a discriminatory purpose," and (3) "the prosecution . . . ha[s] a discriminatory effect on the *group* which the defendant belongs to." *Rieves v. Town of Smyrna*, 959 F.3d 678, 700 (6th Cir. 2020) (first omission in original) quoting *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997)).

Zastrow asserts that in his motion to dismiss, he "cited to evidence that since the leak of *Dobbs*, there ha[ve] been over 170 incidents of violence against pro-life centers and churches, without prosecution. At the same time, the DOJ began systematically prosecuting those, like Zastrow, who represent the peaceful pro-life movement." Setting aside that we do not generally allow litigants to incorporate by reference other filings, *see* Fed. R. App. P. 27(a)(2)(A), d)(2)(A), we rejected a substantially similar argument made by Zastrow's co-defendant in seeking a stay of sentencing. *Vaughn*, 2024 U.S. App. LEXIS 29010, at *3–5. Other courts have rejected similar claims made by similar defendants relying on similar evidence, too. *See, e.g.*, *United States v. Houck*, No. 22-cr-323, 2023 WL 144117, at 3 (E.D. Pa. Jan. 10, 2023) (rejecting similar evidence as insufficient in relation to claim of selective prosecution of the FACE Act); *Williams*, 701 F. Supp. 3d at 264–67 (same).

Because Zastrow does not offer any support for his fourth argument that the penalty provisions of § 241 are disproportionate to the offense, this argument also fails as a substantial question. *See United States v. Moore*, 849 F.2d 1474, 1988 WL 63191, at 1 (6th Cir. June 16, 1988) table) order) ("[M]ere identification of issues does not demonstrate that an appeal establishes a substantial question entitling the defendant to release pending appeal . . . .").

Lastly, Zastrow argues that the district court's decision to close the courtroom during voir dire infringed on his Sixth Amendment right to a public trial. It is well established that the public-trial right extends to jury selection. *Presley v. Georgia*, 558 U.S. 209, 213–15 2010) (per

curiam). And while not absolute, a defendant's right to a public trial may give way only in "rare" circumstances. *Waller v. Georgia*, 467 U.S. 39, 45 (1984). A violation of the right to a public trial is considered a structural error, that, when preserved and raised on direct review, generally affords the defendant a new trial as a matter of right. *Weaver v. Massachusetts*, 582 U.S. 286, 296, 305 (2017).

But to satisfy the preservation requirement applicable to a public-trial challenge, the defendant must "advance a contemporaneous objection to the courtroom closure so that the district court could address the public-trial issue." *United States v. Salaam*, No. 21-3566, 2024 WL 3163256, at 4 (6th Cir. June 25, 2024); *see Puckett v. United States*, 556 U.S. 129, 134–41 2009). And Zastrow did not preserve a Sixth Amendment challenge to the closure of the courtroom during voir dire. His counsel's objection was to the district court's closure of the *hallway*; indeed, it appears no specific objection was made to the courtroom closure. *See United States v. LeBlanc*, 612 F.2d 1012, 1014 (6th Cir. 1980).

While we may still consider a public-trial challenge absent a timely objection, the review is for plain error. *Salaam*, 2024 WL 3163256, at *5. Thus, Zastrow must establish (1) an error, (2) that is plain, (3) that affected a substantial right, and 4) that had a serious effect on the fairness, integrity, or public reputation of judicial proceedings. *Id.* Because Zastrow failed to present any argument as to why he prevails under the fourth factor, he also fails to raise a substantial issue on this claim.

None of these preliminary judgments represent the final word on Zastrow's arguments. But, at this stage, we conclude that he has not satisfied his burden for release under 18 U.S.C. § 3143(b).

Accordingly, the motion for release pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk