23-7577

United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

DOUGLASS MACKEY,

Defendant-Appellant.

On Appeal from the United States District Court for the
Eastern District of New York
Case No. 21-cr-00080-AMD

DEFENDANT DOUGLASS MACKEY'S REPLY IN SUPPORT OF HIS MOTION FOR RELEASE PENDING APPEAL

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. WHETHER SPREADING POLITICAL MISINFORMATION IS A FEDERAL CRIME IS AT MINIMUM "CLOSE." 2

II. WHETHER INTERNET OFFENSES CAN BE PROSECUTED ANYWHERE IN THE COUNTRY IS AT MINIMUM "CLOSE." 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 4

Dubin v. United States,
599 U.S. 110 (2023) 5

Friend v. Gasparino,
61 F.4th 77 (2d Cir. 2023) 7

Mullenix v. Luna,
577 U.S. 7 (2015) (per curiam) 3

United States v. Alvarez,
567 U.S. 709 (2012) 6, 7

United States v. Brennan,
183 F.3d 139 (2d Cir. 1999) 9

United States v. Brown,
293 F. App'x 826 (2d Cir. 2008) 9

United States v. Classic,
313 U.S. 299 (1941) 4

United States v. Hansen,
599 U.S. 762 (2023) 6

United States v. Lanier,
520 U.S. 259 (1997) 3

United States v. Pollard,
778 F.2d 1177 (6th Cir. 1985) 2

United States v. Randell,
761 F.2d 122 (2d Cir. 1985) 2

United States v. Rowe,
414 F.3d 271 (2d Cir. 2005) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Royer,
549 F.3d 886 (2d Cir. 2008) 8

United States v. Stone,
188 F. 836 (D. Md. 1911) 4

United States v. Zimny,
857 F.3d 97 (1st Cir. 2017) 2

White v. Pauly,
580 U.S. 73 (2017) (per curiam) 3

STATUTES

18 U.S.C. § 3237 9

18 U.S.C. § 3143 ..... 1, 7

INTRODUCTION

Douglass Mackey was sentenced to prison for spreading voting misinformation, in the first use of § 241 to prosecute deceptive speech since its enactment 150 years ago. And he was prosecuted in EDNY, solely based on the fact that internet data "traversed" that district (and the rest of the country). Yet the Government insists that Mackey's appeal does not even raise "close" questions, and that he should serve his seven-month sentence before this Court considers the validity of his conviction.

Respectfully, the Government's position is not serious. This is an unprecedented prosecution that raises novel and weighty questions about the scope of an important criminal statute, the First Amendment's protections for false political speech, and how venue rules apply to online offenses. Scholars have already written about the case, and a broad array of *amici* are expected to chime in. In trying to downplay this appeal, the Government attacks overstuffed straw-men, glosses over the real issues with superficial reasoning, and ignores virtually all the authority Mackey cited.

If anything, calling the questions presented by this case "close" *undersells* the force of Mackey's appeal. But, given the Government's concessions about the other elements of 18 U.S.C. § 3143(b), a "close" question is all Mackey must show to remain out of prison. He has plainly cleared that bar. The Court should thus grant release and prevent this appeal from becoming an academic exercise.

ARGUMENT

Although there is no "presumption favoring release" (Opp.14 n.4), a defendant has an "entitlement to release" if he can satisfy each of § 3143(b)'s requirements. *United States v. Zimny*, 857 F.3d 97, 101 (1st Cir. 2017). Here, the Government admits Mackey poses neither a flight risk nor a danger to the public. Opp.13 n.3. Nor is there dispute that if Mackey secures a "contrary appellate holding" on the questions at issue, the result would be "reversal." Opp.14. This motion thus turns on whether at least one appellate issue is "substantial," *i.e.*, "close." *Id.*; *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985). And "since the issue whether an appeal raises a substantial question presents an issue of law, this Court reviews the question de novo." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985).

I. WHETHER SPREADING POLITICAL MISINFORMATION IS A FEDERAL CRIME IS AT MINIMUM "CLOSE."

Last month, the Government trumpeted this prosecution as "groundbreaking,"[1] but it now claims § 241's application to deceptive speech is so "well-trodden" that it does not even present a close question. Opp.15. The press release had this right. The Government fails to cite *a single case* of § 241 being used to prosecute misinformation, and its sweeping reading would transform this statute into a political speech code of unparalleled breadth, contrary to Supreme Court precedent and in the teeth of the First Amendment. Calling this a "close" issue is *generous* to the Government.

[1] https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-sentenced-after-conviction-election.

A. At the threshold, the Government admits that § 241 fails to "delineate the range of forbidden conduct with particularity," *United States v. Lanier*, 520 U.S. 259, 265 (1997), so prosecution is permissible only if the defendant violated "'clearly established' law"—the demanding standard from "the qualified-immunity context." Opp.17.

But then the Government makes the same mistake that the Supreme Court has repeatedly corrected in that context: "defining the clearly established law at too high a level of generality." *White v. Pauly*, 580 U.S. 73, 78 (2017) (per curiam); *see also* Mot.9 n.2 (citing cases). The Government says § 241 has long protected "the right to vote." Opp.17; *see also* Opp.2 ("long legal and historical tradition of using § 241 to protect voting rights"). But that abstraction is the start, not the end, of the analysis. The inquiry requires courts to consider "in light of the specific context of the case … whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam). The Government never grapples with that inquiry.

B. It is true that § 241 has long protected the right to vote. But for 150 years it protected that right from *coercion* and *electoral fraud*, not *deceptive speech*. That is why this prosecution was "groundbreaking." It is also why it gives rise to "close" questions.

For all its talk about "a long legal and historical tradition," the Government fails to identify a single case in which § 241 was used to prosecute deceptive speech—even though deceptive political speech has always been ubiquitous. *United States v. Saylor* involved election officials who stuffed the ballot box with fake ballots, 322 U.S. 385, 386 (1944), and *Anderson v. United States* involved state and county officials who "cast

false and fictitious votes," 417 U.S. 211, 214 (1974). Opp.19-20. Those are cases about *electoral fraud*—nullification of the right to vote by *falsifying the official vote count*. That can readily be characterized as "injur[ing]" the right (Opp.19); private misinformation about whether, how, or for whom to vote cannot.[2]

To be sure, there need not be "a prior case involving the precise conduct at issue" (Opp.16), but "precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). So precedent forbidding falsifying ballots in a *general* election may serve as fair warning that officials cannot falsify ballots in a *primary* election. *See United States v. Classic*, 313 U.S. 299, 322-24 (1941) (cited at Opp.18). But there is an obvious chasm between an *official* who *stuffs a ballot box* and a *citizen* who *posts misleading memes*.

To be clear, the novelty of this prosecution has nothing to do with Mackey's "use of modern technology" (Opp.17); that is a straw-man meant to distract. It would be equally unprecedented to apply § 241 to misinformation spread by mouth, newspaper, leaflet, phone, or any other means (all of which are illegal on the Government's theory, despite being utterly routine). The "originality" of Mackey's technology (Opp.2) is irrelevant; the "originality" of the Government's radical legal theory is fatal.

[2] The Government also cites *United States v. Stone*, 188 F. 836 (D. Md. 1911). But as Mackey explained and the Government ignores, district court opinions cannot create "clearly established" law. Mot.11. Anyway, *Stone* involved officials who designed the ballot to make it "impossible" for "illiterate negro voters to vote for" their candidate of choice. 188 F. at 838. It did not involve deceptive speech.

C. Even if there were some analogy to be drawn between official ballot-box fraud and private political misinformation, Supreme Court precedent could not be any clearer in condemning such creative extensions of federal criminal statutes. As Mackey explained, the Government's expansionary interpretation harbors all the same problems as those the Court has rejected "[t]ime and again" as "reading incongruous breadth into opaque language in criminal statutes." *Dubin v. United States*, 599 U.S. 110, 130 (2023); *see also* Mot.14. The Government has no answer, so it ignores all this.

Equally notable, the Government does not contest the practical implications of its reading—as covering *any* false speech that bears on how one votes. It does not even dispute that Harry Reid and George Santos would be felons on its view (Mot.15). If anything, the Government doubles down, insisting § 241 covers *any* "trick" causing one to "abstain[] from their constitutional right to vote." Opp.18. That is remarkable. Every campaign tries to "depress voter turnout" for its adversary. Opp.4. If federal law criminalizes all false speech that causes someone not to vote, does § 241 cover efforts to suppress Republican turn-out by branding President Trump a Russian agent? How about those who claimed President Obama was ineligible for office because he was born in Kenya? Or those who discourage others to vote by casting doubt on election integrity? Are those all federal crimes so long as a jury finds that the claims were knowingly false? It should go without saying that whether § 241 opens this case of worm-cans is, at minimum, a "close" question.

D. As this all reveals, the Government inflates § 241 so much that it would pop under the slightest First Amendment pressure. The Government's interpretation amounts to a comprehensive criminal prohibition on misleading political speech. Such a blunderbuss ban could not possibly survive under *United States v. Alvarez*, 567 U.S. 709 (2012). That is reason enough to eschew this broad interpretation, *see United States v. Hansen*, 599 U.S. 762, 771 (2023)—or at least to recognize the issue as "close."

The Government repeats the district court's misdirected analysis, which focused on whether *Mackey's speech* could be constitutionally proscribed, rather than whether the *Government's interpretation of the statute* would render it unconstitutional. Opp.20 (quoting district court's discussion of what "this prosecution targets"). Arguing along those lines, the Government says Mackey's tweets involved "verifiably false" statements "about the time, place, or manner of elections." Opp.21. That defense is doubly wrong.

First, it misses the point: If § 241 reaches as far as the Government says—to forbid speech that "obstructs, hinders, or prevents" voting—it would not be limited to Mackey's tweets. It would also reach false statements about a candidate's views, exit polls, or even the weather, if designed to induce "voters into staying home." Opp.4. Indeed, it would forbid virtually any lie meant to deceive a voter. So construed, § 241 would grossly fail *Alvarez*, just as many *narrower* laws have. Mot.14 (citing cases). The Government's interpretation of § 241 does not rest on the precipice of a "slippery slope" (Opp.21); it has already tripped and is skidding uncontrollably down the ice.

Second, the Government is wrong even on its own terms. Mackey's speech is not *categorically* beyond First Amendment protection. *See Friend v. Gasparino*, 61 F.4th 77, 87-88 (2d Cir. 2023) (courts cannot deem speech unprotected based on their views about its value). And while it is possible that a narrow, targeted prohibition on false speech about the time, place, or manner of voting could survive scrutiny under *Alvarez*, § 241 is not such a law. The Government's only effort to reconcile its theory with *Alvarez* is to cite Justice Breyer's concurrence for the idea that false speech may be proscribed if there is "proof of specific harm to identifiable victims." Opp.21. But § 241 contains no such element, and the Government identified no "victims" who failed to vote as a result of Mackey's tweets.

It should not be controversial to observe that criminalizing voting-related speech raises substantial constitutional questions. Once the First Amendment is added to the rest, it is undeniable that the Government's reading of § 241 raises "close" questions.

* * *

Under § 241, only "clearly established" violations can be criminally prosecuted. And under § 3143(b), even a "close" question warrants release pending appeal. Putting those two propositions together, Mackey is entitled to relief so long as it is *fairly debatable* whether his conduct *clearly violated* federal law. That test is more than satisfied. In less doctrinal terms, if the Government is really going to imprison a private citizen for the first time in history for spreading political misinformation, execution of that sentence should at least await appellate review.

II. WHETHER INTERNET OFFENSES CAN BE PROSECUTED ANYWHERE IN THE COUNTRY IS AT MINIMUM "CLOSE."

The Government asserts that it proved venue because "tweets passed through the EDNY en route from Manhattan to Twitter's servers elsewhere." Opp.22.[3] That unprecedented theory presents another "close" question. Venue lies only where the "acts" or "conduct" constituting the conspiracy were committed. Mot.17; *United States v. Royer*, 549 F.3d 886, 896 (2d Cir. 2008). But internet data traversing water or air is not an "act" by anyone in EDNY.

The Government identifies no case holding otherwise. Instead, it cites cases involving direct point-to-point communications. Mot.19. Most did not rely on a "pass through" theory, but instead on the fact that a communication was made *to* a particular district where an "act" furthering the offense occurred—*e.g.*, where calls were answered or messages received. *See, e.g.*, *Royer*, 549 F.3d at 894-96 (finding venue where hundreds of messages were received); *United States v. Rowe*, 414 F.3d 271, 273-74, 279-80 (2d Cir. 2005) (finding venue where transmissions between "linked" computers were received). Those cases lend no support to venue here, as the Government merely proved that data *passed through* EDNY en route to elsewhere, not that anyone *received* Mackey's tweets in EDNY. Mot.19; Opp.9 (claiming only that "similar" tweets were read in EDNY).

[3] The Government asserts in a footnote that venue was also proper because Mackey testified that his tweets "were intended to be viewed by third parties in the EDNY." Opp.22 n.5. But it cites no such testimony. And the district court correctly *rejected* that theory, because the location of "intended victims," rather than *actual* victims, cannot show the necessary acts in the forum. ECF 54 at 20-21.

The few cases finding venue in districts where a wire transfer "passed through" do not justify venue here either. As Mackey explained and the Government ignores, those cases rested on a provision expressly extending venue to "pass through" districts. Mot.19; *United States v. Brown*, 293 F. App'x 826, 829 (2d Cir. 2008) (relying on *second* paragraph of 18 U.S.C. § 3237(a)). That statute was not invoked and does not apply here. This Court should not "impose the same result by way of … expansive statutory interpretation." *United States v. Brennan*, 183 F.3d 139, 148 (2d Cir. 1999).

Moreover, since internet data flows "like water" across the country (Mot.18), the theory employed below would allow prosecution of this offense and many others in *any* district—directly violating this Court's "rule favoring restrictive construction of venue." *Brennan*, 183 F.3d at 146. The Government responds that the data underlying Mackey's tweets did not pass through *every* district "en route to Twitter's servers" (Opp.25), but that is irrelevant. If data traversing a district suffices for venue, then the Government could have prosecuted this case not only in the (many) districts traversed *en route to Twitter's servers* (ECF 123 at 139:22-140:5) but also in any district later traversed *en route to Twitter users*. *See* ECF 114 at 29 (holding that venue extends to any district through which data traverses "en route to Twitter's servers" and "*beyond*"). That is untenable.

The Government responds that Mackey should not be allowed to harm "far-flung victims" and then resist venue for "far-flung injuries." Opp.25-26. That might resonate if the Government had rested venue on a *victim* in EDNY. It did not. It never proved that Mackey's tweets deceived a single voter in EDNY (or elsewhere).

Beyond all that, the Government identifies no evidence satisfying the substantial-contacts test, an additional venue requirement. Mot.19. It instead insists the district court "recognized that the 'substantial contacts' test does not apply in conspiracy cases." Opp.27 n.9. But the court said no such thing; it simply explained that the test is satisfied "*when 'an overt act in furtherance of [the] conspiracy has been committed in the district'*"—a key condition that the Government omits and that is not met here. ECF 54 at 17, 21 (emphasis added). Nor can the Government circumvent the substantial-contacts test by repeating the district court's assertion at the motion-to-dismiss stage that "bias and inconvenience" were not "substantially present." Opp. 27 n.9 (quoting ECF 54 at 21). That was based on zero evidence and ignored the well-established factors that comprise the test, none of which is "bias and inconvenience." *See* Mot.19.

Venue here is anything but "settled." Opp.22. The Government's theory goes far beyond existing precedent, and results in unconstrained flexibility to prosecute internet-linked offenses anywhere. This too is clearly a "close" question.

CONCLUSION

The Court should grant release pending appeal.

Date: November 17, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume and typeface requirements of Fed. R. App. P. 27(d), because it contains 2,598 words, and has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

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