No. _____

In The
Supreme Court of the United States

MICHAEL PAUL MISELIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Raymond C. Tarlton
Counsel of Record
TARLTON POLK, PLLC
Post Office Box 1386
Raleigh, North Carolina 27602
(919) 948-6464
rtarlton@tarltonpolk.com

Counsel for Petitioner

Dated: March 4, 2021

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

The Federal Anti-Riot Act ("Act") prohibits interstate travel or the use of the facilities of interstate commerce with the intent to engage in a number of activities related to a "riot." 18 U.S.C. § 2101. The prohibited activities include the inciting, organizing, promoting, encouraging, participating in, or carrying on of a riot, as well as the commission of any act of violence in furtherance of a riot. The law was passed in response to the civil rights riots of the 1960s and was immediately used to prosecute Vietnam War Era protesters. After the Seventh Circuit narrowly (2-1) upheld the facial constitutionality of the law, while vacating the convictions of the Chicago Seven, the law fell out of use and faded from public view. But no longer.

In response to recent civil unrest around the country, prosecutions under the Act have resumed, and the lower courts are divided on the constitutionality of the law. The Fourth Circuit held below that certain aspects of the Act were facially overbroad, but that those portions of the law were severable from the rest of the statute. Moreover, the court inferred that the petitioner knowingly pled guilty to the constitutional parts of the law, upholding his conviction under the same. In a twin prosecution in the Central District of California, the district court struck down the law as unconstitutional in its entirety. And both of these decisions conflict, in different ways, with the Seventh Circuit's interpretation of the law. At this time in our nation's history, this Court should resolve the important questions of the dividing line between protest and riot, and the constitutional limit of the federal

government's power to prosecute individuals in the aftermath of local social unrest.

The questions presented are:

1. Whether 18 U.S.C. § 2101, the Anti-Riot Act, is facially invalid under the First Amendment.

2. If so, are the constitutionally infirm provisions of the statute severable.

3. Whether a defendant's plea to conspiring to commit a federal statute is unknowing, unintelligent, and involuntary when significant portions of the statute are later declared to be unconstitutional.

PARTIES TO THE PROCEEDING

The petitioner is Michael Paul Miselis who was a criminal defendant in the court below.

STATEMENT OF RELATED CASES

U.S. Court of Appeals for the Fourth Circuit:

> *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020): Petition for certiorari is being simultaneously filed by co-defendant Benjamin Daley who has appointed counsel preventing the consolidation of the petitions

U.S. Court of Appeals for the Ninth Circuit:

United States v. Rundo, No. 19-50189 (argued November 18, 2020).

TABLE OF CONTENTS

Pages

APPENDIX:

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Miselis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020), and reprinted in Appendix 1a. The order denying the petition for rehearing and rehearing en banc is unpublished and printed at Appendix 68a. The district court's opinion rejecting a facial challenge to the Act is reported at *United States v. Daley,* 378 F. Supp. 3d 539 (W.D. Va. 2019). The Seventh Circuit's opinion rejecting a facial challenge to the Act is reported at *United States v. Dellinger*, 472 F.3d 340 (7th Cir. 1972). The United States District Court for the Central District of California's decision striking down the entire Act as unconstitutional is reported at *United States v. Rundo*, --F. Supp. 3d--, 2019 WL 11779228 (C.D. Cal. June 3, 2019).

JURISDICTION

The district court in the Western District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 18 U.S.C. § 3742. That court issued its opinion and judgment on August 24, 2020. A petition for rehearing was denied on October 5, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2101 (The Anti-Riot Act) provides:

> (a) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent--
>
> (1) to incite a riot; or
>
> (2) to organize, promote, encourage, participate in, or carry on a riot; or
>
> (3) to commit any act of violence in furtherance of a riot; or
>
> (4) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;
>
> and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph--
>
> Shall be fined under this title, or imprisoned not more than five years, or both.
>
> (b) In any prosecution under this section, proof that a defendant engaged or attempted to engage in one or more of the overt acts described in

subparagraph (A), (B), (C), or (D) of paragraph (1) of subsection (a)2 and (1) has traveled in interstate or foreign commerce, or (2) has use of or used any facility of interstate or foreign commerce, including but not limited to, mail, telegraph, telephone, radio, or television, to communicate with or broadcast to any person or group of persons prior to such overt acts, such travel or use shall be admissible proof to establish that such defendant traveled in or used such facility of interstate or foreign commerce.

(c) A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

(d) Whenever, in the opinion of the Attorney General or of the appropriate officer of the Department of Justice charged by law or under the instructions of the Attorney General with authority to act, any person shall have violated this chapter, the Department shall proceed as speedily as possible with a prosecution of such person hereunder and with any appeal which may lie from any decision adverse to the Government resulting from such prosecution.

(e) Nothing contained in this section shall be construed to make it unlawful for any person to travel in, or use any facility of, interstate or foreign commerce for the purpose of pursuing the legitimate objectives of organized labor, through orderly and lawful means.

(f) Nothing in this section shall be construed as indicating an intent on the part of Congress to

> prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section; nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law.

18 U.S.C. § 2102 provides the following definitions:

> (a) As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.
>
> (b) As used in this chapter, the term "to incite a riot", or "to organize, promote, encourage, participate in, or carry on a riot", includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere

> oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts

The First Amendment of the Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

At a time of deep social unrest, this court of appeals decision—severing and excising significant parts of a law that criminalizes speech and actions taken in connection with an intended riot—warrants immediate review. This Court normally grants certiorari when a lower court has invalidated a federal statutory provision on constitutional grounds, and that customary approach is especially appropriate here where the opinion creates a three-way circuit split with the Seventh Circuit which upheld the law in its entirety, and the United States District Court for the Central District of California, which struck it down completely.

The lower courts, and the public, need guidance from this Court in determining the line between protected speech and felony incitement. The decision below should be reviewed because the lower courts are split on the constitutionality of the Act, because decision below is incorrect, and because the Department of Justice has departed from its

longstanding policy of seeking certiorari in cases like this to strategically preserve the use of this overbroad law in other circuits. The Fourth Circuit correctly recognized that the Act's criminalization of actions taken with the intent of "encouraging" or "promoting" a riot ran afoul of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). The Fourth Circuit was also correct that the statute's definition of inciting, organizing, participating in, or carrying on a riot was constitutionally infirm because it criminalized the "urging" of a riot and also expressly included within its broad reach advocacy of the rightness of violence. But the court erred by not going further, like the United States District Court for the Central District of California, because the Act as a whole fails to require any imminence of violence.

Even assuming the Fourth Circuit was correct in its limited delineation of the law's constitutional problems, the court was wrong to create an entirely new law by severing and excising away the "expressive" portions of the law and leaving, in its view, a "conduct-focused" statute, that in practice lacks any meaningful line between expression and conduct. This Court has been clear that line-editing a law in this way is a "serious invasion of the legislative domain." *United States v. Stevens*, 559 U.S. 460, 481 (2010). "The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). Yet the Fourth Circuit did not consider or refer to any of the legislative history that establishes that the specific intent of this law was to stop riots before they started by criminalizing pre-riot speech.

Resolution of the questions presented is a matter of tremendous national importance. After the successful prosecution of the petitioner, the Act has been used to prosecute numerous individuals in connection with the protests and riots during the summer of 2020 following the death of George Floyd. Many of these prosecutions included individuals who used social media to encourage people to take to the streets.[1] Further, in explaining to Congress why it is choosing not to seek certiorari in this case, the Acting Solicitor General admitted that "The Department of Justice does not agree with certain aspects of the Fourth Circuit's decision holding that portions of the Anti-Riot Act violate the First Amendment, and we remain committed to investigating and prosecuting individuals and groups who, like the defendants in this case, pose a threat to public safety and national security by engaging in 'violent confrontations' during protests." [2] The continuing threat of prosecution under this overbroad law casts a chilling shadow on

---

[1] *United States v. Brown*, No. 3:20-cr-55 (E.D.Tenn. Jul 7, 2020) (allegedly used snapchat to identify stores people should raid); *United States v. Gibson*, No. 1:20-mj-6078 (C.D. Ill. 2020) (allegedly used Facebook live to coordinate a riot); *United States v. Peavy*, No. 4:20-mj-6092 (N.D. Ohio June 5, 2020) (arrested after Facebook posts about rioting but before participating in any riot); *United States v. Massey*, No. 1:21-cr-142 (N.D. Ill. March 1, 2021) (charged with posting videos and messages on Facebook on August 9, 2020 calling for people to travel to Chicago and participate in looting); *United States v. Betts*, No. 2:20-cr-20047 (C.D.Ill. Jul 7, 2020) (allegedly used Facebook to incite a riot).

[2] Letter to the Hon. Nancy Pelosi from Acting Solicitor General Elizabeth Prelogar (February 18, 2021) available at https://www.justice.gov/oip/foia-library/osg-530d-letters/us_v_miselis_530d/download.

legitimate constitutional speech, and amplifies the need for this Court to weigh in now given the lack of uniform application of the Act throughout the country.

Statutory Background

Congress passed the Act as part of the Fair Housing Act of 1968. During the 1960s, Congress considered several different versions of anti-riot legislation to respond to numerous racially-charged riots that broke out in cities across the country.[3] The congressional record reflects a core ideological conflict over whether riots were caused by outside agitators, or by poverty and racial inequality. The National Advisory Commission on Civil Disorders appointed by President Lyndon B. Johnson issued a report on February 29, 1967 attributing responsibility for the riots to racial division and poverty, implicating the role of "white society" and "white institutions" for creating and sustaining the divide.[4] The Report recommended addressing the root causes of the riots

[3] Comprehensive overviews of the legislative history may be found in the partial dissent in *United States v. Dellinger*, 472 F.3d at 410-11, as well as in *Congress & Federal Anti-Riot Proposals, Pro-Con*, 47 Cong. Dig. 99 (1968) (hereinafter "*Anti-Riot Pro Con*") and Zalman, Marvin. The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory, 20 *Villanova L. Rev.* 5-6 at 897. These two articles were included as Attachments to the Reply Brief in the record below. *See* No. 19-4551, dkt #61.

[4] Report of the National Advisory Commission on Civil Disorder (1968) available at https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf; *see also* Lepore, J., The History of the "Riot" Report, The New Yorker (June 22, 2020), available at https://www.newyorker.com/magazine/2020/06/22/the-history-of-the-riot-report.

through multi-billion dollar expenditures of Federal funds to address low-income housing, improved education, employment assistance, and public welfare.

Backlash was swift. The Attorney General's warning that "Federal legislation, if enacted, should be precisely drafted, with a clear definition of all operative terms, so as to preserve scrupulously the constitutional rights of all Americans" was ignored.[5] Instead of relying on prior versions of anti-riot legislation which had been debated for months and awaited Senate action, Senators Strom Thurmond and Frank Lausche introduced an expansive new anti-riot proposal on the floor of the Senate on March 4, 1968 that ultimately became the Act.[6] Several Senators objected to the hasty process and the fact they were asked to vote for a bill that "comes right off the top of the head without quite knowing what its implications are and what it will do."[7] But the Senate passed the bill anyway on March 11, 1968, with only minor amendments to the version first proposed a week earlier. It was signed into law within days of the assassination of Dr. Martin Luther King, Jr.

The final product was substantially and deliberately broader than the legislation proposed in previous years and the alternate bill proposed in 1968 by the Johnson Administration. For example, the final bill included new language that incitement and other prohibited activities included the "advocacy of

---

[5] 114 Cong. Rec. S2231 (March 5, 1968).

[6] H.R. 2516, 90th Cong., Amdt. No. 589.

[7] 114 Cong. Rec. S2225 (March 5, 1968).

any act of acts of violence or assertion of the rightness of, or the right to commit, any such act or acts." Likewise, the definition of "riot" was expanded well past prior definitions to include any "public disturbance" with three or more people where there was a mere threat of violence that could constitute a "clear and present danger" to person *or* property.

The Act was deliberately broad because Congress wanted to target outside agitators who were perceived to have come into cities, stirring up discontent with speeches and rhetoric, and then leaving a crowd primed for a future riot.[8] Debate on each iteration of anti-riot legislation shows a focus on

---

[8] *See, e.g.,* 112 Cong. Rec. 17665 (Aug. 8, 1966) (Rep. Taylor) (Communists were "trying to take advantage of the civil rights movement" by going "from city to city and State to State to promote riots and violence and stir up race against race and class against class"); *id.* at 17653 (Rep. Harsha) ("known among members of the Federal Bureau of Investigation that certain Communist groups are responsible"); *id.* at 17643 (Rep. Edwards) ("Communists are involved in these riots"); *Id.* at 17666 (Rep. Dickinson) ("It should go far in preventing a Stokely Carmichael from whipping his supporters into a frenzy"); 114 Cong. Rec. 1798 (Feb. 1, 1968) (Sen. Talmadge) ("Rap Brown and Stokely Carmichael, who go from city to city, day to day, fomenting strife and riots"); 114 Cong. Rec. 3353 (Feb 19, 1968) (Sen. Eastland) (introducing the 1967 House Bill as part of the Internal Security Act of 1968 and describing riot provision as targeting the "teaching or advocating the forceful, violent overthrow of government, and against the activities of Communist organizers"); April 10, 1968 House Record 9535 (Rep. Tuck) (King "openly advocated nonviolence. . . [but] fomented discord and strife between the races" and "[v]iolence followed in his wake wherever he went"); *id.* at 9574 (Rep. Fisher)) (King plotted with H. Rap Brown and Stokely Carmichael "the self-professed revolutionary who globetrotted across the Communist world from Havana to Hanoi last year"

speech and the expression of ideas that foment later violence—not on the acts of violence themselves. The Congressional record is filled with words like preaching, promoting, spewing forth, and ranting.[9] One Congressman summed it up directly: "preceding a riot, an outside agitator has appeared in a community to harangue an audience member concerning their grievances . . . often the speeches of these agitators have been criminally inflammatory . . . ."[10]

In contrast, Congress intended for the actual rioting violence to be prosecuted by the states. Congress acknowledged that the "keeping of the public peace in our cities has always been traditionally a matter of local control"[11] and that it is not "proper for the Federal Government to assume responsibility for criminal law which is entirely intrastate when there is not a shred of evidence any one of the 50 states has had a breakdown or law and order or that there has been a reluctance on the part

---

[9] In this vein, one Congressman suggested that the Vice President was guilty of "encouraging" riots, along with the civil rights leaders who "travel[ ] form one end of this country to the other to incite and direct riots….piously preach[ing] nonviolence while at the same time they encourage violence." 112 Cong. Rec. 17654 (Aug. 8, 1996) (Rep. Martin). Other supporters likewise cited the "group of malcontents and would be revolutionaries . . . [t]hey preach and promote a nightmarish, nihilist tide of thought" and described them as "professional agitators" who "spew forth a cant of hate and evil disobedience." *Anti-Riot Pro-Con* at 108. "We see them on our television screens; we hear their rantings on radio, we see their pictures in the newspapers and national magazines." *Id.*

[10] *Anti-Riot Pro-Con* at 126.

[11] 112 Cong. Rec. 17659 (Rep. Edwards).

of the states to enforce laws against this condition."[12] Proponents of the bill explained that the law was not focused on the "acts of violence" themselves but the events that preceded the riots.[13] For this reason, the Act contained an express carve-out to clarify that it was not taking jurisdiction away from the states.

Prior to the prosecution of the petitioner, only *one* prosecution under the law had ever produced a conviction not overturned on appeal.[14] Instead, the more typical use of the law has been to obtain search warrants or compel grand jury testimony where no charges ever resulted.[15] The number of times this

---

[12] *Id.* at 17669 (Rep. Corman).

[13] For example, the House Committee on the Judiciary Majority Report explained of the 1967 House Bill that "riot control, riot prevention, and the punishment of rioters" generally rested with State and local police, but this bill focused on "those who agitate and incite such violence by the use of facilities in interstate commerce."

[14] *See United States v. Markiewicz*, 978 F.3d 786 (2d Cir. 1992) (defendants also convicted of numerous other offenses including arson, theft, witness tampering and perjury). *Compare United States v. Hoffman*, 334 F. Supp. 504, 509 (D.D.C. 1971) (charges dismissed on government motion); *Dellinger*, 472 F.3d 340 (Chicago Seven prosecution overturned on appeal); *United States v. Camil*, 497 F.2d 225, n.3 (5th Cir. 1974) (referencing "Gainesville Six" prosecution of anti-war protesters at 1972 Republican National Convention where all defendants were acquitted).

[15] *See, e.g., United States v. McNamara-Harvey*, No. 2:10-cr-219 (E.D. Penn.), *In re Application of Madison*, 687 F.Supp.2d 103 (E.D. NY 2009); *In re Shead,* 302 F. Supp. 560 (N.D. Cal. 1969).

broad law has been used in these ways is knowable only to the government.[16]

Procedural Background

The petitioner was indicted out of the Western District of Virginia for one count of violating of the Act, 18 U.S.C. § 2101, and a second count of conspiracy to violate the same. App. 7a-8a. Less than two weeks after the petitioner and several others were arrested for these charges, four other men were arrested on a criminal complaint filed in the Central District of California alleging the same two offenses. *See Rundo*, 2019 WL 11779228 at *1. All of these individuals were alleged to be part of the Rise Above Movement ("RAM"), a group that self-identified as white nationalist. App. 4a-5a. The Virginia defendants comprised the half of the group who travelled to Charlottesville, Virginia, to participate in the Unite the Right Rally on August 12, 2017, with interstate travel cited as the basis for the Act. App. 5a. The RAM members who did not attend the Unite the Right Rally were instead indicted in California, alleging their use of the facilities of interstate commerce (the Internet, telephone, and a credit card) as the hook under the Act. *See Rundo*, 2019 WL 11779228 at *1

In each court the defendants challenged the facial constitutionality of the Act, with opposite results. After the district court in Virginia denied a motion to dismiss, ruling the law was constitutional, the petitioner below pled guilty to Count One of the

[16] The government declined to provide this information at the request of counsel, or in response to Freedom of Information queries.

indictment, conspiracy to violate the Act. App. 8a. In a written plea agreement, the petitioner reserved his right to appeal the constitutionality of the Act. *Id.* The petitioner also entered into a written stipulation of fact. App. 51a. In June of 2019, the court in the Central District of California ruled that the Act was facially unconstitutional it its entirety, dismissing the indictment. *Rundo*, 2019 WL 11779228.

The Fourth Circuit concluded that portions of the Act were overbroad in violation of the First Amendment, but that the record showed the petitioner's conviction rested on the constitutional part of the Act that remained, so ultimately affirmed the decision below. App. 50a-52a.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's opinion splits with the Seventh Circuit and the United States District Court for the Central District of California on the overbreadth of the Act.

The Act was passed in 1968, one year before this Court ruled that for advocacy to qualify as incitement and fall outside of the protection of the First Amendment it must be "directed to inciting or producing imminent lawless action" and be "likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447 (concluding mere advocacy of the rightness of violence was protected speech). In arriving at their vastly different conclusions about the constitutionality of the Act in light of *Brandenburg*, the lower courts have struggled and divided on the interpretation of numerous aspects of the Act, including: (1) the overt act requirement; (2) the appropriate meaning of "organize," "promote,"

"encourage," and "urge"; and (3) the Act's specific inclusion of the "advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts".

a. The Seventh Circuit narrowly concluded that the Act survived *Brandenburg*.

The constitutionality of the Act was first considered in a cluster of three related cases all stemming from the prosecution of the "Chicago Seven". Initially the constitutionality of the Act was raised by in a declaratory action that the Seventh Circuit readily rejected without lengthy analysis. *Nat'l Mobilization Committee v. Foran*, 411 F.2d 934 (7th Cir. 1969). A district court in the District of Columbia then relied on this decision to affirm the constitutionality of the law in a challenge in a related challenge to a search warrant. *United States v. Hoffman*, 334 F. Supp. 504 (D.D.C. 1971). After the Chicago Seven were ultimately prosecuted and convicted, the court took up a complete review of the statute in *Dellinger*, ultimately over-turning the convictions but splitting 2-1 on the constitutionality of the law. 472 F.2d 340.

The *Dellinger* majority started with the structure of the statute and interpreted the law as requiring an intent to commit one of the four listed categories, and that the law required an overt act that "must itself by a fulfillment of one of the elements listed . . . and not merely a step toward one such element." *Id.* at 361. In reaching this conclusion, the majority explained that "[i]f we could be persuaded that the overt act . . . could be a speech which only was

a step toward one of the elements of (A)-(D), taking those merely as goals, we would be unable to conclude that the statute required an adequate relation between speech and action." *Id.* at 362. But the court elected to interpret "for any purpose specified" as "equivalent to fulfillment of any purpose listed and therefore concluded that the statute had "an adequate relation between expression and action." *Id.*

Turning to *Brandenburg*'s requirement that speech must be likely to result in imminent violence before it falls outside of the umbrella of First Amendment protection, the majority concluded that while there were arguments that the verbs "organize, promote, encourage" and "urge" had an "insufficient relationship" to "propelling action," that the "threshold definition of all [of these] categories as 'urging or instigating' puts a sufficient gloss of propulsion [to action] on the expression described." *Id.* at 361. The court also concluded that the definitions Congress provided in § 2102(b) for "to incite a riot" and "to organize, promote, encourage, participate in, or carry on a riot" did not include "advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts," while acknowledging that it could be read the other way. *Id.* at 363. But because the court considered "any possibility that prosecution would be undertaken in reliance on defendants' proffered construction of the challenged phrase as minimal," the court was satisfied that there was no overbreadth. *Id.* at 364.

In a partial dissent, the third judge reviewed the legislative history of the law and disagreed with the conclusion that the Act was constitutional. *Id.* at 416 ("I would hold that the statute was not drawn

sufficiently narrowly to avoid the conflict" between "congressional power and individual rights" under the First Amendment). Notably, even the majority expressed significant hesitation:

> We do not pretend to minimize the first amendment problems presented on the face of this statute. In one hypothetical application, the statute could result in punishment of one who, having traveled interstate, or used the mail, with intent to promote a riot, attempted to make a speech or circulate a handbill for the purpose of encouraging three people to riot. Arguably the statute does not require that the speech, if made, or the handbill, if circulated, succeed in any substantial degree in encouraging the audience to riot. Arguably a frustrated attempt to speak or circulate would not achieve the constitutionally essential relationship with action in any event. Arguably the statute does not require that a speech or handbill succeed in producing a riot or bringing the persons addressed to the brink of a riot, prevented only by some intervening and superseding force, and arguably no less degree of propelling of action by speech or handbill will suffice, even though intent to succeed must also be proved. Although we reject these arguments, in part as constructions of the statute, and in part as grounds for declaring it void, we acknowledge the case is close.

Id. at 362.

b. The United States District Court for the Central District of California held that the Act is unconstitutionally overbroad and struck it down in its entirety.

In the companion prosecution to this one, the United States District Court for the Central District of California held that the Act was substantially overbroad and unconstitutional. *Rundo*, --F. Supp. 3d--, 2019 WL 11779228. The court noted the law "covers far more than acts of violence," particularly noting that it "criminalizes activities that precede any violence, so long as the individual acts with the required purpose of intent" and that it "reaches speech and expressive conduct." *Id.* at *2. The court further explained that the Act "does not just criminalize the behavior of those in the heat of a riot" but "criminalizes acts taken long before any crowd gathers, or acts that have only an attenuated connection to any riot." *Id.* at *3. By way of example, the court explained "a defendant could be convicted for renting a car with a credit card, posting about a political rally on Facebook, or texting friends about when to meet up." *Id.*

The district court then noted that under the law "it is *not* a crime merely to advocate ideas" but "it may *still* be a crime to advocate acts of violence or assert the rightness of, or the right to commit, any such acts." *Id.* More fundamentally, however, the court found that the Act "has no imminence requirement" and that it "does not require that advocacy be directed toward inciting or producing imminent lawless action" and instead "criminalizes advocacy even where violence or lawless action is not

imminent." As a result, it "eviscerates *Brandenburg*'s protections of speech." *Id.* at *4.

The district court observed that the definition of "riot" did not add any imminence of violence because the riot was always "some event in the future" distinct from the overt act made for "the purpose of urging or instigating that future event." *Id.* For this reason someone who "posts on social media, urging others to attend a rally" with the "purpose of promoting or organization a riot" has violated the law even if "the rally is six months away" and therefore "there is no imminent lawless action." *Id.* Put succinctly, "[e]ven if the riot itself would eventually pose a clear and present danger, the overt act does not." *Id.* For this same reason, the terms "incite," "organize," "promote," and "encourage" could not satisfy the imminence requirement because even if they "imply *some* degree of action" there is "no requirement that the organizing or promoting be directed towards *imminent* violence or lawless action—that event, for instance, could be months away." *Id.* at *5.

Finally, the court concluded that the statute criminalized a substantial amount of protected expressive activity in relation to the statute's legitimate sweep because the act "does not focus on the regulation of violence" but "*pre*-riot communications and actions" while "sweep[ing] in a wide swath of protected expressive activity." *Id.* citing *United States v. Williams*, 553 U.S. 285, 292 (2008). And the danger of a "chilling effect is heightened by its context" because rioting "in history and by nature, almost invariably occurs as an expression of political,

social, or economic reactions, if not ideas." *Id.* quoting *Dellinger*, 472 F.3d at 359.

c. The Fourth Circuit tried to land somewhere in between.

The Fourth Circuit concluded that the Act had several areas of substantial overbreadth. App. 4a. In particular, the court found that the Act's inclusion of actions intended to "encourage," and "promote" others to riot did not have a requisite relation to imminent violence under *Brandenburg*. App. 26a-30a. On the other hand, the court that the intent to "incite," "organize," "participate in," or "carry on" a riot had a sufficient link to action. *Id.* To reach this conclusion, the court significantly amended the definitions Congress provided for these same terms:

> As used in this chapter, the term "to incite a riot", or "to organize, ~~promote, encourage~~, participate in, or carry on a riot", includes, but is not limited to, ~~urging or~~ instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief~~, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts~~.

App. 36a (demonstrating changes to Act). In so holding, the court agreed that the statute as drafted included advocacy "of the right to commit" violence as a prohibited activity. App. 33a-34a. Nonetheless, the court found these were all "discrete instances of overbreadth," that the statute was "capable of functioning independently," and that "such minimal

severance is consistent with Congress's basic objective in enacting the Anti-Riot Act." App. 39a.

The Fourth Circuit explained that it had agreed that the "overt-act element" and the "definition of riot" were overbroad, "*these* elements of the statute might prove difficult to sever." App. 43a. But it did not. *Id.* In particular, the court concluded that both of the parties, and the *Dellinger* court, had incorrectly interpreted the structure of the statute and the overt act requirement. Instead, the Act "was drafted as an *attempt* offense, of which it bears all the classic hallmarks, rather than a commission offense." App. 23a. While noting that "we're not aware of another instance in which Congress has sought to proscribe the attempt to engage in unprotected speech," the court did not see any bar to such legislation. App. 24a. *Cf. Dellinger*, 472 F.2d at 362 ("[i]f we could be persuaded that the overt act . . . could be a speech which only was a step toward one of the elements of (A)-(D), taking those merely as goals, we would be unable to conclude that the statute required an adequate relation between speech and action").

The court also found no problem with the definition of "riot." Acknowledging that the "clear-and-present-danger test" was displaced by *Brandenburg* from the prevailing incitement test, the court nevertheless concluded that the test set out in the definition of riot "doesn't relate to the same things under the Anti-Riot Act as it did under the First Amendment." App. 34a.

Finally, the court concluded that the stipulation of fact the petitioner agreed to as part of his guilty plea hearings "establish[ed] conclusively

that the defendants' substantive offense conduct falls under the statute's surviving purposes" so therefore his "conviction[ ] must stand." App. 51a.

II. The decision below conflicts with decisions of this Court.

a. The Fourth Circuit is wrong that the overbreadth in the statute is "discrete".

After *Brandenburg*, it is clear that unprotected speech requires both the imminence and likelihood of violence. 395 U.S. at 447. In addition, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id.* at 448; *see also Hess v. Indiana*, 414 U.S. 105, 109-10 (1973) (incitement requires the specific intent "to produce . . . imminent disorder and a "tendency to lead to violence" is not enough).

The opinion below was wrong to conclude that there was a sufficient threat of imminent violence from any of the Act's intended purposes. Because there is no requirement that the intended riot take place at all, let alone within a close temporary proximity to the travel or use of commerce, the Act is overbroad in every instance. The Act "has no imminence requirement." *Rundo*, --F. Supp. 3d--, 2019 WL 11779228 at *4. Nothing in the Act requires "that advocacy be directed toward inciting or producing imminent lawless action." *Id.* Instead, the Act "criminalizes advocacy even where violence or lawless action is not imminent." *Id.* As a result, it

"eviscerates *Brandenburg*'s protections of speech." *Id.* The definition of "riot" is also overbroad, infecting the interpretation of the entire Act.

b. Even if the Fourth Circuit correctly identified the only areas of overbreadth, it was wrong to sever those portions from the law.

The opinion below directly conflicts with *Stevens* where this Court struck down the entirety of a similarly sweeping statute on First Amendment overbreadth grounds. 559 U.S. 460. Like the Act, the overbreadth in the animal cruelty statute examined in *Stevens* was central to the law. *Id.* at 474-75. Nor did the overbreadth in that statute appear only in an amendment to an otherwise long-standing and valid statutory scheme. *Id. Compare Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (plurality opinion) (concluding severability supported by fact that the unconstitutional portion of the statute had been added as an amendment to an otherwise long-standing and well-operating statutory scheme). And the law examined in *Stevens*—like the Act—lacked a severability clause. *Id.*

For these reasons, when this Court concluded that only two words, "wounded" and "killed," were overbroad in a clause that banned "any . . . depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," the entire statute had to be struck down. *Id.* at 474-75 (citing 18 U.S.C. § 48). This result was required to avoid "rewrite[ing] a . . . law to conform it to constitutional requirements" because "doing so would constitute a

serious invasion of the legislative domain." *Id.* at 481 (cleaned up, internal quotation omitted).

The Fourth Circuit instead: (1) deleted two verbs, "promote," and "encourage" from a list of five expressive verbs, and then (2) struck down half of the specific definitions Congress provided for the remaining three verbs from that list ("organize," "participate in," and "carry on"), as well as for the separately listed prohibited purpose to "incite." The right result under this Court's precedent was outright invalidation. The definitions in Section 2102 criminalize speech that is not incitement or a true threat and this infects the entire Act. *See Allen v. Louisiana*, 103 U.S. 80, 83 (1880) (allowing severance "if the [constitutional and unconstitutional] parts are wholly independent of each other").

This is particularly the case where the legislative history makes plain that Congress would not have enacted the version of the law left in place by the Fourth Circuit. The court below agreed that Congress had specifically intended to criminalize the expression of beliefs about the right to commit acts of violence—then promptly cut that language from the statute. The court otherwise ignored the legislative history and origins of the Act which plainly did not focus "on the regulation of violence" but instead on "*pre*-riot communications and actions." *Rundo*, --F. Supp. 3d--, 2019 WL 11779228 at *5. Basic presumptions of federalism prohibit this dramatic rewrite which leaves in place a law that proscribes nothing more than assault and vandalism—quintessential local crimes that Congress left to the States. *See Bond v. United States*, 572 U.S. 844, 858 (2014) ("Perhaps the clearest example of traditional

state authority is the punishment of local criminal activity").

The enacting Congress expressly sought to target the speech and expressive conduct of outside agitators who were promoting, encouraging, and urging through advocacy of acts of violence and asserting the rightness of and the right to commit an act or act of violence. The solution below—removing the speech verbs that have the closest fit to targeting pre-riot communications and activities—excludes from the reach of the Act the majority of the people Congress declared to be the malevolent force behind the riots it was trying to stop. The result of severance in this case is judicially-forbidden rewriting of a statute that "give[s] it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935). And the chilling effect on speech remains even with the reduced version of the Act because the government can investigate and prosecute conspiracies to violate what the Fourth Circuit has now classified a mere attempt statute. The right result under this Court's precedent is invalidation of the entire Act.

c. And even if the Fourth Circuit was correct to sever, it was wrong to conclude the petitioner's plea could be knowing and voluntary when he did not know a significant portion of the law was unconstitutional.

During his guilty plea colloquy with the district court, the petitioner was informed of the elements of

the Act.[17] He was not informed or advised that a significant portion of the law to which he was pleading was unconstitutional. A defendant has a fundamental autonomy interest in knowing, before surrendering himself to years behind bars, every element that the Government would have to prove against him at trial. A violation of that interest, in and of itself, necessitates relief.

"The first and most universally recognized requirement of due process" is that every defendant receive "real notice of the true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)); *see also Bousley v. United States*, 523 U.S. 614, 618 (1998); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). That being so, this Court held in *Henderson* that where a trial court failed at a plea colloquy to inform the defendant of an intent element regarding the charge, accepting the defendant's guilty plea violated the Due Process Clause's requirement that guilty pleas be knowing and voluntary. 426 U.S. at 646. Furthermore, the *Henderson* Court held that the violation of this constitutional principle required the defendant's guilty plea to be set aside, even "assum[ing] . . . that the prosecutor had overwhelming evidence of guilt available." *Id.* at 644.

A guilty plea where a defendant was not advised of the accurate elements of the offense contravenes a defendant's interest in "mak[ing] the fundamental choices about his own defense." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). In *McCoy*,

---

[17] *United States v. Miselis*, No. 3:18-cr-25, dkt #207 (W.D. Va.) (Transcript of Guilty Plea hearing)

the Court held that a violation of a defendant's constitutional right to decide whether to admit guilt at trial constitutes structural error. It explained that even when counsel believes "that confessing guilt offers the defendant the best chance to avoid the death penalty," a defendant must have the autonomy to "insist that counsel refrain from admitting guilt." *Id.* at 1505. Similarly, in *Faretta v. California*, 422 U.S. 806 (1975), the Court held that a defendant "must be free personally to decide whether in his particular case counsel is to his advantage," even if refusing counsel is "ultimately to his own detriment." *Id.* at 834. These holdings reflect the Framers' belief in "the inestimable worth of free choice." *Id.* If, as *McCoy* and *Faretta* hold, a deprivation of a defendant's right to decide how he will put forward his defense impinges a defendant's autonomy, it necessarily follows that an impingement of a defendant's right to determine whether he puts forward a defense likewise violates a vital autonomy interest. Before giving up his liberty and agreeing to spend years in prison, the petitioner had the right to be accurately informed of what the Government would have to prove at a jury trial. Only with that complete information could the petitioner make a "choice on whether to plead guilty" that truly respected his autonomy.

III. This case is an excellent vehicle for this Court to address an important national issue concerning core First Amendment Rights.

a. The Solicitor General almost always seeks review when a court strikes down as unconstitutional an act of Congress.

This Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional," even in the absence of a circuit conflict. *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013); *see also, e.g., Matal v. Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Department of Transp. v. Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *United States v. Alvarez*, 567 U.S. 709 (2012); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *United States v. Comstock*, 560 U.S. 126 (2010); *United States v. Stevens*, 559 U.S. 460 (2010); *Williams*, 553 U.S. 285; *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); *NEA v. Finley*, 524 U.S. 569 (1998); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

That practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called upon to perform." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Here, there is already clear circuit disagreement, increasing the importance of review in this case. The fact that the Department of Justice has decided not to

file a petition for a writ of certiorari in this case does not change this Court's precedent that helps ensure the uniformity of federal laws throughout the land.[18]

b. This issue is one of exceptional national importance.

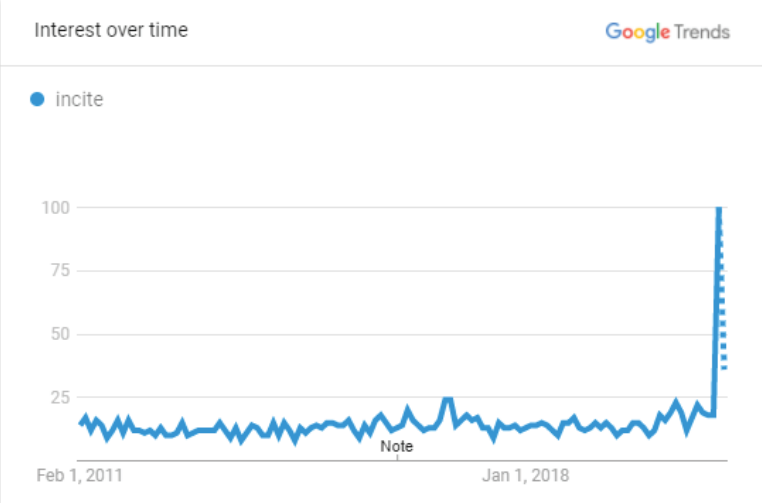
This Court's review is particularly appropriate because the Act stands at the intersection between a nation in political turmoil and the First Amendment which guarantees the freedoms to speak and assemble. The continuing real threat of potential prosecution[19] under the Act will only exacerbate the unrest. As the Seventh Circuit aptly observed fifty years ago, "rioting, in history and by nature, almost invariably occurs as an expression of political, social, or economic reactions, if not ideas." *Dellinger*, 472 F.2d at 359. The nationwide unrest that followed George Floyd's death in May of 2020 and the months of protests, violent conflicts, riots, and uncertainty about the difference between lawful and unlawful dissent underscores the need for this Court to address the constitutionality of this broad law. Anyone living in the United States in the last year intuitively knows that these topics have been the source of national interest. Google Trends data supports the same, reflecting internet search queries within the United States for the terms "incite" (the first graph) and

---

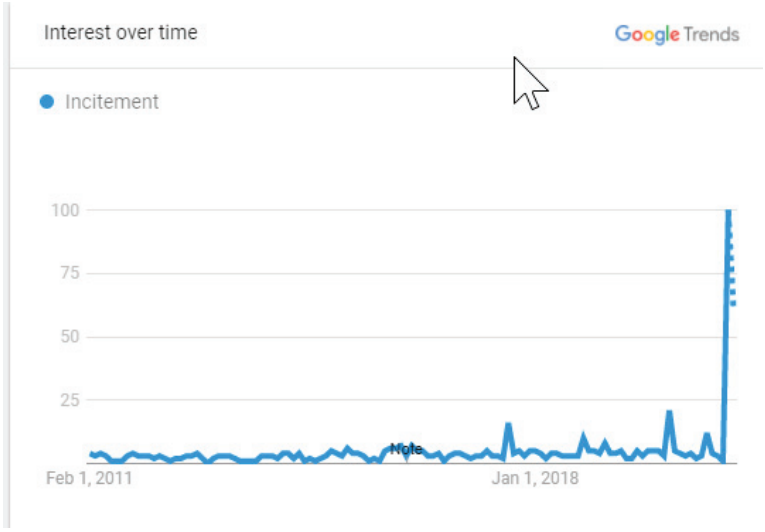
[18] The Act itself contains an express requirement that the Department of Justice "shall proceed as speedily as possible . . .with any appeal which may lie from any decision adverse to the Government resulting from such prosecution" under the Act. 18 U.S.C. § 2101(d).

[19] Or if not prosecution, at a minimum invasive searches.

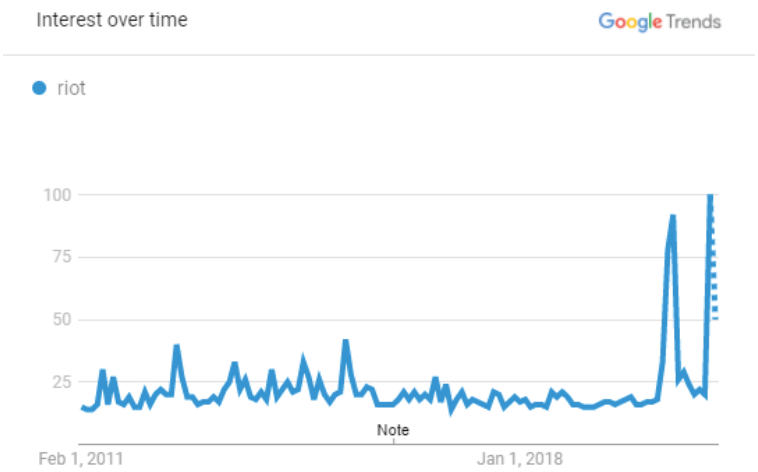
"incitement" (the second graph) over the last 10 years:[20]



[20] Google Trends data may be generated at https://trends.google.com/trends/?geo=US. According to Google, the numbers "represent search interest relative to the highest point on the chart for the given region and time. A value of 100 is the peak of popularity for the term. A value of 50 means that the term is half as popular. A score of 0 means there was not enough data for this term."



The same is true for search queries like "riot vs protest" (the first graph) and "riot" (the second graph):



At the same time, the ability to communicate online is now unlimited, making speech cheaper and easier than ever. As of 2019, the Pew Research Center reported that more than 72% of adults in America use some type of social media.[21] Digital marketing data reports suggest that social media users in the United States spent an average of 2 hours and 7 minutes a day using social media between 2020 and 2021.[22]

The sheer volume of internet speech is critically important where the Act makes it a crime where someone "posts on social media, urging others to attend a rally" with the "purpose of promoting or organization a riot" even if "the rally is six months away" and therefore "there is no imminent lawless action." *Rundo*, --F. Supp. 3d--, 2019 WL 11779228 at

---

[21] https://www.pewresearch.org/internet/fact-sheet/social-media/

[22] https://www.zdnet.com/article/we-will-spend-420-million-years-on-social-media-in-2021/

*4. Prosecutions under the Act for internet speech of this kind are no longer mere hypotheticals.[23]

c. This case is a good vehicle to resolve this important issue.

This case is a particularly good vehicle for addressing the question presented. It comes to the Court on a direct appeal and thus does not present any of the complications that might arise in a collateral-review posture. The court of appeals directly addressed the facial constitutionality of the statute and whether the statute was severable. It also directly determined that the petitioner's convictions survived under the red-lined version of the law the court left in place. Each of the three questions presented is also outcome-determinative.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s Raymond C. Tarlton
Raymond C. Tarlton
Counsel of Record
Tarlton Polk, PLLC
PO Box 1386
Raleigh, NC 27602
(919) 948-6464
rtarlton@tarltonpolk.com

[23] *See* fn. 1 *supra*.

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

FILED: August 24, 2020

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4550

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MICHAEL PAUL MISELIS,

Defendant - Appellant

THE FREE EXPRESSION FOUNDATION, INC.,

Amicus Supporting Appellant

No. 19-4551

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

BENJAMIN DRAKE DALEY,

Defendant – Appellant,

THE FREE EXPRESSION FOUNDATION, INC.,

Amicus Supporting Appellant.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, Senior District Judge. (3:18-cr-00025-NKM-JCH-2; 3:18-cr-00025-NKM-JCH-1)

Argued: January 31, 2020

Decided: August 24, 2020

Before KING, DIAZ, and RUSHING, Circuit Judges.

Affirmed by published opinion. Judge Diaz wrote the opinion, in which Judge King and Judge Rushing joined.

ARGUED: Lisa M. Lorish, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charlottesville, Virginia, for Appellants. Laura Day Rottenborn, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee. **ON BRIEF**: Juval O. Scott, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Roanoke, Virginia,

for Appellant Benjamin Daley. Raymond C. Tarlton, TARLTON | POLK PLLC, Raleigh, North Carolina, for Appellant Michael Miselis. Thomas T. Cullen, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee. Glen K. Allen, Baltimore, Maryland, for Amicus The Free Expression Foundation, Inc.

DIAZ, Circuit Judge:

Michael Paul Miselis and Benjamin Drake Daley entered conditional guilty pleas to one count each of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371, with the substantive offense being a violation of the Anti-Riot Act, 18 U.S.C. §§ 2101–02. The charges arise from the defendants' violent participation in three white supremacist rallies during the year 2017: two in their home state of California, and the third being the notorious "Unite the Right" rally in Charlottesville, Virginia.

On appeal, the defendants challenge their convictions on the grounds that the Anti- Riot Act is facially overbroad under the Free Speech Clause of the First Amendment, as well as void for vagueness under the Due Process Clause of the Fifth Amendment. Reviewing these issues de novo, *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006), we disagree that the statute is unconstitutionally vague. But we agree that it treads too far upon constitutionally protected speech—in some of its applications.

While the category of speech that lies at the core of the Anti-Riot Act's prohibition, called "incitement," has never enjoyed First Amendment protection, the statute sweeps up a substantial amount of speech that remains protected advocacy under the modern incitement test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), insofar as it encompasses speech tending to "encourage" or "promote" a riot under 18 U.S.C. § 2101(a)(2), as well as speech "urging" others to riot or "involving" mere advocacy of violence under 18 U.S.C. § 2102(b).

In all other respects, however, the statute comports with the First Amendment. And because the discrete instances of overbreadth are severable from the remainder of the statute, the appropriate remedy is to invalidate the statute only to the extent that it reaches too far, while leaving the remainder intact.

Finally, because the factual bases for the defendants' guilty pleas conclusively establish that their own substantive offense conduct—which involves *no* First Amendment activity—falls under the Anti-Riot Act's surviving applications, their convictions stand.

I.

We begin with an overview of the defendants' offense conduct, the procedural history, and the Anti-Riot Act.

A.

The defendants (who are residents of Southern California) began in early 2017 to associate with a local white supremacist group called the "Rise Above

Movement," or "RAM" for short. Billing itself as a "combat-ready, militant group of a new nationalist white identity movement," the group's chief purpose was to attend "purported 'political' rallies" (typically organized by other groups) at which its members engaged in violent attacks on counter-protestors. J.A. 227, 232. And to prepare for such rallies, RAM members spent their weekends training in martial arts and other combat techniques.

The charges in this case arise from three such rallies held in 2017. The first took place on March 25, in Huntington Beach, California, where the defendants and their colleagues first obtained front-page notoriety for RAM by carrying out numerous assaults against counter-protesters. They celebrated this coverage among themselves and posted it on various white supremacist platforms to recruit new members to their ranks.

The second rally took place on April 15, in Berkeley, California. The defendants and a handful of other RAM members drove up to Berkeley the day before, riding together in an eleven-passenger rental van. Hundreds of white nationalists attended the rally, as did dozens of counter-protestors, and violence again broke out amongst the camps. In one clash, the defendants and their colleagues trampled a barrier separating the two camps and assaulted a group of counter-protestors. In another, after the rally had been broken up and the participants dispersed into the streets of downtown Berkeley, the defendants and their colleagues chased after another group of counter-protestors, whom they proceeded to punch, kick, and stomp; defendant Miselis even broke his hand in the effort.

After returning from Berkeley, RAM members became aware that the now-infamous "Unite the Right" rally would be held at Emancipation Park in Charlottesville, Virginia, on August 12, 2017. The rally had been organized by Jason Kessler, a self-styled "white advocate," to protest the City Council's vote to remove a statue of the Confederate general Robert E. Lee from the park. *See* Hawes Spencer & Sheryl Gay Stolberg, *Virginia Town Is on Edge Over Confederate Statue*, N.Y. Times, Aug. 12, 2017, at A12. The defendants and at least two of their RAM colleagues, Cole Evan White and Thomas Walter Gillen (who were later charged alongside them), each purchased roundtrip airfare to attend.

The defendants and their colleagues arrived in Charlottesville on August 11, 2017. That night, they joined hundreds of other white nationalists for a torch-lit march on the campus of the University of Virginia, just west of downtown Charlottesville. There, the torch-bearers chanted slogans such as "Blood and soil!" and "Jews will not replace us!" as they made their way to the statue of Thomas Jefferson in front of The Rotunda (the University's signature building), where they confronted a smaller group of student counter- protesters bearing a banner that read, "VA Students Act Against White Supremacy." J.A. 230, 235. A brawl ensued between the two camps, in which defendant Daley and other RAM members attacked multiple counter-protestors with their tiki torches.

The morning of August 12, the defendants arrived at Emancipation Park for the long-planned "Unite the Right" rally. But by 11 a.m., violence erupted (yet again) between groups of white

nationalists and counter-protestors who had surrounded the park. *See* Sheryl Gay Stolberg & Brian M. Rosenthal, *White Nationalist Protest Leads to Deadly Violence*, N.Y. Times, Aug. 13, 2017, at A1. Police promptly declared the assembly unlawful and began to clear the park, while officials from the city declared a state of emergency, citing an "imminent threat of civil disturbance, unrest, potential injury to persons, and destruction of public and personal property." *Id.*

Much of the violence associated with the "Unite the Right" rally took place after it had been made to disperse, in the streets of downtown Charlottesville.[1] For their part, the defendants engaged in several skirmishes both during and after the rally, including a clash near the 2nd Street NE entrance to the park in which they "collectively pushed, punched, kicked, choked, head-butted, and otherwise assaulted" a group of counter-protestors, and "not in self-defense." J.A. 231, 236.

B.

Following a federal investigation, the defendants (along with Gillen and White) were indicted on two counts each: (1) conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371, with the underlying offense being the substantive violation set forth in Count 2; and (2) traveling in interstate commerce with intent to riot,

---

[1] That violence culminated in the death of Heather D. Heyer, who was killed when an avowed neo-Nazi deliberately plowed into her and over a dozen others with his car. See Sheryl Gay Stolberg & Brian M. Rosenthal, *White Nationalist Protest Leads to Deadly Violence*, N.Y. Times, Aug. 13, 2017, at A1.

in violation of the Anti-Riot Act, 18 U.S.C. §§ 2101–02.

The defendants moved to dismiss the indictment, raising numerous challenges. Following a hearing, the district court denied the motion. *United States v. Daley,* 378 F. Supp. 3d 539, 545 (W.D. Va. 2019). The defendants each pled conditionally guilty to Count 1 the next day, subject to their rights to appeal the constitutionality of the Anti-Riot Act. The district court thereafter sentenced Daley to a 37-month prison term, while Miselis received 27 months; each was also given two years of supervised release. They appealed.[2]

C.

Congress passed the Anti-Riot Act as a rider to the Civil Rights Act of 1968, amidst an era, not unlike our own, marked by a palpable degree of social unrest. *See* Anti-Riot Act, Pub. L. No. 90-284 § 104(a), 82 Stat. 73, 75–77 (April 11, 1968). The statute's passage followed on the heels of what has been deemed the "long, hot summer of 1967," in which more than 150 cities across 34 states witnessed riots stirred by issues such as racial injustice and the war in Vietnam. See generally Malcolm McLaughlin, The Long, Hot Summer of 1967: Urban Rebellion in America (2014). And the statute's immediate catalyst was the upheaval sparked anew, in over 100 American cities,

[2] Gillen also pled guilty and filed an appeal alongside the defendants, *see United States v. Gillen*, No. 19-4553 (4th Cir. filed July 30, 2019), but moved to sever his appeal. We granted the motion, and have since held Gillen's appeal in abeyance pending our decision here. As for White, he pled guilty to Count 1 as well, *see United States v. Daley et al.*, No. 3:18-mj-24 (W.D. Va. 2018), ECF Nos. 57–60, but hasn't filed an appeal.

by the assassination of Martin Luther King, Jr. on April 4, 1968. *See* Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 Vill. L. Rev. 897, 912 (1975).

The turbulence that lingered throughout 1968 gave rise to most of the few cases in which courts have addressed—and upheld—the constitutionality of the Anti-Riot Act on overbreadth or vagueness grounds. *See United States v. Dellinger*, 472 F.2d 340, 355 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *United States v. Hoffma*n, 334 F. Supp. 504, 509 (D.D.C. 1971); *In re Shead*, 302 F. Supp. 560, 567 (N.D. Cal. 1969), *aff'd sub nom. on other grounds*, *Carter v. United States,* 417 F.2d 384 (9th Cir. 1969). The statute wasn't challenged again until along came RAM, whose participation in the California rallies described above also gave rise to the other recent facial challenge, and the first successful one. *See United States v. Rundo,* No. 18-cr-759 (C.D. Cal. June 3, 2019), *appeal docketed*, No. 19-50189 (9th Cir. June 12, 2019) (finding the Anti-Riot Act facially overbroad and dismissing indictments against RAM members who didn't travel to Charlottesville).

The Anti-Riot Act comprises three provisions that bear on the defendants' facial challenges: one that proscribes a range of speech and conduct, and two that contribute to the definition of such speech and conduct. *First* and foremost, § 2101(a) provides that:

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail,

> telegraph, telephone, radio, or television, with intent—
>
> > (1) to incite a riot; or
> >
> > (2) to organize, promote, encourage, participate in, or carry on a riot;
> >
> > or
> >
> > (3) to commit any act of violence in furtherance of a riot; or
> >
> > (4) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;
>
> and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph[3]—
>
> Shall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. § 2101(a).

Second, § 2102(a) defines the "riot" at the center of the statute, and which forms the object of § 2101(a)'s laundry list of alternative purposes, to mean

---

[3] As codified, the statute contains a footnote in this location explaining that the reference to "subparagraph (A), (B), (C), or (D)" is the result of a drafting mistake, and should read "[sub]paragraph (1), (2), (3), or (4)." *See* 18 U.S.C. § 2101 n.1.

> a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.

Id. § 2102(a).

And *third*, § 2102(b) glosses the ordinary meaning of each of the speech- and conduct-related verbs found in § 2101(a)(1)–(2) as follows:

> As used in this chapter, the term "to incite a riot", or "to organize, promote, encourage, participate in, or carry on a riot", includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or

> assertion of the rightness of, or the right to commit, any such act or acts.

Id. § 2102(b). Because the statute's constitutionality hinges on these three interlocking provisions, we focus on them as we address the defendants' appeal.

II.

Before turning to the defendants' facial challenges to the Anti-Riot Act, we take up an issue on which we sought supplemental briefing: whether the defendants have standing to contest the constitutionality of a statute forming the object of their conspiracy convictions under 18 U.S.C. § 371. We agree with the parties that they do.

It is well-established that a conspiracy consists of "an agreement among the defendants to do something which the law prohibits." *United States v. Hedgepeth*, 418 F.3d 411, 420 (4th Cir. 2005) (quoting *United States v. Meredith*, 824 F.2d 1418, 1428 (4th Cir. 1987)); *see also Salinas v. United States*, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense . . . ."). Indeed, this axiomatic principle is embedded directly in the text of § 371, which spells out a conspiracy "to commit any offense against the United States." *See* 18 U.S.C. § 371.

Yet because the object of an agreement can't be unlawful "if the statute defining [it] is unconstitutional," it follows that "no prosecution for conspiracy to commit that offense will lie." *United States v. Rosen*, 520 F. Supp. 2d 786, 792 (E.D. Va. 2007). We therefore agree with our sister circuit that

"the statutory requirement of conspiring to commit an 'offense against the United States,' 18 U.S.C. § 371, is not fulfilled by an offense which fails to meet constitutional muster." *United States v. Baranski*, 484 F.2d 556, 561 (7th Cir. 1973). Accordingly, because the defendants' convictions under § 371 cannot stand if the Anti-Riot Act is unconstitutional, we are satisfied that the defendants have standing to pursue the facial challenges to which we now turn.

III.

The defendants contend that the Anti-Riot Act is facially overbroad, under the Free Speech Clause of the First Amendment, in a variety of respects. We agree—in *part*.

In our view, the Anti-Riot Act sweeps up a substantial amount of speech that retains the status of protected advocacy under *Brandenburg* insofar as it encompasses speech tending to "encourage" or "promote" a riot under § 2101(a)(2), as well as speech "urging" others to riot or "involving" mere advocacy of violence under § 2102(b). In all other aspects, however, we find the statute consistent with the First Amendment. And because we also find that the discrete areas of overbreadth are severable—meaning that the remainder of the statute is constitutionally valid, capable of operating independently, and consistent with Congress's basic objectives—the appropriate remedy is to invalidate the statute only to the extent that it reaches too far, while leaving the remainder intact.

A.

We begin by setting out the principles that guide our overbreadth analysis. Here, the defendants bring a facial challenge to the Anti-Riot Act, meaning they claim that the statute is unconstitutional not as it applies to their own conduct, but rather "on its face," as it applies to the population generally. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Such claims of facial invalidity "are disfavored for several reasons." *Id.* at 450 (cleaned up). For one thing, facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law that is broader than is required by the precise facts to which it is to be applied." *Id.* (cleaned up). Relatedly, facial challenges "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

In light of these twin concerns, a facial challenge typically requires a showing that "no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications," *Wash. State Grange*, 552 U.S. at 449 (cleaned up); or "that the statute lacks any plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 472 (2010) (cleaned up). And in assessing whether a statute meets one of these high bars, courts must typically take care "not to . . . speculate about hypothetical or imaginary cases." *Wash. State Grange*, 552 U.S. at 50 (cleaned up).

In the First Amendment context, however, the fear of chilling protected expression "has led courts to entertain facial challenges based merely on hypothetical applications of the law to nonparties." *Preston v. Leake*, 660 F.3d 726, 738 (4th Cir. 2011). Under this "second type" of facial challenge, a statute "may be invalidated as overbroad" as long as "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (cleaned up).

This so-called overbreadth doctrine "allows a party to challenge a law facially under the First Amendment by 'describing a substantial number of instances of arguable overbreadth of the contested law,' even if the law is constitutional as applied to [himself]." Preston, 660 F.3d at 738–39 (quoting *Wash. State Grange,* 552 U.S. at 449 n.6) (cleaned up); *see also Stevens*, 559 U.S. at 483–84 (Alito, J., dissenting) ("[T]he over-breadth doctrine allows a party to whom the law may be constitutionally applied to challenge the statute on the ground that it violates the First Amendment rights of others."). In fact, in the overbreadth context, the "usual judicial practice" is to determine that the statute "would be valid as applied" to the challenger's own conduct before proceeding to a facial challenge premised on the hypothetical conduct of others "unnecessarily." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484–85 (1989); *accord Preston*, 660 F.3d at 738.[4]

[4] We adhere to the usual judicial practice here, being satisfied that the circumstances under which the defendants raise their facial overbreadth challenge amount to a concession that the Anti-Riot Act may be constitutionally applied to their own

To maintain an "appropriate balance" between the "competing social costs" at issue in the overbreadth context, the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). As the Court has explained,

> On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects.

Id. In consequence, it isn't enough to render a statute susceptible to a facial attack that one may simply "conceive of some impermissible applications."

---

offense conduct. For starters, because the defendants don't appeal the district court's rejection of their as-applied challenge, *see Daley*, 378 F. Supp. 3d at 558–59, they've waived any argument to the contrary, *see, e.g., United States v. Hudson*, 673 F.3d 263, 268 (4th Cir. 2012). Relatedly, at oral argument, the defendants confirmed that they've abandoned their as-applied challenge. *See* Oral Arg. at 8:10–8:12 ("We're never going to make an as-applied challenge, Your Honor."). Finally, for reasons we make clear in Part V, the record readily substantiates the defendants' tacit acknowledgement that the statute is "plainly legitimate as applied" to their conduct. *Cf. Stevens*, 559 U.S. at 472–73 (proceeding under such an assumption after finding that any as-applied challenge had been waived).

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).

Overbreadth analysis proceeds along several steps. Because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers," we must first "construe the challenged statute." *Williams*, 553 U.S. at 293. In so doing, we must seek to avoid any "constitutional problems" by asking whether the statute is "subject to [] a limiting construction." *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). We must then determine whether, so construed, the statute "criminalizes a substantial amount of protected expressive activity." *Williams,* 553 U.S. at 297. Finally, if the statute proves "impermissibly overbroad," we must assess whether "the unconstitutional portion" is "severable" from the remainder; if so, only that portion "is to be invalidated." *Ferber*, 458 U.S. at 769 n.24. Altogether, these efforts to preserve a statute from facial invalidation reflect the notion "that the overbreadth doctrine is strong medicine," to be applied "only as a last resort," in cases where it is "truly warranted." *See id*. at 769.

In conducting our analysis, we find it preferable, at least in the context of the Anti- Riot Act, to begin (at step zero, as it were) by delineating the scope of unprotected speech that the statute aims to regulate. *Cf. Dellinger*, 472 F.2d at 358 ("Ideally the analysis should begin with a delineation of the scope of speech protected by the first amendment."). With that backdrop in mind, we'll be better able to perceive where the statute overshoots its target and purports to regulate a substantial amount of *protected* speech.

B.

A glance at the Anti-Riot Act reveals that the category of unprotected speech that lies at the core of the statute's prohibition is that which also lies at the origin of First Amendment jurisprudence: "incitement." In general legal parlance, "incitement" refers to "[t]he act of persuading"—that is, of inducing—"another person to commit a crime." *See Incitement*, Black's Law Dictionary (11th ed. 2019); *cf. Persuade,* Black's Law Dictionary (11th ed. 2019) ("To induce (another) to do something; to make someone decide to do something[.]"). More important for our purposes is how the Supreme Court has defined "incitement" in First Amendment jurisprudence. And notably, while the Court initially did so much more broadly than the dictionary, the modern test does so almost as narrowly.

The modern incitement test derives from the Court's per curiam decision in *Brandenburg*, *see* 395 U.S. 444, which came down in 1969, the year *after* the Anti-Riot Act was enacted. That case concerned the conviction of a Ku Klux Klan leader under the Ohio Criminal Syndicalism statute, *id.* at 444–45, which made it a crime to "advocate or teach the duty, necessity, or propriety of violence as a means of accomplishing industrial or political reform," *id.* at 448 (cleaned up).[5]

---

[5] The specific words giving rise to the Klansman's prosecution in Brandenburg were these: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." See id. at 446.

Though the Court had upheld an analogous statute in *Whitney v. California*, 274 U.S. 357 (1927), it asserted that *Whitney* "ha[d] been thoroughly discredited by later decisions," from which it distilled the principle that "the constitutional guarantees of free speech" protected the "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *See id.* at 447. And because the Ohio statute "purport[ed] to punish *mere* advocacy" of lawless action as opposed to advocacy directed and likely to produce *imminent* lawless action, the Court held that it fell "within the condemnation" of the First Amendment. *Id.* at 449 (emphasis added).

While *Brandenburg* purported to draw its incitement test from midcentury cases, it's widely acknowledged that the Court had theretofore (including well after *Whitney*) used a far more encompassing test, called the "clear and present danger" test, to determine when advocacy of lawlessness became unprotected incitement. *See generally* Wallace Mendelson, *Clear and Present Danger: From* Schenk *to* Dennis, 52 Colum. L. Rev. 313 (1952). Under that test, "[t]he question in every case" is whether the speech was "of such a nature" and "used in such circumstances . . . as to create a clear and present danger that [it] w[ould] bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also *Dennis v. United States*, 341 U.S. 494, 509 (1951); *Whitney*, 274 U.S. at 374; *Frohwerk v. United States*, 249 U.S. 204, 206 (1919); *Debs v. United States*, 249 U.S. 211, 215 (1919). Devoid of any such limiting criteria as directedness, likelihood, or

imminence, the clear-and-present-danger test applied to a wide range of advocacy that now finds refuge under *Brandenburg*. *See Dennis*, 341 U.S. at 516–17 (upholding conviction for mere advocacy of Communism); *Whitney*, 274 U.S. at 371–72 (same); *Frohwerk*, 249 U.S. at 206–07 (upholding conviction for mere advocacy of disobedience to the draft); *Schenck*, 249 U.S. at 51–52 (same).

Brandenburg has thus been widely understood, starting with the two concurring Justices, as having significantly (if tacitly) narrowed the category of incitement. *See Brandenburg*, 395 U.S. at 449–50 (Black, J., concurring) ("[T]he 'clear and present danger' doctrine should have no place in the interpretation of the First Amendment."); *id*. at 454 (Douglas, J., concurring) ("I see no place in the regime of the First Amendment for any 'clear and present danger' test . . . ."); *see also, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 778 (1996) (Souter, J., concurring) ("[T]he clear and present danger [test] of *Schenk v. United States* . . . evolved into the modern incitement rule of Brandenburg v. Ohio . . . ."); *see generally* Comment, Staughton Lynd, Brandenburg v. Ohio: *A Speech Test for All Seasons?*, 43 U. Chi. L. Rev. 151 (1975). These days, then, advocacy of lawlessness retains the guarantees of free speech unless it's directed and likely to produce imminent lawlessness.

As a corollary, we've understood Brandenburg's protection to be limited to mere or "abstract" advocacy. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997); *cf. Brandenburg*, 395 U.S. at 447–48 ("[T]he mere abstract teaching of the moral propriety . . . [of] a resort to force and violence[]

is not the same as preparing a group for violent action and steeling it to such action." (cleaned up)). Speech taking some form "other than abstract advocacy," by contrast, such as that which "constitutes . . . aiding and abetting of criminal conduct," doesn't implicate the First Amendment under our *Rice* decision. *See* 128 F.3d at 239, 242–43 (holding that the publication of a *Hit Man: A Technical Manual for Independent Contractors*, whose detailed and concrete instructions on "how to murder and become a professional killer" assisted a man in taking three lives, wasn't protected abstract advocacy); *see also Williams*, 553 U.S. at 299–300 (suggesting that *Brandenburg* only protects "abstract advocacy"). In other words, *Rice* effectively recognizes a second category of unprotected speech inherent in that of incitement, which may be proscribed without regard to whether it's directed and likely to produce imminent lawlessness.

With this delineation in mind, we consider whether the Anti-Riot Act encompasses the sort of advocacy that *Brandenburg* "jealously protects." *See Rice*, 128 F.3d at 262.[6]

C.

---

[6] Because we agree with the parties that our overbreadth analysis revolves around the contours of protected advocacy under *Brandenburg*, we decline the Free Expression Foundation's invitation, as amicus supporting the defendants, to analyze the Anti-Riot Act under strict scrutiny. In that regard, we note the view of some commentators that Brandenburg effectively operates as an even stricter stand-in for strict scrutiny when it comes to regulating "advocacy of illegal conduct." *See, e.g.*, Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Penn. L. Rev. 2417, 2245 n.114 (1996).

We find it useful to begin our analysis of the Anti-Riot Act by breaking § 2101(a) down into the four essential elements of a violation, which are:

> (1) "travel[ing] in . . . or us[ing] any facility of interstate commerce";
>
> (2) "with intent" either to a) "incite"; b) "organize, promote, encourage, participate in, or carry on"; c) "commit any act of violence in furtherance of"; or d) "aid or abet any person in inciting or participating in or carrying on . . . or committing any act of violence in furtherance of";
>
> (3) "a riot"; and
>
> (4) "perform[ing] or attempt[ing] to perform any other overt act," for any of the foregoing purposes, "either during the course of any such travel or use or thereafter."

See 18 U.S.C. § 2101(a). Stated otherwise, a violation requires two overt acts plus specific intent to carry out one or more of numerous alternative purposes with respect to a riot.

The defendants argue that three of these elements tread on protected advocacy: (1) the "any other" (or second, in addition to the antecedent "travel in . . . or use of any facility of interstate commerce") overt-act element; (2) the specific-intent element; and (3) the definition of a "riot." We construe the statute by focusing on each in turn.

1.

We start with the defendants' contention that the "any other" or second overt-act element is overbroad because, by its plain meaning, it extends criminal consequences to "speech and expression" (or even nonexpressive conduct) "far removed from violence," Defs.' Br. at 10. In the defendants' view, that means the statute fails to bear an adequate relation between speech and violence under *Brandenburg*, which requires lawlessness to be the *likely* and *imminent* result of speech and expression.

Appearing to agree that a straightforward reading of this element to require only "a step toward" one of the purposes set forth under § 2101(a)(1)–(4) would pose overbreadth problems, the government urges us to take after our sister circuit by construing it to require the actual "fulfillment" of one or more of these purposes. *Cf. Dellinger*, 472 F.2d at 361–62 ("assuming" such a view). So construed, the government contends that the statute necessitates "an adequate relation between . . . speech and action." *See id.*

We disagree with the parties. In our view, the presence of an overt-act element (or two, in fact), together with specific intent to incite or engage in a riot, simply indicates that the Anti-Riot Act was drafted as an *attempt* offense, of which it bears all the classic hallmarks, rather than a commission offense. See Martin v. Taylor, 857 F.2d 958, 961 (4th Cir. 1988) ("An attempt crime requires specific intent to commit a crime and some overt act which tends toward but falls short of the consummation of the crime."); *United States v. McFadden*, 739 F.2d 149,

152 (4th Cir. 1984) ("The classical elements of an attempt are intent to commit a crime, the execution of an overt act in furtherance of the intention, and a failure to consummate the crime."). Indeed, as the indictment in this very case illustrates, the crime described by § 2101(a) is simply that of "Travel with Intent to Riot." J.A. 73.

The inescapable conclusion that Congress drafted the Anti-Riot Act to encompass unconsummated attempts to incite or engage in a riot explains why, as the defendants put it, the statute "does not criminalize rioting" alone, but also "behavior far-removed" from rioting. Defs.' Br. at 27. It also explains why the statute's overt-act elements don't implicate *Brandenburg*: because, as with inchoate offenses generally, the overt acts themselves—"which may be entirely innocent when considered alone," *United States v. Fleschner*, 98 F.3d 155, 159–60 (4th Cir. 1996)—serve only to establish that a defendant specifically intended to carry out (and went far enough toward carrying out) an unlawful "purpose," *see Meredith*, 824 F.2d at 1428.[7]

Recall that an inchoate offense requires proof beyond a reasonable doubt that a defendant "intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *See Salinas*, 522 U.S. at 65. Accordingly, to obtain a conviction under the

---

[7] Though we're not aware of another instance in which Congress has sought to proscribe the attempt to engage in unprotected speech, we see no bar to such legislation, in the same way that Congress may proscribe any other attempt to engage in unlawful conduct (provided, of course, that the conduct falls under Congress's limited legislative authority).

Anti-Riot Act, the government must at a minimum prove that, notwithstanding any failure of consummation, the defendant acted with specific intent to engage in unprotected speech or conduct under § 2101(a)(1)–(4). It's therefore with respect to the defendant's *intended* speech, as opposed to *actual* speech (if any), that *Brandenburg* mandates the adequate relation between words and lawless action for purposes of the Anti-Riot Act.

So framed, the central overbreadth question becomes whether any of the purposes included in the statute's specific-intent element implicate protected advocacy. If so, those purposes can't form the basis of an attempt to engage in unlawful speech, rendering overbroad the particular way of violating the statute described thereby.

We proceed to take up this question.

2.

The defendants contend that the specific-intent element is overbroad in two ways: (1) with respect to the plain meaning of the string of speech-related verbs under § 2101(a)(2); and (2) with respect to the additional meaning that many of the speech-related verbs under § 2101(a)(1)–(4) obtain under § 2102(b). We take up each provision in turn.

i.

Because the First Amendment protects speech (the sine qua non of expression) as opposed to mere conduct,[8] and because the purposes set forth under

[8] Of course, the First Amendment does protect expressive conduct through an intermediate (i.e., "less demanding") level of

§ 2101(a)(1)–(4) encompass both speech- and mere-conduct-related varieties, it's necessary to distinguish between them. Here, we agree with the parties, as well as our sister circuit, that the purposes implicating speech are those embodied by the verbs "incite," "organize," "promote," and "encourage" under § 2101(a)(1)–(2). *See Dellinger*, 472 F.2d at 361.[9]

With respect to "incite" under § 2101(a)(1), we have little difficulty concluding that this verb encompasses no more than unprotected speech under *Brandenburg*. Thus, in the world of *Brandenburg,* "incite" most sensibly refers to speech that is directed and likely to produce an imminent lawlessness. The other conceivable definition is the dictionary one, which, as noted, is even narrower than *Brandenburg's* because it requires lawlessness to occur, not just be likely. So either way, § 2101(a)(1) readily comports with the First Amendment.

Turning to § 2101(a)(2), however, we find that two verbs in the string "to organize, promote, [or] encourage" a riot fail to bear the requisite relation between speech and lawlessness. The loosest such

---

scrutiny under *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). *See Texas v. Johnson*, 491 U.S. 397, 406–07 (1989). But the defendants don't argue—and properly so, in our view—that any of the statute's conduct-related purposes implicate expressive conduct or, if so, fail to pass muster under *O'Brien*.

[9] While the compound verb "to aid or abet" under § 2101(a)(4) can also implicate speech, we agree with the government that any such speech would constitute "aiding and abetting of criminal conduct," which doesn't implicate the First Amendment under *Rice*, *see* 128 F.3d at 242–43—especially since none of the statutory objects of such aiding-and- abetting speech are themselves overbroad (including, as we explain, "incite").

relation in the bunch belongs to "encourage," which means simply "to attempt to persuade (someone) to do something." *See Encourage*, Merriam-Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/encourage (last accessed July 30, 2020). Speech tending to encourage a riot thus encompasses *all* hypothetical efforts to advocate for a riot, including the vast majority that aren't *likely* to produce an *imminent* riot (even assuming they're *directed* to producing a riot). Indeed, because mere encouragement is quintessential protected advocacy, the Supreme Court has recognized that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it" under *Brandenburg*. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *see also Williams*, 553 U.S. at 300 (offering the statement, "I encourage you to obtain child pornography," as protected advocacy). It follows that *Brandenburg* protects speech having a mere tendency to encourage others to riot.

The verb "promote" occupies a similarly overinclusive position on the continuum of relation between advocacy and action. While "promote" admits of a wide range of meanings depending on context, we think that, in the context of an enterprise like a riot, it's best understood to mean "to support or encourage something," or "to advance" or "further something by helping to . . . introduce it." *See Promote*, Encarta Webster's Dictionary of the English Language (2d ed. 2004); *see also Promoter*, Encarta Webster's Dictionary of the English Language (2d ed. 2004) ("a supporter or advocate of something"); *cf. Williams*, 553 U.S. at 294 (defining "promote" to refer to "the act of recommending"). These definitions indicate that "promote" refers to a comparable, and

perhaps even wider, range of riot-oriented advocacy as "encourage" in the context of § 2101(a)(2). It thus suffers from the same overbreadth, subsuming an abundance of hypothetical efforts to persuade that aren't likely to produce an imminent riot. As a result, *Brandenburg* also protects speech having a mere tendency to promote others to riot.

We reject the government's argument that "promote" is readily susceptible of a limiting construction under *Williams*. In *Williams*, the Supreme Court found that "promote" isn't overbroad within the meaning of 18 U.S.C. § 2252A, which proscribes "[c]ertain activities relating to . . . child pornography," by relying on the distinctly "transactional connotation" arising from the statutory context at issue. *See* 553 U.S. at 294–95. The Court reasoned that, in relation to an object (grammatically speaking) like child pornography, promotion doesn't refer to "abstract advocacy" protected under *Brandenburg*, but rather "to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer." *Id*. at 299–300.

But that reasoning is inapposite in the context of the Anti-Riot Act, where the object of the promotional speech—the "riot" defined under § 2102(a)—is wholly non- transactional, and can't materialize until a sufficient number of people are persuaded to show up at a certain future time and place and engage in lawless conduct. In this statutory context, we think that "promote" refers to abstract advocacy.

We likewise reject the government's invitation to limit both "promote" and "encourage" to advocacy

that is directed and likely to produce an imminent riot. For starters, we don't think either verb is "readily susceptible" of such an artificial limitation. *See Stevens*, 559 U.S. at 481 (cleaned up). Moreover, because advocacy that is direct and likely to produce imminent lawlessness is already called "incitement," the government's proposed course would effectively require us to read these verbs as if they each said "incite"—the same term already found under § 2101(a)(1). That, however, "requires rewriting, not just reinterpretation," and we may not "rewrite a law to conform it to constitutional requirements." *See Stevens*, 559 U.S. at 481 (cleaned up).

With respect to the verb "organize," however, we reach a different outcome. As it pertains to an event like a riot, "organize" is readily understood to mean "to form or establish something . . . by . . . bringing people together into a structured group," "to oversee the coordination of the various aspects of something" or "to arrange the components of something in a way that creates a particular structure." *See Organize,* Encarta Webster's Dictionary of the English Language (2d ed. 2004). We think speech tending to organize a riot might thus include communicating with prospective participants about logistics, arranging travel accommodations, or overseeing efforts to obtain weapons needed to carry out the planned violence.

Yet as these definitions and examples indicate, speech tending to "organize" others to riot consists *not* of mere abstract advocacy, but rather of concrete aid. For, by the time speech reaches the point of organizing a riot, it has crossed the line dividing abstract idea from material reality, even if its

components must still be brought together, coordinated, arranged, or otherwise structured into form.

In other words, speech tending to organize a riot serves not to persuade others to engage in a hypothetical riot, but rather to facilitate the occurrence of a riot that has already begun to take shape. Such speech comes much closer to "preparing a group for violent action" than merely "teaching . . . the moral propriety" of violence in the abstract, *Brandenburg,* 395 U.S. at 48, and may even be characterized as the sort of "aiding and abetting of criminal conduct" that doesn't qualify for First Amendment protection, *see Rice*, 128 F.3d at 242–43. It follows that speech tending to organize a riot under § 2101(a)(2), unlike that of encouraging and promoting a riot, doesn't implicate mere advocacy of lawlessness, and may thus be proscribed without reference to *Brandenburg*.

ii.

Turning to § 2102(b), the defendants argue that this provision, which provides an admittedly curious gloss on the statute's specific-intent element, is overbroad in two ways. Since these arguments track the provision's two clauses, we take each in turn.

The first clause of § 2102(b) provides that the terms "'to incite a riot', or 'to organize, promote, encourage, participate in, or carry on a riot', includes, but is not limited to, urging or instigating other persons to riot." 18 U.S.C. § 2102(b). Like the parties, we understand this clause to gloss two more purposes onto each subparagraph under § 2101(a)(1)–(4) (excepting § 2101(a)(3),"to commit any act of violence

in furtherance of a riot"). These additional purposes are "urging" and "instigating" other persons to riot.

With respect to speech "instigating" others to riot, we agree with the parties this verb is best understood as a direct synonym for the dictionary definition of "incite"— which, as noted, is even narrower than *Brandenburg's*. *See Instigate*, Encarta Webster's Dictionary of the English Language (2d ed. 2004) ("to cause a process to start"); see also Instigate, Merriam-Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/instigate (last accessed July 30, 2020) ("provoke, incite"). In consequence, just as speech "instigating" others to riot seems to be already accounted for under § 2101(a)(1), so too is it consistent with the First Amendment.

As to speech "urging" others to riot, however, we agree with the defendants that this verb suffers from a similarly inadequate relation between speech and lawless action as "encourage" and "promote" under § 2101(a)(2). After all, to "urge" means simply to "encourage," "advocate," "recommend," or "advise . . . earnestly and with persistence." *Urge*, Encarta Webster's Dictionary of the English Language (2d ed. 2004); *see also Urge*, Merriam-Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/urge (last accessed July 30, 2020) ("to present in an earnest and pressing manner" or "advocate or demand with importunity"). And because earnestness and persistence don't suffice to transform such forms of protected advocacy into speech that is likely to produce imminent lawless action, *Brandenburg* renders the purpose of "urging" others to riot overbroad.

The second clause of § 2102(b) provides that the terms "'to incite a riot', or 'to organize, promote, encourage, participate in, or carry on a riot' . . . shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts." 18 U.S.C. § 2102(b). Phrased in simpler terms, this clause provides that each of these purposes under § 2101(a) shall *not* be deemed to encompass the mere advocacy of ideas or beliefs not involving advocacy of violence.

The defendants argue that the last phrase of this clause, beginning with "not involving," is overbroad. They point out that "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment" in a Brandenburg world. *See NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 927 (1982) (emphasis omitted). And they contend that, owing to the double-negative construction of the second clause of § 2102(b), the final phrase must be construed as affirmatively criminalizing mere advocacy of violence, running afoul of its protected status.

The government concedes that mere advocacy of violence is protected speech under *Brandenburg,* but argues that the phrase beginning with "not involving" needn't be read to affirmatively criminalize such advocacy. In the government's view, because the second clause of § 2102(b) starts with "shall not be deemed," the entire clause can be limited to subtracting from, without adding onto, the purposes of inciting, organizing, promoting, encouraging, participating in, and carrying on a riot. So confined,

the government posits that the second clause's exclusion of mere advocacy of violence can be read neither to affirmatively criminalize nor to affirmatively exempt such advocacy. And since the First Amendment already exempts it, the Anti-Riot Act doesn't have to.

We think the last phrase of the second clause of § 2102(b) isn't "readily susceptible" of the government's proposed limiting construction. *See Stevens*, 559 U.S. at 481 (cleaned up). Rather, under the familiar rule that a double negative cancels itself out, the natural meaning of this phrase is that the purposes of inciting, organizing, promoting, encouraging, participating in, and carrying on a riot "*shall* . . . *be* deemed to mean the mere . . . advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts." *See* 18 U.S.C. § 2102(b) (emphasis added); *cf., e.g., House v. Bell*, 547 U.S. 518, 538 (2006) (demonstrating this familiar rule in action).

Indeed, as our sister circuit herself pointed out in considering this issue, just as "[a] true negation of a negation is an affirmation," so too "a careful exclusion from an exclusion" results "in an inclusion." *Dellinger*, 472 F.2d at 363. And while the *Dellinger* majority opted to avoid overbreadth by assuming that such inclusion doesn't follow with equal force from the double negative here, we agree with the separate opinion in that case that such a view strains common sense, and thus amounts to judicial rewriting. *See id.* at 412 (Pell, J., concurring in part and dissenting in part).

Moreover, because Congress drafted the Anti-Riot Act against the backdrop of a long line of cases, from *Whitney* to *Dennis*, in which mere advocacy of violence was regularly held to be unprotected, we find it all the more likely that the exclusion found in the final phrase of § 2102(b) means to attach criminal consequences to such advocacy, and isn't just indifferent to it. We therefore hold this language to be overbroad as well.

3.

The defendants' final overbreadth argument concerns the Anti-Riot Act's definition of a "riot" under § 2102(a). They contend that this definition is overbroad because it contains the clear-and-present-danger test that *Brandenburg* displaced from the prevailing incitement test. The government responds that, while the clear-and-present-danger test is no longer part of the prevailing incitement test, it's nonetheless flexible enough that we may construe it consistently with *Brandenburg's* tightened standard.

In our view, however, § 2102(a)'s clear-and-present-danger test doesn't relate to the same things under the Anti-Riot Act as it did under the First Amendment. Recall that, before being replaced by the *Brandenburg* test, the clear-and-present-danger test referred to the relation between unprotected incitement and "the substantive evils that Congress has a right to prevent"—i.e., the lawless action being incited. *See Schenck*, 249 U.S. at 52. And while *Brandenburg* tightened the required relation between those things, it didn't alter the fact that the object of any unprotected incitement is simply "lawless action" in general. See 395 U.S. at 448.

In the context of the Anti-Riot Act, the object corresponding to "lawless action" under *Brandenburg* is (of course) the "riot" defined under § 2102(a). Yet the relation between incitement and rioting under the statute isn't governed by § 2102(a)'s clear-and-present-danger test, but rather directly by the verb "incite" under § 2101(a)(1) (which, as noted, provides the necessary relation between speech and lawless action all by itself).

To revisit § 2102(a), that provision defines two types of riot: the first based on one or more "acts of violence," 18 U.S.C. § 2102(a)(1), and the second based on one or more "threats" to commit one or more acts of violence, *id*. § 2102(a)(2). With respect to each type, the clear-and-present-danger test governs only the relation between the act or threat of violence forming the core of the riotous conduct and the resulting risk of "damage or injury" to the "property" or "person" of any other individual. *See id*. § 2102(a). So, whatever the precise measure of risk required by that test, a "riot" entails at bottom an act or a threat of violence presenting "grave danger" to others. *Cf. United States v. Matthews*, 419 F.2d 1177, 1180–82, 1184 (D.C. Cir. 1969) (discussing the District of Columbia's anti- riot statute, passed by Congress in late 1967, which defines a "riot" similarly to § 2102(a) as a public disturbance "which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons").

We think it plain that both types of riot describe conduct that Congress had the right to prevent in enacting the Anti-Riot Act. Indeed, regardless of any risk of bodily injury or property damage, acts of violence against others in and of

themselves constitute well- recognized forms of unlawful conduct, finding no protection under the first or any other amendment. As for "threats of violence," they too "are outside the First Amendment" under the doctrine of true threats, which "protects individuals" from even "the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); *see also Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (plurality opinion) (discussing "true threats"). And we have little trouble reading "threat" under § 2102(a) to contemplate only such true threats, which are frequently made unlawful as well.

Thus, like our sister circuit, we conclude that Congress in § 2102(a) has managed to describe "a disorder of a type which is enough of an assault on the property and personal safety interests of the community" that inciting, engaging in, or aiding and abetting one "can be made a criminal offense." *See Dellinger*, 472 F.2d at 360–61. Accordingly, we discern no overbreadth in the statute's definition of a riot.

D.

Having found that the Anti-Riot Act is overbroad vis-à-vis *Brandenburg* insofar as it proscribes speech tending to "encourage" or "promote" a riot, as well as speech "urging" others to riot or "involving" mere advocacy of violence, we turn now to consider whether the amount of overbreadth is substantial, "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292. We conclude that it is.

To be sure, the Anti-Riot Act has a plainly legitimate sweep. The statute validly proscribes not only efforts to engage in such unprotected speech as inciting, instigating, and organizing a riot, but also such unprotected conduct as participating in, carrying on, and committing acts of violence in furtherance of a riot, as well as aiding and abetting any person engaged in such conduct. In other words, it encompasses just about every form of unprotected activity in relation to a riot. And the statute's conduct-related applications appear to form the basis of every reported prosecution under it.

Yet the Anti-Riot Act nonetheless sweeps up a substantial amount of protected advocacy. Whereas *Brandenburg* removes advocacy relating to a riot from the protection of the First Amendment only if it is directed and likely to produce an imminent riot, the statute purports to regulate any speech tending merely to "encourage," "promote," or "urge" others to riot, as well as mere advocacy of any act of violence. Altogether, these areas of overbreadth cover the whole realm of advocacy that *Brandenburg* protects, and dwarfs that which it left unprotected. Thus, while the statute may have been perfectly consistent with the contemporary understanding of the First Amendment when it was enacted, *Brandenburg* causes it to encroach substantially upon free speech.

E.

Having concluded that the Anti-Riot Act is substantially overbroad in part, we turn at last to consider whether the overbroad portions of the statute are severable from the constitutionally valid remainder; if so, only those portions are "to be

invalidated." *See Ferber*, 458 U.S. at 769 n.24. We agree with the government that they are.

Because facial invalidation "is strong medicine" that serves "as a last resort," *id*. at 769, the "normal rule" in the case of a partially unconstitutional statute is "that partial, rather than facial, invalidation is the required course," *Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (cleaned up). Indeed, the Supreme Court has repeatedly cautioned that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional," it is our "duty" as a court to "maintain the act in so far as it is valid." *Regan v. Time, Inc.,* 468 U.S. 641, 652 (1984) (plurality opinion) (cleaned up); see also *Seila Law LLC v. Consumer Fin. Prot. Bureau,* 140 S. Ct. 2183, 2209 (2020) (plurality opinion) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." (cleaned up)).

As the Court recently observed, the Judiciary's "power and preference" for partial invalidation "has been firmly established since *Marbury v. Madison*." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350 (2020) (plurality opinion). From then to the present, the Court's cases have developed "a strong presumption of severability." *Id.*; *see, e.g., Bank of Hamilton v. Dudley's Lessee*, 27 U.S. (2 Pet.) 492, 526 (1829) ("If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States . . . .").

Thus, "[e]ven in the absence of a severability clause, the traditional rule is that the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Seila Law*, 140 S. Ct. at 2209 (cleaned up). Put differently, "we must retain those portions of the [a]ct that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 259 (2005) (cleaned up); *see also Seila Law*, 140 S. Ct. at 2209.

Several of the Court's cases illustrate just how "surgical" we ought to be in severing unconstitutional language from an otherwise inoffensive statute. *See Barr*, 140 S. Ct. at 2350–51. Consider *Regan,* in which the Court held that the "purpose requirement" of a prior version of 18 U.S.C. § 504—which authorized the use of certain photographic reproductions of currency (otherwise proscribed under 18 U.S.C. § 474) "for philatelic, numismatic, educational, historical, or newsworthy purposes"—constituted an invalid time, place, and manner regulation under the First Amendment. *See* 468 U.S. at 647–48, 659 (cleaned up). But finding the remainder of the statute constitutional, a five-member majority of the Court (including Justice Stevens, who concurred in the judgment in relevant part) found that the proper fix was to excise the "select[] words" making up the purpose requirement, even though they formed part of "a single integrated statutory phrase" in which they flowed directly into the words of another element. *See id.* at 666–67

(Brennan, J., concurring in part and dissenting in part).[10]

More recently, in *Barr,* a seven-member majority of the Court (including Justices Breyer, Ginsburg, Kagan, and Sotomayor, who concurred in the judgment with respect to severability) agreed that the government-debt exception to the Telephone Consumer Protection Act's robocall restriction—which the Court found also constituted an invalid time, place, and manner regulation, *see* 140 S. Ct. at 2346—could be excised from the remainder of the statute, even though it consisted of a sentence fragment appended to a single subparagraph, *see id.* at 2344–45 & n.2, 2352–54; *cf.* 47 U.S.C. § 227(b)(1)(A)(iii). And while the Court noted that the statute included a severability clause, *see* 47 U.S.C. § 608, the Court made clear that it would have excised the government-debt exception all the same under the general "presumption of severability," 140 S. Ct. at 2252–53.

Applying these principles to the Anti-Riot Act, we hold that the appropriate remedy is to invalidate no more than the language responsible for the statute's overbreadth. That language consists of the words "encourage," "promote," and "urging" under §§ 2101(a)(2) and 2102(b), as well as the final phrase of § 2102(b), beginning with the words "not involving" and continuing through the end of that provision.

---

[10] As for Justice Brennan, even his concern with such selective excision would have been quelled if Congress had offset the purpose requirement from its surrounding provision with the disjunctive "or." *See id*. at 667–68.

Severed accordingly, these provisions of the statute look like this:

> (a) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—
>
> . . . .
>
> (2) to organize, promote, encourage, participate in, or carry on a riot;
>
> . . . .
>
> and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph[]—
>
> Shall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. § 2101(a)(2).

> As used in this chapter, the term "to incite a riot", or "to organize, ~~promote, encourage~~, participate in, or carry on a riot", includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief~~, not involving~~

~~advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.~~

Id. § 2102(b).

Besides these discrete instances of overbreadth, the remainder of the Anti-Riot Act "is perfectly valid." *See Booker*, 543 U.S. at 258. It's also capable of functioning independently and thus "fully operative without the offending" language. *See Seila Law*, 140 S. Ct. at 2209. After all, that language makes up only a fraction of the statute's specific-intent element, consisting of just two items from a menu of alternative purposes under § 2101(a)(1)–(4), plus two additional purposes glossed onto these by way of § 2102(b).

Moreover, though the Anti-Riot Act's overbroad language consists of select words within two subsections left otherwise intact, it nonetheless lends itself to being cleanly excised from these "surrounding" provisions. *Cf. Barr*, 140 S. Ct. at 2352 & n.9 (noting that, while "it is fairly unusual for the remainder of a law not to be operative," a statute may occasionally be drafted such that a "surrounding or connected provision" must be severed alongside the "offending provision"). Whereas "encourage," "promote," and "urging" are each set off from their adjoining purposes by the disjunctive "or" (in addition to commas where appropriate), the last phrase of § 2102(b) is easily dropped off from the rest of the clause in which it appears, much like the government-debt exception severed in *Barr*. The remaining statute thus makes for smooth reading.

Further, such minimal severance is consistent with Congress's basic objective in enacting the Anti-Riot Act. We think that objective is to proscribe, to the maximum permissible extent, unprotected speech and conduct that both relates to a riot and involves the use of interstate commerce. And while Congress drafted the statute to encompass the full scope of such unprotected speech as of 1968, our partial invalidation serves only to remove the discrete purposes that *Brandenburg* rendered overbroad, thereby trimming the statute's scope without altering its meaning. We thus have no doubt that, if Congress could have foreseen the Court's decision in *Brandenburg*, it would have readily preferred to enact this appropriately narrowed version of the statute than none at all.

The defendants' arguments against partial invalidation rely on their view that the Anti-Riot Act is significantly more overbroad than we have found it to be, including with respect to its second overt-act element and its definition of a riot. But while these elements of the statute might prove difficult to sever if in fact they were overbroad, we are sure Congress "would prefer that we use a scalpel rather than a bulldozer" to cure the much more limited overbreadth we have identified. *See Seila Law*, 140 S. Ct. at 2210–11.

Accordingly, because the defendants' overbreadth challenge leaves the bulk of the Anti-Riot Act intact, we proceed to consider their remaining challenge to the statute.

IV.

As an alternative ground for facial invalidation, the defendants contend that the Anti-Riot Act is void for vagueness under the Due Process Clause of the Fifth Amendment. We disagree.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine therefore "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

These twin concerns of inadequate notice and arbitrary or discriminatory enforcement are especially pronounced "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms" because ambiguity "inevitably lead[s] citizens to steer far wider of the unlawful zone than if the boundaries . . . were clearly marked," thereby chilling protected speech. *See Grayned*, 408 U.S. at 109 (cleaned up). That said, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Williams*, 553 U.S. at 304 (cleaned up).

The defendants argue that the Anti-Riot Act is unduly vague primarily with respect to its definition of a riot under § 2102(a). Not so. In our view, the definition provides more than the "minimal guidelines" necessary to provide a sufficient standard

of conduct and enforcement for purposes of due process. *See Kolender*, 461 U.S. at 358.

Recall that § 2102(a) describes two types of "riot": one based on actual violence and another based on a threat of violence. *See* 18 U.S.C. § 2102(a). Each type breaks down into roughly four elements. An actual-violence riot consists of (1) a "public disturbance," (2) involving one or more "acts of violence," (3) committed "by one or more persons" who form part of a group "of three or more persons," and (4) that either "result[s] in[] damage or injury to the property . . . or . . . person of any other individual" or "constitute[s] a clear and present danger" of such damage or injury. *See id.* § 2102(a)(1). Similarly, a threat-of-violence riot consists of (1) a "public disturbance," (2) involving one or more "threats" to commit an act of violence, (3) committed "by one or more persons" who form part of a group of "three or more persons" and have "the ability of immediate execution" of the threat or threats, and (4) that, if executed, would either result in "damage or injury to the property . . . or . . . person of any other individual" or constitute a clear and present danger of such damage or injury. *See id.* § 2102(a)(2).

The defendants largely take issue with the term "public disturbance," which they contend invites "wholly subjective judgments" about the scope of proscribed conduct, much as with statutes that the Court has voided for criminalizing "'annoying' or 'indecent'" conduct. *See Williams*, 553 U.S. at 306 (citing *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870–71 & n.35 (1997)). But even assuming that a statute criminalizing mere public disturbances might be

unduly vague, we believe that the other components of § 2102(a) provide sufficient "narrowing context." *See Williams*, 553 U.S. at 306.

In particular, § 2102(a)'s requirement that the public disturbance involve either an act or threat of violence renders the scope of proscribed conduct significantly more definite. Indeed, because the word "*violence*" has a settled and objective meaning, the definition's violence element serves to exclude a wide range of conduct that might constitute a "public disturbance" judged subjectively—such as "making an unnecessary or distracting noise," *see Breach of the Peace*, Black's Law Dictionary (10th ed. 2014); or, as the defendants hypothesize, causing a "public uproar" on Twitter, see Defs.' Br. at 31 n.5.

In fact, because *any* act or threat of violence inherently constitutes a disturbance or breach of the peace, the definition's public-disturbance element appears in context to mean simply that the act or threat of violence must occur in a public setting—as, for instance, with each of the three rallies at which the defendants conducted *their* acts of violence. So construed, the core elements of § 2102(a) leave little to the imagination.

The statute's definition of a riot is further narrowed by § 2102(a)'s remaining elements. Under the third, the act or threat of violence constituting the public disturbance must be committed by someone who forms part of a group of at least three people, thereby ensuring that more ordinary instances of violence, accomplished by less than a crowd of three, don't rise to the level of riotous conduct. Under the fourth, the act or threat of violence must either cause

bodily injury or property damage or create a clear and present danger of the same, thereby excluding violence that entails an insignificant or remote risk of harm to others.

Altogether, these elements adequately define the range of conduct that constitutes a riot within the meaning of § 2102(a)—which, after all, differs little from definitions that courts have upheld under similar statutes. *See Matthews*, 419 F.2d at 1180–82 (finding "scant room . . . for mistaking the conduct contemplated by" the District of Columbia's anti-riot statute, which, as noted, defines a "riot" in similar terms); *State v. Beasley*, 317 So.2d 750, 752–53 (Fla. 1975) (rejecting vagueness challenge to Florida statute incorporating common law definition of a riot to mean "a tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent, either in executing a lawful private enterprise in a violent and turbulent manner . . . or in executing an unlawful enterprise in a violent and turbulent manner").

The defendants fare no better in contending that § 2102(a) is rendered unduly vague by its inclusion of the clear-and-present-danger test in relation to the threat of injury posed by the core act or threat of violence. While the defendants point out that this test requires an inquiry into the "imminence and magnitude," as well as the "likelihood," of the risk of injury posed by the violence, *see Landmark Commc'ns. Inc. v. Virginia*, 435 U.S. 829, 843 (1978), they fail to show that this inquiry is any more "imprecise" than similar tests found in many "perfectly constitutional statutes," such as "serious potential risk" or "substantial risk," *see Sessions v.*

Dimaya, 138 S. Ct. 1204, 1214 (2018) (cleaned up). Indeed, even the *Brandenburg* test demands an analogous inquiry into these risk-oriented variables.

Nor is § 2102(a) unduly vague because "close cases can be envisioned" under the clear-and-present-danger test, since "[c]lose cases can be imagined under virtually any statute." *See Williams*, 553 U.S. at 305–06. For that reason, the vagueness doctrine demands only that we be able to discern what *sort* of "incriminating fact" must be established, even if it may prove difficult to determine whether that fact "has been proved" in some cases. *Id*. at 306. The clear-and-present-danger test satisfies this demand.

The defendants' next attack on § 2102(a), which focuses on the requirement that any threat of violence undergirding a riot be capable of immediate execution, is similarly misguided. As with the clear-and-present-danger inquiry, determining whether a particular threat of violence could have been carried out forthwith entails the same sort of "abstract assessment[s] of chance," Defs.' Br. at 33, that the law asks judges to make all the time.

The defendants' reliance on *Johnson v. United States*, 135 S. Ct. 2551 (2015) is therefore misplaced. In *Johnson*, the Supreme Court found the residual clause of the Armed Career Criminal Act void for vagueness *not* because it required a "judicial assessment of risk," but rather because it tethered such assessment "to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 2557; *accord Dimaya*, 138 S. Ct. at 1213–14. But where, as here, the relevant qualitative standard is assessed by reference to "real-world

conduct," the vagueness doctrine takes no offense. *Johnson*, 135 S. Ct. at 2561; *accord Dimaya*, 128 S. Ct. at 1215–16.

The defendants next assert that the same three verbs under § 2101(a)(2) that we discussed earlier—"to organize, promote, [or] encourage," are unduly vague as well. Having already excised the latter two of these verbs, we consider only "organize." And here, the defendants fail to demonstrate any ambiguity in this familiar term, which they themselves ask us to read (as we do) "with the plain meaning that persons of ordinary intelligence would assign" to it. Defs.' Br. at 35. Instead, the defendants largely repackage their overbreadth argument, which we have rejected on the ground that speech tending to organize a riot doesn't constitute protected advocacy.

Finally, the defendants posit that the Anti-Riot Act violates due process because it doesn't require the second overt act (the one beyond traveling in or using a facility of interstate or foreign commerce) to concur in time with specific intent to carry out a purpose set forth under § 2101(a)(1)–(4). But we agree with the government, as well as three other courts, that the statute is best read to require both overt acts to coincide with the same specific intent. See *United States v. Markiewicz*, 978 F.2d 786, 813 (2d Cir. 1992); *Dellinger*, 472 F.2d at 393; *Hoffman*, 334 F. Supp. at 509. Indeed, as the element itself provides, the act must be performed "*for any purpose specified*" under § 2101(a)(1)–(4). 18 U.S.C. § 2101(a) (emphasis added). We thus have little trouble concluding that this element must be accomplished with specific intent to achieve one of those purposes.

V.

So far, we have held that the Anti-Riot Act is substantially overbroad to the extent that it proscribes the attempt to engage in speech tending to "encourage" or "promote" a riot under § 2101(a)(2), as well as speech "urging" others to riot or "involving" mere advocacy of violence under § 2102(b). But we have also held that the statute is severable to the same partial extent, allowing the remainder to be left intact. Finally, we have held that the statute isn't void for vagueness. All that remains is to consider the appropriate disposition of the defendants' convictions. That disposition, we hold, is to affirm.

In arguing that their convictions must be vacated even though the Anti-Riot Act remains largely operative, the defendants assert that the indictment and, by extension, their guilty pleas (which invoke "Count 1 of the Indictment," J.A. 238, 250) are premised on a conspiracy to violate the statute as a whole, without specifying which of its alternative purposes they conspired to (and in fact did) carry out. But it's well-established that a conviction under a statute that "specifies several alternative ways" to commit an offense "will stand" as long as the record evidence suffices to prove "one or more of the means of commission," even if the indictment alleged "the several ways" in conjunction. *United States v. Brandon*, 298 F.3d 307, 314 (4th Cir. 2002) (cleaned up); accord *Turner v. United States*, 396 U.S. 398, 420 (1970); *cf. Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (describing such statutes).

That's essentially the situation we face here, except that a few of the Anti-Riot Act's alternative purposes happen to be overbroad and, thus, invalid. And because the record, as we explain, establishes conclusively that the defendants' substantive offense conduct falls under the statute's surviving purposes, their convictions must stand.

Before accepting the defendants' guilty pleas, the district court was required to "determine that there [was] a factual basis" for them, Fed. R. Crim. P. 11(b)(3), which it did by accepting the defendants' respective Statements of Offense. In those Statements, the defendants stipulated that the substantive offense conduct underlying their respective conspiracy convictions consists (beyond such overt acts as traveling to rallies through interstate commerce, conducting combat training, and buying supplies) of engaging "in violent confrontations," J.A. 227, which is to say "physical conflict," J.A. 232, with counter-protestors at each of the three rallies discussed above. Specifically, the defendants admitted to having each (as part of an assemblage of three or more) "personally committed multiple violent acts"—including but not limited to pushing, punching, kicking, choking, head-butting, and otherwise assaulting numerous individuals, and none of which "were in self-defense"—in Huntington Beach, Berkeley, and Charlottesville. J.A. 231, 236.

Such substantive offense conduct qualifies manifestly as "commit[ting] any act of violence in furtherance of a riot" within the ordinary meaning of § 2101(a)(3), as well "participat[ing] in" and "carry[ing] on a riot" within the ordinary meaning of § 2101(a)(2)—three wholly conduct-oriented

purposes left unscathed by our partial invalidation of the statute. By the same token, the defendants' offenses have manifestly nothing to do with speech tending to encourage, promote, or urge others to riot; mere advocacy of violence; or any other First Amendment activity; as the district court properly found. *See Daley*, 378 F. Supp. 3d at 559 (noting that the First Amendment doesn't "immunize[] violence," even "within the broader context of a political demonstration"). The defendants muster no argument to the contrary.

Moreover, as noted, the defendants have necessarily conceded—consistent with the "usual judicial practice" in overbreadth cases, *see Fox*, 492 U.S. at 484–85; *Preston*, 660 F.3d at 737–38—that the Anti-Riot Act poses no constitutional concern as applied to their own conduct. And indeed, none of the defendants' overbreadth theories, including those we have rejected, provide any basis for an as-applied challenge on the facts to which they have stipulated. It follows that anything less than facial invalidation of the statute affords the defendants no relief from their convictions. *Cf. Regan*, 468 U.S. at 659 (holding that 18 U.S.C. § 504 as partially invalidated wasn't unconstitutional "as applied" to the challenger, whose offense conduct qualified under "the remaining portions of the statute").

* * *

For the foregoing reasons, the judgments of the district court are

AFFIRMED.

FILED: August 24, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4550(L)
(3:18-cr-00025-NKM-JCH-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL PAUL MISELIS

Defendant - Appellant

THE FREE EXPRESSION FOUNDATION, INC.

Amicus Supporting Appellant

No. 19-4551
(3:18-cr-00025-NKM-JCH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BENJAMIN DRAKE DALEY

Defendant - Appellant

THE FREE EXPRESSION FOUNDATION, INC.

Amicus Supporting Appellant

J U D G M E N T

In accordance with the decision of this court, the judgments of the district court are affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

ENTERED: July 26, 2019

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA

vs.

MICHAEL PAUL MISELIS

JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW318CR000025-002
Case Number:
USM Number: 77038112

Warren Cox, Esq.
Defendant's Attorneys

THE DEFENDANT

■ Pleaded guilty to count(s) one

☐ Pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ Was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 USC 371	Conspiracy to Riot	10/10/2018	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.

■ Count(s) two ■ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

July 19, 2019
Date of Imposition of Judgment

/s/
Signature of Judge

NORMAN K. MOON,
SENIOR U.S. DISTRICT JUDGE
Name and Title of Judge

7/26/2019
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of Twenty-seven (27) months;

■ The court makes the following recommendations to the Bureau of Prisons: The defendant be designated at Dublin, California, as close to his home in Stockton, California as possible.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on: _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Two (2) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. ☐ you must make restitution in accordance with sections 3663 and 3663A, or any other statue authorizing a sentence of restitution. (*check if applicable*)
3. You must not unlawfully possess a controlled substance.
4. You must refrain from any unlaswful use of a controlled substance. You must submit ot one drug test iwthin 15 days of release from improsionment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

5. ■ You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. §20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the

location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)

7. ☐ You must participate in an approved program of domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or job responsibilities), you must notify the probation officer at least 10 days before the change. If

notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person

and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall pay any special assessment, fine, and/or restitution that is imposed by this judgment.

2. The defendant shall provide the probation officer with access to any requested financial information.

3. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

4. The defendant shall participate in a program oftestingandtreatmentforsubstanceabuse,asapproved bytheprobationofficer, until such time as the defendant has satisfied all requirements of the program.

5. The defendant shall reside in a residence free of firearms, ammunition, destructive devices, dangerous weapons.

6. The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms and illegal controlled substances.

7. The defendant shall submit to warrantless search and seizure of person and property as directed by the probation office or other law enforcement officer, whenever such officer has reasonable suspicion that the defendant is engaged in criminal activity.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**JVTA Assessment***	**Fine**	**Restitution**
TOTALS	$100.00		$	$

☐ The determination of restitution is deferred until _____ An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority

order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
.			1
			1
TOTALS	$	$	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the

☐ fine ☐ restitution.

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ■ Lump sum payment of $100.00 immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (weekly, monthly, quarterly) installments of $_____ over a period of _____ (*e.g., months or years*), to commence_____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal _____installments of no less than _____to commence (*e.g., 30 or 60 days*) *days* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within (*e.g., 30 or 60 days*) after release from imprisonment. The court will set

the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ During the term of imprisonment, payment in equal_____ (e.g., weekly, monthly, quarterly) installments of $_____, or _____%of the defendant's income, whichever is. greater _____to commence _____ (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____during the term of supervised release, to commence_____ (e.g., 30 or 60 days) after release from imprisonment

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, 210 Franklin Rd., Suite 540, Roanoke, Virginia 24011, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Any obligation to pay restitution is joint and several with other defendants, if any, against whom an order of restitution has been or will be entered.

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,

(5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

FILED: October 5, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4550(L)
(3:18-cr-00025-NKM-JCH-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL PAUL MISELIS

Defendant - Appellant

THE FREE EXPRESSION FOUNDATION, INC.

Amicus Supporting Appellant

No. 19-4551
(3:18-cr-00025-NKM-JCH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BENJAMIN DRAKE DALEY

Defendant - Appellant

THE FREE EXPRESSION FOUNDATION, INC.

Amicus Supporting Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Diaz, and Judge Rushing.

For the Court

/s/ Patricia S. Connor, Clerk