No. 25-10928

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GABRIELLA OROPESA,

Defendant-Appellant

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

UNITED STATES' OPPOSITION TO DEFENDANT-APPELLANT'S TIME-SENSITIVE MOTION FOR RELEASE PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1-26.1-3, the United States certifies that, in addition to those identified by defendant-appellant, the following persons may have an interest in the outcome of this case:

1. Dhillon, Harmeet K., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Hoppmann, Karin, U.S. Department of Justice, U.S. Attorney's Office for the Middle District of Florida, counsel for the United States;
3. Lee, Jason, U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal.

s/ Noah B. Bokat-Lindell
NOAH B. BOKAT-LINDELL
Attorney

Date: April 21, 2025

Pursuant to Federal Rule of Appellate Procedure 27(a)(3), the United States respectfully files this Opposition to Defendant-Appellant Gabriella Oropesa's Time-Sensitive Motion for Release Pending Appeal in this matter, filed April 11, 2025.

BACKGROUND

Gabriella Oropesa was convicted by a jury of conspiring against rights in violation of 18 U.S.C. 241. After the leak of the Supreme Court's draft opinion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), Oropesa and her co-conspirators agreed to vandalize reproductive health service facilities that provide and counsel alternatives to abortion in Florida. Doc. 355, at 5-6 (¶¶ 10-13) (Presentence Report); Doc. 54, at 1-4.[1] Oropesa and her co-conspirators vandalized three such facilities, with Oropesa herself participating in two of these attacks. Doc. 355, at 5-6 (PSR ¶¶ 11-13); Doc. 54, at 3-4. Arriving at night and fully disguised, Oropesa and her co-conspirators

[1] "Doc. __, at __" refers to the docket entry and page number of documents filed in the district court, No. 8:23-cr-25 (M.D. Fla.). "Mot. __" refers to the page number of Oropesa's Time-Sensitive Motion for Release, CA Doc. 11-1. "Tr. __" refers to the page number of the transcript of Oropesa's sentencing hearing, CA Doc. 11-2. "Br. __" refers to the page number of the Appellant's Brief, CA Doc. 13.

spray-painted threatening messages on the facilities' buildings, including "If abortions aren't SAFE then niether [sic] are you" and "WE'RE COMING FOR U." *Ibid.* These messages placed employees of the facilities in fear for their lives and safety, as well as for the lives and safety of the women whose care they provided. *See* Doc. 357, at 3-5.

A grand jury charged Oropesa with one count of violating 18 U.S.C. 241 and 2. *See* Doc. 54, at 1-4. The Superseding Indictment alleged that Oropesa conspired "to injure, oppress, threaten, and intimidate employees of facilities providing reproductive health services in the free exercise and enjoyment of the rights and privileges secured to them by the laws of the United States." *Id.* at 2; *see* 18 U.S.C. 241. The statutory right affected was "the right to provide and seek to provide reproductive health services as provided by Title 18, United States Code, Section 248(c)(1)," a provision of the Freedom of Access to Clinic Entrances (FACE) Act. Doc. 54, at 2.

In her first pretrial Motion to Dismiss, and in a motion under Federal Rule of Criminal Procedure 29, Oropesa argued that the FACE Act is not a "[l]aw[] of the United States" whose rights can be enforced via Section 241 because the FACE Act contains its own enforcement

scheme. Doc. 102, at 9-13; Doc. 341, at 2. Oropesa also argued in a second pretrial Motion to Dismiss, and in her Rule 29 Motion, that recent Supreme Court decisions interpreting other criminal statutes so altered the rules of statutory construction that the rights created by the FACE Act no longer could provide the basis for a Section 241 prosecution. Doc. 238, at 3; Doc. 341, at 2. The district court rejected these arguments each time Oropesa made them. Doc. 144, at 8-17; Doc. 249, at 1-8; Doc. 354, at 6-7. A jury found Oropesa guilty on her Section 241 charge. *See* Doc. 335.

On March 13, 2025, the district court sentenced Oropesa to 120 days' imprisonment. Doc. 360; Doc. 363, at 2-3. In her sentencing memorandum, and again during sentencing, Oropesa asked for release pending appeal based on the same legal arguments that the court had rejected three times previously. *See* Doc. 358, at 4-6; Tr. 45-47. Oropesa argued that these issues posed "substantial question[s] of law," as required for release (18 U.S.C. 3143(b)(1)(B)), solely because there was "no controlling law" from courts of appeals on the issues (Tr. 45; *see* Doc. 358, at 6). The court initially mused that it had never before granted a motion for release pending appeal and did not "think this case

deserves that type of special qualification" (Tr. 44); but the court then engaged in a minutes-long colloquy with counsel about the motion (Tr. 44-48). The court noted that Oropesa already had "filed a motion to dismiss" on the same issues, which the court had "denied." Tr. 46. And government counsel explained that the Sixth Circuit had recently denied a motion to stay sentencing pending appeal on the same issues, having "specifically noted the unlikelihood of success on the merits" (Tr. 47). The court denied Oropesa's request for release. Tr. 48. Oropesa renewed her motion in writing after filing her Notice of Appeal (Doc. 366), and the court denied the renewed motion (Doc. 367).

DISCUSSION

This Court should deny Oropesa's Motion for Release pending appeal. Release is appropriate only if, in addition to meeting other requirements, the defendant's appeal "raises a substantial question of law or fact." 18 U.S.C. 3143(b)(1)(B).[2] "[T]he burden of establishing" the substantiality of the question "is on the convicted defendant." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (per

[2] The United States does not contest Oropesa's satisfaction of the other factors required by 18 U.S.C. 3143(b)(1). *See United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam).

curiam). Oropesa has not met her burden. A legal question does not become substantial merely because it has not yet been decided by this Court. And viewed on their merits, as the district court recognized, Oropesa's legal arguments do not present close questions.

A. Lack of controlling precedent on the legal questions Oropesa raises does not make those questions "substantial."

Oropesa bases her motion on an incorrect understanding of what makes a question "substantial" for purposes of the release statute. Contrary to what Oropesa suggests (Mot. 7), an absence of "controlling precedent" does not, by itself, render an issue "substantial."

This Court first interpreted Section 3143(b)(1)(B)'s substantiality standard in *United States v. Giancola*, 754 F.2d at 898-901. The Court noted "that while Congress did not intend for the 1984 Bail Act to eliminate [release] pending appeal, it did intend to limit its availability." *Id.* at 900 (footnote omitted). Reading Section 3143's text in light of this purpose, the Court rejected the idea that mere lack of frivolous arguments on appeal could justify release pending appeal. *Id.* at 901. Instead, it held that "a 'substantial question' is . . . a 'close' question or one that very well could be decided the other way." *Ibid.*

Oropesa insists that the legal issues she raises are substantial because they are "novel" or have "not been decided by controlling precedent." Mot. 6, 8 (citation omitted); *see* Mot. 7 ("Oropesa, however, satisfies the *Giancarlo* [sic] standard, as she will raise a substantial issue that has not been decided by controlling precedent."); *ibid.* (noting her first claim "has not yet been decided by the Supreme Court or any Circuit Court of Appeals"); Mot. 8 (same for second issue). This circuit does not grant that sort of dispositive weight to the absence of controlling precedent.

In *Giancola*, 754 F.2d at 900-901, this Court generally adopted the Third Circuit's approach to Section 3143(b) from *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985). Under that approach, a defendant must raise an issue that both has substantial merit and is "so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial." *Giancola*, 754 F.2d at 900 (quoting *Miller*, 753 F.2d at 23). However, contrary to Oropesa's suggestion (Mot. 6), this Court did *not* adopt the Third Circuit's test for a "substantial question" wholesale. It rejected *Miller*'s "suggest[ion] that" an issue "that has not been

decided by controlling precedent" necessarily constitutes "a 'substantial question.'" *Giancola*, 754 F.2d at 901. In fact, this Court listed various reasons why "an issue may be without controlling precedent" and yet not present a substantial question. *Ibid.* For instance, "that issue [may be] so patently without merit that it has not been found necessary for it to have been resolved," or there may be "no real reason to believe that this circuit would depart from unanimous resolution of the issue by other circuits." *Ibid.*

Therefore, the mere novelty of a legal issue, or the lack of controlling precedent in this circuit, cannot alone determine whether a legal issue is substantial for purposes of release pending appeal. Other circuits have recognized as much when adopting this Court's *Giancola* standard. *See United States v. Bilanzich*, 771 F.2d 292, 298-299 (7th Cir. 1985); *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985); *United States v. Powell*, 761 F.2d 1227, 1231-1232 (8th Cir. 1985) (en banc); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985). Even the Third Circuit, after *Miller*, has clarified that the substantiality inquiry cannot be "focused solely on the absence of controlling precedent." *United States v. Smith*, 793 F.2d 85, 88 (3d Cir.

1986). Oropesa's motion, however, argues that her proffered legal issues are substantial for one reason only: because "these are issues that have not been decided by controlling precedent." Mot. 8. Since the lack of controlling precedent does not by itself indicate substantiality, Oropesa has not met her burden under *Giancola*.

B. Neither legal question presented in Oropesa's appeal is a close one.

Even if Oropesa had provided more in her motion than the mere novelty of the issues she raises, she could not show that those issues are substantial. Again, a "substantial question" is "a 'close' question or one that very well could be decided the other way." *Giancola*, 754 F.2d at 901. As other circuits noted in adopting *Giancola*'s test, this is a higher standard than whether the question is "fairly doubtful" or "fairly debatable"—tests that the Third and Ninth Circuits had adopted. *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (citation omitted); *see United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985); *Affleck*, 765 F.2d at 952; *Powell*, 761 F.2d at 1231-1232.

The "close question" standard best accords with the history of the Bail Reform Act of 1984, which Congress passed to *restrict* the availability of release pending appeal. The 1984 law heightened the

prior frivolousness standard that had applied under the Bail Reform Act of 1966 and "reversed the presumption in favor of bail [pending appeal] that existed under the prior statute." *Giancola*, 754 F.2d at 900; *see Perholtz*, 836 F.2d at 556-557; *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985); *Bayko*, 774 F.2d at 523; *Bilanzich*, 771 F.2d at 299; *Affleck*, 765 F.2d at 952; *Powell*, 761 F.2d at 1232; *Valera-Elizondo*, 761 F.2d at 1024.

To meet the higher *Giancola* standard, Oropesa must present a question "that 'could readily go either way, that . . . is a toss-up or nearly so.'" *United States v. Shoffner*, 791 F.2d 586, 590 n.6 (7th Cir. 1986) (citation omitted). Neither of the questions raised on appeal is anything close to a toss-up.

1. First, Oropesa argues that the FACE Act is not among the "laws of the United States" enforceable via Section 241. Mot. 7-8. To state this argument is to refute it. "'Laws' means 'laws,' no less today than in the 1870s" when Congress passed Section 241. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 172 (2023) (discussing 42 U.S.C. 1983). The district court rightly recognized that "[t]he FACE Act, a federal statute, is clearly a 'law[] of the United States' for

purposes of Section 241." Doc. 144, at 14 (second alteration in original) (quoting 18 U.S.C. 241).

Nor does it matter that the FACE Act contains its own civil and criminal enforcement regimes. *Contra* Br. 10. Oropesa largely relies on caselaw analyzing whether statutory enforcement regimes displace the presumptive availability of private civil suits under 42 U.S.C. 1983. *See* Br. 15-26. But as the district court recognized, this is a different question from—and requires a different analysis than—the question of whether the *government* can still prosecute *criminal conspiracies* under Section 241. *See* Doc. 144, at 15.

It is a "well-established principle that Congress may intentionally prescribe multiple punishments for the same conduct." *United States v. Stewart*, 65 F.3d 918, 927 (11th Cir. 1995). And the FACE Act authorizes exactly that. After the subsections setting out the FACE Act's substantive covered conduct and its criminal and civil remedies, the Act states that "[n]othing in this section shall be construed . . . to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies." 18 U.S.C. 248(d)(3). This

explicit non-exclusivity provision offers "within the four corners of [Section 248] evidence that it was not designed as preempting every other mode of protecting a federal 'right' or as granting immunity to those who had long been subject to the regime of § 241." *United States v. Johnson*, 390 U.S. 563, 566 (1968) (holding same after examining non-exclusivity provision in Title II of the Civil Rights Act of 1964).

Even without the benefit of such an explicit non-exclusivity provision, Section 241 cases have not engaged in the same implied displacement analysis as the Supreme Court's Section 1983 cases. Never has the mere existence of other civil or criminal remedies been held to prohibit a Section 241 charge. To the contrary, the Second Circuit has held that Congress's decision to *remove* such alternative remedies from a law before passage, and thus to provide *no* civil or criminal remedies for violating a federal right, indicated that Congress did not wish to subject violators to Section 241 prosecutions. *See United States v. DeLaurentis*, 491 F.2d 208, 213 (2d Cir. 1974).

The Supreme Court, meanwhile, has only ever precluded a Section 241 prosecution when the statute securing the pertinent federal law "right" for Section 241 purposes already explicitly declared another

remedy exclusive. *See Johnson*, 390 U.S. at 567 (finding that an "exclusive-remedy provision" in Title II of the Civil Rights Act "was inserted only to make clear that the substantive rights to public accommodation defined in" Title II "are to be enforced exclusively by injunction"). In *Johnson*, the Court refused to displace Section 241's application one jot beyond the set of defendants against whom the substantive statute had expressly limited relief. *See ibid.* ("[T]he Act does not purport to deal with outsiders [who interfere with equal provision of accommodations]; nor can we imagine that Congress desired to give them a brand new immunity from prosecution under 18 U.S.C. § 241.").

Section 241 plainly is an available remedy under these standards. The FACE Act provides civil and criminal remedies, indicating a congressional intent to provide for significant sanctions for violating the rights the Act creates. *See* 18 U.S.C. 248(b)-(c). And the Act contains no express limitations on relief for the conspiracy conduct Section 241 reaches. *Ibid.* To the contrary: As described above, Congress made an express statement in the *other* direction. *See* 18 U.S.C. 248(d)(3). The

argument for displacing Section 241's remedy therefore is hardly "substantial" here. 18 U.S.C. 3143(b)(1)(B).

Even if the Court were to apply the standards used for analyzing Section 1983 enforcement, the same result would obtain. It is only in the "exceptional case[]" that a statute's enforcement scheme impliedly displaces Section 1983. *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994). There is no such displacement where the substantive statute's "remedial scheme could 'complement,' not 'supplant, § 1983.'" *Talevski*, 599 U.S. at 190 (citation omitted). Such is the case here. Section 241 provides a criminal remedy for conspiring to violate the rights the FACE Act protects. *See* 18 U.S.C. 241. This remedy covers different circumstances from, and thus provides a complement to, the FACE Act's own remedies for completed FACE Act violations. *See* 18 U.S.C. 248(a)(1) and (b). And in any event, Congress indicated "expressly, through 'specific evidence from the statute itself,'" that the FACE Act's remedies should not displace others, including Section 241's criminal prohibition on conspiring against rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 n.4 (2002) (citation omitted); *see* 18 U.S.C. 248(d)(3).

2. Second, Oropesa asserts that the FACE Act cannot form the basis of a Section 241 charge because the latter permits up to a ten-year maximum sentence while a first-time violation of the former is a misdemeanor. Mot. 8. She bases this claim on *Fischer v. United States*, 603 U.S. 480 (2024), and *Snyder v. United States*, 603 U.S. 1 (2024). But as the district court correctly noted, "neither *Fischer* nor *Snyder* [is] applicable to Oropesa's case." Doc. 249, at 5.

Fischer simply interpreted "the residual 'otherwise' clause in" a criminal provision of the Sarbanes-Oxley Act. 603 U.S. at 485. It employed the "general principles" of *noscitur a sociis* and *ejusdem generis* to hold that the scope of the residual clause in 18 U.S.C. 1515(c)(2) must be "limited by the preceding list of criminal violations" in Subsection (c)(1). *Id.* at 487, 489. After this textual analysis, the Court reasoned that "[a]n unbounded interpretation of [the residual clause] would also render superfluous the careful delineation of different types of obstructive conduct in Section 1512 itself." *Id.* at 493. *Fischer* focused on the unlikelihood that Congress would have intended an ambiguous residual clause to cover—and to provide a different

maximum sentence for—precisely the same conduct that Congress already had addressed in the same statute. *See id.* at 494.

But *Fischer* "did not revolutionize the way courts must evaluate criminal liability altogether." Doc. 249, at 7. Section 241 reaches *different* conduct from the FACE Act—conspiracies to violate rights—and it does so in a *different* statute. Congress is perfectly entitled "to separate" substantive and conspiracy offenses and "affix to each a different penalty." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946).

Snyder is even further afield. There, the Court asked whether the federal bribery statute—specifically, 18 U.S.C. 666(a)(1)(B)—"makes it a federal crime for state and local officials to accept gratuities for their past official acts." *Snyder*, 603 U.S. at 10. The Court determined that "[s]ix reasons, taken together," indicate "that § 666 is a bribery statute and not a gratuities statute." *Ibid.* Oropesa focuses on only one of these six necessary-but-individually-insufficient reasons: "the matter of unacceptably disparate 'statutory punishments.'" Br. 35 (quoting *Snyder*, 603 U.S. at 13). Had the Court read the bribery statute to reach gratuities, it would have punished state and local officials five times more harshly as another statute punished federal officials for

precisely the same conduct. *Snyder*, 603 U.S. at 13. It also would have "authorized the same 10-year maximum sentences for (i) gratuities to state and local officials and (ii) bribes to state and local officials," when bribery otherwise is "treated as a far more serious offense" than providing gratuities. *Ibid.*

These disparities—which the government could not explain—buttressed the Court's preexisting textual reading "that § 666 is a bribery statute" and "not a gratuities statute." *Snyder*, 603 U.S. at 12-14. But nowhere did the Court assert that the specter of sentencing disparities alone would authorize courts to distort an unambiguous phrase like "laws of the United States." 18 U.S.C. 241. Regardless, *Snyder*'s analysis of the federal bribery statute says nothing about whether Congress can impose a different maximum sentence in Section 241 than in the FACE Act for different conduct. Nor did it "remake the law to mandate that conspiracies resulting in disparate sentences are now presumptively invalid." Doc. 249, at 8.

3. Oropesa's arguments are not just wrong; the questions are far from close. Every court to have examined these issues has determined that the FACE Act is a law of the United States that can be enforced

under Section 241, *United States v. Handy*, Crim. No. 22-96, 2023 WL 4744057, at *3 (D.D.C. July 25, 2023); *United States v. Gallagher*, 680 F. Supp. 3d 886, 904-905 (M.D. Tenn. 2023), and that it is perfectly acceptable to bring a felony Section 241 conspiracy claim even when a completed FACE Act violation would only merit a misdemeanor charge, *United States v. Zastrow*, No. 3:22-cr-327, 2024 WL 3558363, at *3 (M.D. Tenn. July 26, 2024).

The Sixth Circuit recently agreed with these rulings, rejecting a motion for release pending appeal in another Section 241 case that raised—among other issues—the same two questions Oropesa raises here. *See* Order, *United States v. Vaughn*, No. 24-5615 (6th Cir. Nov. 14, 2024). The Sixth Circuit found that "the FACE Act appears to create a right secured by laws of the United States, and the government may prosecute Vaughn under Section 241 for conspiring to violate that right." *Id.* at 4. The court also "s[aw] little promise in [the] argument that the Supreme Court's holding in *Fischer v. United States*, 144 S. Ct. 2176 (2024)—which addressed the scope of the Sarbanes-Oxley Act—somehow affects the scope of 18 U.S.C. § 241." Order at 5, *Vaughn*,

supra (No. 24-5615).[3] As the Sixth Circuit's ruling confirms, neither of Oropesa's "allegation[s] of error is so convincing as to indicate that [Oropesa] has 'a substantial chance of prevailing' on appeal." *United States v. Clark*, 917 F.2d 177, 180 (5th Cir. 1990).[4]

[3] Because the defendant in *Vaughn* was not sentenced to incarceration, the Sixth Circuit applied the traditional stay factors from *Nken v. Holder*, 556 U.S. 418 (2009), rather than the standards outlined in 18 U.S.C. 3143(b). *See* Order at 2, *Vaughn*, *supra* (No. 24-5615). However, the standard the court applied—whether there are "serious questions going to the merits" (*ibid.* (citation omitted))—is similar to or laxer than the "close question" standard announced in *Giancola*, 754 F.2d at 901.

[4] The United States' merits brief, which will refute Oropesa's legal arguments in greater detail, is due April 25. *See* Expedited Briefing Schedule (Mar. 31, 2025). As Oropesa is not scheduled to report to the Bureau of Prisons until April 29, 2025 (*see* Mot. 1 n.1), the panel would have time to review the United States' brief before ruling on Oropesa's Motion for Release, if it wished.

CONCLUSION

For the foregoing reasons, Oropesa's Motion for Release should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached UNITED STATES' OPPOSITION TO DEFENDANT-APPELLANT'S TIME-SENSITIVE MOTION FOR RELEASE PENDING APPEAL:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A), because the document, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f), contains 3673 words; and

(2) complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365, in 14-point Century Schoolbook font.

s/ Noah B. Bokat-Lindell
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Date: April 21, 2025