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 MOTION FOR RELEASE PENDING APPEAL

Eric S. Dreiband
Yaakov M. Roth
Joseph P. Falvey
Caleb P. Redmond
Harry S. Graver
JONES DAY
51 Louisiana Ave, N.W.
Washington DC 20001
(202) 879-3939

Counsel for Defendant-Appellant Douglass Mackey

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

For the first time in U.S. history, a private citizen has been sentenced to prison for sharing political "misinformation." Defendant-Appellant Douglass Mackey was a self-described Internet troll who posted hundreds of Twitter messages daily in the days preceding the 2016 presidential election. Among them were two "memes" claiming voters could vote for Hillary Clinton by text message. Almost four years later—and two days into the Biden Administration—he was arrested, and charged with one count of violating 18 U.S.C. § 241, a Civil War-era statute that forbids conspiring to "injure, oppress, threaten, or intimidate" any person in the exercise of a federal right. A jury convicted, and a district judge sentenced Mackey to seven months in prison.

Mackey now asks this Court to grant release pending appeal, so he is not required to serve his entire term before this Court can consider the validity of this unprecedented conviction. The Government opposes this relief. But the law demands it. A court "shall" grant release pending appeal if the defendant is not likely to flee or pose a danger to the public, the appeal is not for purposes of delay but rather raises a "substantial question" that, if resolved in the defendant's favor, is "likely to result in" reversal. 18 U.S.C. § 3143(b). There is no dispute that Mackey (who has been free on bond for years) poses neither a flight risk nor a public danger. And his appeal will present at least two fundamental legal challenges to his conviction, success on either of which would result in reversal. Both of those issues are undoubtedly "substantial," which this Court has defined in this context to mean "novel," "close," or "debatable."

First and foremost, Mackey's conduct was *not a crime*. It is at least "close" or "debatable" whether § 241 forbids political misinformation—*i.e.*, speech that deceives others about whether or how to vote. It is certainly "novel." For over 150 years, this statute has been used in the voting sphere exclusively to combat *coercive acts* (like threatening voters) and *ballot-box fraud* (like shredding ballots). It has never before been invoked to criminalize misinformation—even though deceptive political speech has been ubiquitous since the Founding. Statutory text and history cut powerfully against this sweeping expansion. It would also render § 241 egregiously overbroad under the First Amendment—exactly what the Supreme Court recently warned courts *not* to do. As if all that were not enough, § 241's vagueness led the Court to impose a special standard—mirroring qualified immunity—that limits its reach to "clearly established" violations. It is inconceivable to claim Mackey violated *clearly established law* by tweeting political misinformation. Even if one believes this conduct *could be* and *should be* illegal, one cannot credibly say Congress has "clearly" criminalized it.

Second, the Government chose to prosecute Mackey in the Eastern District of New York (EDNY)— home of the Clinton campaign headquarters—even though it is undisputed that *neither he nor any other alleged co-conspirator* lived there, tweeted from there, or took any other actions there. The district court upheld venue solely on the basis that his tweets caused Internet data to *travel through* EDNY—via either fiber-optic cables or wireless signals—en route to Twitter's servers elsewhere. This Court has *never* upheld criminal venue on that theory, which would allow *any* offense involving Internet activity

to be prosecuted in *any* district in the country. To the contrary, this Court has warned that "venue-anywhere" theories must be avoided, and has further required a showing of "substantial contacts" between the offense and the venue—a test the lower court ignored because it so obviously could not be satisfied.

Again, the question at this phase is not whether Mackey is correct—only whether his appellate challenges are "substantial" in that they are novel, close, or debatable. That much cannot seriously be disputed. This Court should grant release pending appeal, so that Mackey's appellate rights are not rendered hollow in the interim.

BACKGROUND

1. Mackey is a self-described troll who sent hundreds of thousands of tweets, many political in nature, under the screen name "Ricky Vaughn." This case arises from two memes he posted on Twitter on November 1 and 2, 2016:

ECF 174 (Post-Trial Op.), at 9. Media outlets picked up the vote-by-text story, and Mackey touted his trolling success, saying he had "haphazardly post[ed]" a meme that wound up on television. *Id.* at 11. Others were less enthusiastic, however, and Mackey's Twitter account was suspended on November 2. *Id.* at 11 & n.16.

The Clinton campaign observed these memes before Mackey shared them, and coordinated with the company that controlled the 59925 number so that any messages triggered auto-responses explaining that the ad was not associated with the campaign. That auto-message was installed the same day of Mackey's suspension, one day after he tweeted his first voting misinformation meme. *Id.* at 13. There is no evidence anyone failed to properly vote on account of Mackey's tweets.

2. On January 22, 2021, two days after the inauguration of President Biden and more than four years after the tweets, FBI agents arrested Mackey. An EDNY grand jury charged him with one count of conspiracy in violation of 18 U.S.C. § 241 for conspiring to "injure, oppress, threaten, and intimidate" persons in the exercise of their right to vote. ECF 8.

Judge Nicholas Garaufis denied Mackey's motion to dismiss the indictment. As to § 241, the court construed it as prohibiting all acts to *impede* one's ability to vote—including speech aimed to deceive about the time, place, and manner of an election. ECF 54, at 32-33. As to venue, the court ruled in relevant part that venue would be proper in EDNY if the Government proved that electronic data underlying the tweets "passed through" the district. *Id.* at 17-21.

Mackey was tried in March 2023, with Judge Donnelly presiding because Judge Garaufis became ill. The Government relied mainly on tweets and messages. Mackey testified, reiterating that he did not work, live, or post anything online in EDNY during the conspiracy period, and that he posted the memes for media attention but did not believe anyone would actually be fooled. Post-Trial Op. 16-17.

The jury twice advised the court that it could not reach a unanimous verdict. *See* ECF 116. Only after twice being sent back did the jury convict.

3. Mackey sought post-trial relief, again arguing (among other things) that spreading political misinformation was not a clearly established violation of § 241, and that venue was improper in EDNY. ECF 135 at 29-36. Judge Donnelly denied post-trial relief, treating the motion-to-dismiss order as "law of the case" on these two legal issues. Post-Trial Op. 43-48. She sentenced Mackey to seven months in prison, and denied release pending appeal. *See* Minute Entry (Oct. 18, 2023); ECF 178.

LEGAL STANDARD

Under 18 U.S.C. § 3143(b), a court "shall" order release of a defendant pending appeal if (i) the defendant is "not likely to flee or pose a danger to the safety of any other person," *id.* § 3143(b)(1)(A), and (ii) his appeal is "not for the purpose of delay" but rather "raises a substantial question of law or fact" that, if resolved in his favor, will "likely" result in reversal, *id.* § 3143(b)(1)(B). Satisfying this test creates an "entitlement to release." *United States v. Zimny*, 857 F.3d 97, 101 (1st Cir. 2017).

This Court construed the "substantial question" element of § 3143(b) in *United States v. Randell*, 761 F.2d 122 (2d Cir. 1985). *Randell* observed that other Circuits had defined a "substantial" question variously to mean one that is "novel" and "has not been decided by controlling precedent," "a 'close' question or one that very well could be decided the other way," or one that is "fairly debatable." *Id.* at 125. *Randell* agreed with those other Circuits, and did not think their formulations "differ significantly from each other," though it expressed preference for the "close" articulation. *Id.*

In light of that standard, this Court obviously need not find that the district court "committed reversible error." *United States v. Pollard*, 778 F.2d 1177, 1181-82 (6th Cir. 1985). Rather, release is warranted if the appeal presents a close question, so long as "it is more probable than not that reversal … will occur *if the question is decided in the defendant's favor*." *Id.* at 1182 (emphasis added); *see also United States v. Bilanzich*, 771 F.2d 292, 298 (7th Cir. 1985). That is, the question must be both close and material.

Two additional points warrant emphasis. *First*, it is especially common to grant release when an appeal involves the scope of a vague federal statute.[1] Indeed, courts in such cases commonly grant release even when the defendant ultimately loses on the

[1] *See, e.g.*, Order, *United States v. Porat*, 76 F.4th 213 (3d Cir. 2023) (No. 22-1560), ECF 17 (scope of wire fraud); Order, *United States v. Wilson*, No. 19-cr-10080 (D. Mass. May 19, 2022), ECF 2624 (scope of honest services fraud); Order at 2, *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022) (No. 21-11157) (scope of § 666); Order, *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015) (No. 15-4019), ECF 39 (scope of honest services fraud); Mar. 27, 2008 Order at 1–2, 4, *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009) (No. 07-13163) (scope of § 666); Order, *United States v. Gilbert*, 355 F. Supp. 3d 1168 (N.D. Ala. 2018) (No. 17-CR-00419), ECF 324 (same).

merits (as occurred in all but one of the cases cited in n.1). This underscores that the standard for release pending appeal is a distinctly *lower* standard than the ultimate merits.

Second, because Mackey's sentence is only seven months, he is likely to serve most (if not all) of it during the appeal. Merits briefing alone could consume seven months. Mackey will never be able to recover that missed time with his newborn child, even if he ultimately prevails. This Court should therefore grant release so long as he has a viable path to reversal. *See United States v. Garcia*, 340 F.3d 1013, 1019 (9th Cir. 2003) (so holding). By contrast, the Government will suffer no prejudice from this relief: If his convictions are ultimately affirmed, Mackey will serve his full sentence.

ARGUMENT

This is an incredibly easy case for release pending appeal. There is no question that Mackey poses neither a public danger nor a flight risk—he has been free on bond without issue since early 2021. ECF 7. Nor should it be hard to recognize this appeal as "substantial" in challenging the Government's sweeping and unprecedented theories of both guilt and venue. Indeed, noted scholars have written about the novel issues this case presents. Eugene Volokh, *Are Douglass Mackey's Memes Illegal?*, TABLET (Feb. 9, 2021); Richard Hasen, CHEAP SPEECH 110-11 (2022). And if this Court ultimately rejects either of the Government's aggressive theories, Mackey's sole conviction will be reversed—but he will never be able to recover time spent in prison in the interim. This is exactly the type of case for which § 3143(b) exists.

I. MACKEY PRESENTS NEITHER A FLIGHT RISK NOR A PUBLIC DANGER.

The first prong of the test—that the defendant is "not likely to flee or pose a danger," 18 U.S.C. § 3143(b)(1)(A)—has never been disputed. Mackey has been free for almost three years since his indictment, and for more than six months since his conviction, without incident. His "crime" was non-violent. He has participated in all pre-trial, trial, and post-trial proceedings. And he is committed to vindicating himself through appeal. He clearly "is not likely to flee or pose a danger to the safety of any other person or the community if released." *Id.*

II. MACKEY'S APPEAL PRESENTS "SUBSTANTIAL" QUESTIONS THAT WOULD WARRANT REVERSAL IF DECIDED IN HIS FAVOR.

Mackey also satisfies the other element of § 3143(b), since his appeal will raise at least *two* "substantial" questions: whether his conduct was criminal, and whether venue was proper. And if he prevails on either, his conviction would be reversed.

A. Whether § 241 Proscribes Political Misinformation Is At Minimum A Close Question.

The most fundamental question raised by this appeal is whether Mackey's tweets constituted a crime at all. The answer is no. Section 241 does not extend to political misinformation—this is an unprecedented reading of a Civil War-era statute, contrary to its text and history, foreclosed by the First Amendment, and in the teeth of a host of canons of construction. Even if that reading were plausible, § 241 is limited to "clearly established" violations: the protective qualified-immunity standard. Given all that, to claim this appeal is not even "substantial" strains credulity.

1. Section 241 forbids conspiring to "injure, oppress, threaten, or intimidate any person" in the "free exercise or enjoyment of any right" under federal law. That broad formulation fails to "delineate the range of forbidden conduct with particularity." *United States v. Lanier*, 520 U.S. 259, 265 (1997). To avoid void-for-vagueness concerns, the Supreme Court has thus "limited" the "coverage" of § 241 "to rights fairly warned of," meaning those "clearly established" at the time. *Id.* at 267, 270-71. This is the same standard that governs qualified immunity in civil litigation. *Id.* at 270-71.

Federal law is "clearly established" only if "every reasonable [defendant] would have understood" his conduct to be proscribed. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam). This familiar inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam). What must be "clearly established" is the "violative nature of [the] *particular conduct*." *Id.* (emphasis added); *see also Lanier*, 520 U.S. at 270.

These principles are demanding, and the Supreme Court has repeatedly reversed where courts evaluated the conduct at issue at "a high level of generality." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014).[2] Indeed, if a case "presents a unique set of facts," that "alone should [be] an important indication … that [the] conduct did not violate a 'clearly established' right." *White v. Pauly*, 580 U.S. 73, 80 (2017) (per curiam).

[2] *See also, e.g.*, *City of Tahlequah v. Bond*, 595 U.S. 9, 11 (2021) (per curiam); *White v. Pauly*, 580 U.S. 73, 80 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7, 11-13 (2015) (per curiam); *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 612-14 (2015) (per curiam); *Carroll v. Carman*, 574 U.S. 13, 17-18 (2014) (per curiam).

2. Despite the ubiquity of political misinformation, never before in § 241's 150-year history has it been used to prosecute deceptive speech. Rather, it has been applied in the voting context only to two categories of conduct: Coercion (*e.g.*, violence or threats) and election fraud (*e.g.*, stuffing or shredding ballots).

Its original core was coercion. The statute derives from the Enforcement Act of 1870, enacted to safeguard elections from "open violence and insidious corruption." *Ex Parte Yarbrough*, 110 U.S. 651, 658 (1884). Consistent with this principal focus on the "security of life and limb to the voter," *id.* at 661, the first election-related § 241 prosecution involved officials who conspired to kill a Black man because he was going to vote for a Republican. *See United States v. Butler*, 25 F. Cas. 213, 220 (D.S.C. 1877). Still today, coercive acts aimed to prevent voting remain the heartland of § 241. *E.g.*, *United States v. Robinson*, 813 F.3d 251, 254 (6th Cir. 2016) ("[Defendant] … coerced and threatened voters to get them to vote for her by absentee ballot.").

Starting in 1915, the Supreme Court extended § 241 to cover certain other efforts by public officials to "deny or restrict" the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Even then, however, the Court stressed that it does not reach everything "supposed[ly] injurious[] to … [the] freedom, honesty, or integrity of an election," *United States v. Bathgate*, 246 U.S. 220, 226 (1918), or give the Government broad license to "stretch[] old statutes to new uses, to which they are not adapted and for which they were not intended," *United States v. Gradwell*, 243 U.S. 476, 488 (1917).

Rather, the Supreme Court and lower courts have read § 241 to prohibit a narrow set of conspiracies that deprive citizens of the right to vote by destroying ballots or voter registration applications, stuffing ballot boxes, casting fake ballots, or failing to count legitimate ballots.[3] In short: classic electoral fraud.

By contrast, neither the Government nor the district court ever cited *a single case* of § 241 being used to prosecute political misinformation that may simply *impede* voting. The Government's best effort was two district court cases, but trial court orders cannot form "clearly established" law. *See Cugini v. City of New York,* 941 F.3d 604, 615 (2d Cir. 2019) (requiring Supreme Court authority, Second Circuit cases, or "robust consensus" of appellate precedent). Regardless, its cited cases are inapposite. One involved public officials who prepared doctored ballots that made it "impossible" for illiterate voters to vote for anyone but the Democrat. *United States v. Stone*, 188 F. 836, 838 (D. Md. 1911). The other involved jamming telephones to interfere with get-out-the-vote efforts (and a jury later *acquitted*). *United States v. Tobin*, 2005 WL 3199672 (D.N.H. Nov. 30, 2005). Neither case involved a citizen disseminating political misinformation.

That § 241 has never before been invoked or applied in this way, even as false political speech runs rampant, itself suffices to demonstrate that Mackey did not violate "clearly established" law. And, at minimum, that this question is "substantial."

---

[3] *See, e.g.*, *United States v. Mosley*, 238 U.S. 383, 393 (1915); *Anderson v. United States*, 417 U.S. 211, 236-45 (1974); *United States v. Classic*, 313 U.S. 299, 331-41 (1941); *United States v. Saylor*, 322 U.S. 385, 390-93 (1944).

3. Statutory text and history, corroborated by a brigade's worth of canons of construction, confirm that the Enforcement Act of 1870 does not harbor a political speech code that somehow escaped notice for 150 years.

Start with text. Section 241 proscribes conspiracies to "injure, oppress, threaten, or intimidate" any person in the exercise of federal rights. The Government agrees the operative word here is "injure." ECF 54, at 34 n.12. But "injure" does not naturally cover mere *deception*; it connotes a *coercive* act. *Compare Webster's Dictionary* 6914 (1828) (Injure: "To hurt or wound"), *with id.* at 4261 (Deceive: "To mislead the mind"). Injure must also be read in light of the other verbs in the statute, *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961), and those words—oppress, threaten, and intimidate—all involve coercion too. As this Court has recognized, the "most obvious" construction of these verbs together is to sweep in all "conduct that involves … applying physical force." *United States v. Acosta*, 470 F.3d 132, 136 (2d Cir. 2006) (per curiam). By contrast, when Congress wants to capture the distinct harm of *deceit*, it uses different words, like "defraud." That was equally true in 1870.[4]

Section 241's history reaffirms that it does not reach deceptive electoral speech. The Enforcement Act of 1870 originally "prescribe[d] a comprehensive system … to secure [the] freedom and integrity of elections," including a host of very detailed rules

[4] *See, e.g.*, 17 Stat. 323 (1872) ("That if any person having devised or intending to devise any scheme or artifice to defraud…"); 14 Stat. 471 (1867) ("If two or more persons conspire … to defraud the United States …").

governing voting practices. *Bathgate*, 246 U.S. at 225. In 1894, Congress repealed those election-related provisions (28 Stat. 36 (1894)), while leaving in place what is now § 241. The Supreme Court recognized that the repeal necessarily narrowed the scope of the statute, meaning the repealed provisions constitute the *outer bounds* of what § 241 can reach. *Bathgate*, 246 U.S. at 226. But even though that Act reached a prodigious array of offenses—from impersonating voters, to leveraging contracts to influence voting, to evicting people for their vote, and much else—even it did not criminalize mere deceit. Political misinformation was not within the Act's original bounds and thus cannot be within whatever residuum was preserved by § 241 after the broader repeal.

At the very least, given § 241's text and history, whether it can now be expanded to false political speech is plainly a "substantial" question.

That conclusion is only bolstered by a barrage of canons of construction. If the Government is right that "injure" is synonymous with "impede," and that § 241 covers anything that may impede voting, the consequences are astounding. The law would reach any "false" political speech—every distortion designed to depress or promote turnout, every lie told by a candidate or supporter. For years, Congress has debated proposals to narrowly prohibit certain false speech about elections.[5] Yet the premise of this conviction is that all of that—and more—has been illegal since 1870.

5 *See, e.g.*, Deceptive Practices and Voter Intimidation Act, 109th Cong. S. 1975 (2005); 110th Cong. S. 453 (reintroducing); 117th Cong. S. 1840 (same).

That "staggering breadth" is itself "implausible." *Dubin v. United States*, 599 U.S. 110, 129 (2023). Moreover, this reading also triggers "a sweeping expansion of federal criminal jurisdiction," *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020); discovers a major "unheralded power" in a "long-extant statute," *Util. Air Regulatory Grp. v. EPA*, 572 U.S. 302, 324 (2014); and leaves a criminal law's "outer boundaries ambiguous," *McNally v. United States*, 483 U.S. 350, 360 (1987). Those are all things the Supreme Court has forcefully instructed courts not to do. Whether this Court should do them anyway is at least a "substantial" question.

4. As if all that were not enough, the Government's reading would render § 241 obviously unconstitutional under the First Amendment. Indeed, if § 241 means what the Government says, it would be the most pronounced violation of the First Amendment's overbreadth doctrine in the U.S. Code.

The Supreme Court has made crystal clear that the First Amendment protects false speech on matters of public concern. Indeed, all nine Justices agreed on this point in *United States v. Alvarez*, which invalidated the Stolen Valor Act, even though the case otherwise fractured the Court. 567 U.S. 709, 723 (2012) (plurality); *id.* at 736 (Breyer, J., concurring); *id.* at 750 (Alito, J., dissenting). Courts have since repeatedly struck down laws proscribing false speech about candidates. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016); *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015); *see also Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826, 829-31 (Wash. 2007).

On the Government's reading, § 241 would sweep in more speech than all those statutes. If any lie or deceit that "hampers," "inhibits," or "frustrates" voting is a crime, *see* ECF 54, at 34, then § 241 would reach *any* false speech that bears on how one votes—whether to convince or dissuade someone to vote for a particular candidate, or to discourage him from voting at all. It would stretch from the "political arena" to "barstool braggadocio." *Alvarez*, 567 U.S. at 737 (Breyer, J., concurring). It would cover Sen. Harry Reid's false claim that Mitt Romney failed to pay taxes, and Rep. George Santos's lies about his CV. This statute designed to combat KKK violence would become a comprehensive political speech code, with *none* of the "limiting features" that *Alvarez* emphasized were crucial when criminalizing false speech. *Id.* at 736.

To be clear, none of this necessarily means Congress could not permissibly enact a law narrowly targeted at particular political misinformation, such as false statements about time, place, and manner of elections. The point is that § 241 does not remotely do that. And unless a law is limited *on its face* to a certain category of speech, it cannot be artificially limited. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344 (1995). So it does not matter if Congress *could* enact a narrow ban covering Mackey's conduct—a hard question under *Alvarez*. What matter is that Congress *has not*—and that is an easy question. *Accord Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4, 1891 (2018) (agreeing that, in polling places, "State may prohibit messages intended to mislead voters about voting requirements," including the campaign button at issue, yet still invalidating the statute because it swept more broadly).

Simply put, if Congress passed a law that criminalized "any false speech intended to affect how or whether someone votes," nobody would defend its constitutionality. But that is what the Government reads § 241 to say. Since there is an obvious narrower reading—one that comports with text, history, and canons—the Court should eschew the interpretation that thrusts this long-extant statute into constitutional peril. *See United States v. Hansen*, 599 U.S. 762, 771 (2023) (adopting narrow reading of statute that criminalized "encourag[ing] or induc[ing]" illegal immigration, in part to avoid creating a collision with First Amendment overbreadth principles).

* * *

If this Court somehow still harbors doubt, recall the two heavy thumbs on the scales. So long as it was not "apparent" when Mackey posted his memes that doing so would be a crime, he is entitled to acquittal. *Lanier*, 520 U.S. at 272. And so long as this question is itself "novel," "close," or "debatable," Mackey is entitled to remain out of prison pending appeal. *Randell*, 761 F.2d at 125. The one thing that is plainly *not* a close call is that Mackey is entitled to release under § 3143(b).

B. Whether Internet Data Traveling "Through" EDNY Suffices For Venue Is At Minimum A Close Question.

The Government's theory of venue is equally unprecedented, equally aggressive, and equally untenable. It rests entirely and exclusively on the fact that Mackey's tweets caused Internet data to *pass through* EDNY en route to the rest of the country. Whether that is a legally viable theory is at the very least a "substantial" question too.

1. To prevent "prosecutorial abuse," the Founders limited criminal venue to the district "where the wrong was committed." *United States v. Miller*, 808 F.3d 607, 614 (2d Cir. 2015). In conspiracy cases, the Government must make two showings: (i) that "the acts constituting the offense—the crime's 'essential conduct elements'—took place" in the forum; and (ii) that those acts bear "substantial contacts" with the forum. *United States v. Ramirez*, 420 F.3d 134, 138-39 (2d Cir. 2005). Absent that proof, the conviction must be reversed. *United States v. Purcell*, 967 F.3d 159, 198 (2d Cir. 2020).

Here, however, it is undisputed that Mackey did not commit *any acts*—let alone "essential" acts—in EDNY. He did not live there, form any agreements there, or post the memes from there. To the contrary, all agree that Mackey lived in and used Twitter from his "apartment in Manhattan." Post-Trial Op. 44-45. Nor did the Government adduce any evidence that any alleged co-conspirator took action in EDNY. ECF 140 at 35. Indeed, the *only* acts the Government proved in EDNY were the efforts by the Clinton campaign to coordinate auto-response messages to attempted votes-by-text—which obviously did not *further* the conspiracy. *See* Post-Trial Op. 12-13.

2. Instead, the Government argued—and the trial court agreed—that venue could be established merely by proving that data associated with Mackey's tweets briefly "passed through" EDNY waters (by fiber-optic cables) or EDNY airspace (by wireless transmission). ECF 140 at 35; *see also* Post-Trial Op. 44-45 (finding venue established because "deceptive images passed through the internet infrastructure"). Treating that evanescent connection as justifying venue, however, is legally indefensible.

First, that theory would let the Government prosecute Mackey in any district with access to Twitter—which is to say *every* district. After all, the Internet data associated with a Twitter post flows "like water" across the entire country. Post-Trial Op. 13; *see also* ECF 123 at 176. Indeed, if this suffices for venue, that means *any* crime involving online activity on a website or social media platform could be prosecuted in *any* district. Yet venue statutes "should not be so freely construed as to give the Government the choice of a tribunal favorable to it." *United States v. Brennan*, 183 F.3d 139, 146-47 (2d Cir. 1999). To the contrary, they must be "narrowly construed." *Ramirez*, 420 F.3d at 146. This longstanding "rule favoring restrictive construction of venue provisions," *Brennan*, 183 F.3d at 146, is especially critical today because the "ever-increasing ubiquity of the Internet" amplifies the "'danger'" of allowing the Government "to choose its forum," *United States v. Auernheimer*, 748 F.3d 525, 541 (3d Cir. 2014).

Second, courts have widely rejected this "pass through" theory in the analogous context of specific personal jurisdiction; they "routinely" disclaim personal jurisdiction over individuals whose social-media posts or online publications travelled to the forum. *Blessing v. Chandrasekhar*, 988 F.3d 889, 905-07 & n.15 (6th Cir. 2021).[6] That is why, for instance, an anti-"MAGA" comedian cannot be haled into court wherever her tweets travelled. *Id.* The same goes for this pro-MAGA Twitter troll.

[6] *See also Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 318-19 (5th Cir. 2021); *Lyons v. Rienzi & Sons, Inc.*, 856 F. Supp. 2d 501, 510 (E.D.N.Y. 2012); *Gilbert v. Indeed, Inc.*, 513 F. Supp. 3d 374, 413 15 (S.D.N.Y. 2021).

Third, even if fleeting Internet data travel could constitute "essential conduct" in the forum, the Government also needed to prove that the alleged criminal conduct bore "substantial contacts" with EDNY, considering "the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding." *United States v. Davis*, 689 F.3d 179, 186 (2d Cir. 2012); *see also Miller*, 808 F.3d at 622. There is no way the Government could satisfy that test, which is why the lower court simply ignored it.

3. In upholding venue, the district court rested on cases involving *direct point-to-point communications* like calls, texts, emails, and wire transfers. ECF 54 at 13-21. But unlike here, those targeted communications are "directed at" particular districts, and so do not present the danger of licensing the Government to select any district it wishes. *United States v. Kirk Tang Yuk*, 885 F.3d 57, 75 (2d Cir. 2018). And the only cases where this Court has upheld venue based on transmission "*through*" the forum—as opposed to *to* or *from* the forum—were governed by a different venue rule that expressly allows prosecution in districts "through … which" something "move[d]." 18 U.S.C. § 3237(a), par. 2; *see, e.g.*, *United States v. Brown*, 293 F. App'x 826, 829 (2d Cir. 2008).

* * *

Again, Mackey is entitled to release if his appeal presents a substantial question that is material to his conviction. The Government's envelope-pushing venue theory independently satisfies that standard too. *See United States v. Geibel*, No. 02-1645 (2d Cir. Mar. 5, 2003) (granting release pending appeal in case involving venue challenge).

CONCLUSION

The Court should grant release pending appeal, and Mackey respectfully requests that it do so before his reporting date of January 18, 2024.

Date: November 1, 2023

Respectfully submitted,

/s/ Yaakov M. Roth

Eric S. Dreiband
Yaakov M. Roth
Joseph P. Falvey
Caleb P. Redmond
Harry S. Graver
JONES DAY
51 Louisiana Ave, N.W.
Washington DC 20001
(202) 879-3939

Counsel for Defendant-Appellant Douglass Mackey