No. 20-1241

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

BRIEF OF THE FREE EXPRESSION FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Free Expression Foundation, Inc. ("FEF") respectfully submits this brief as amicus curiae in support of the petition for writ of certiorari filed by Michael Paul Miselis.[1]

STATEMENT OF INTEREST

The Free Expression Foundation, Inc. is a fledgling 501c3 nonprofit dedicated to providing legal support for persons who have suffered legal, financial, or social harm as a result of the exercise or attempted exercise of their rights of free expression and assembly, including their rights under the First Amendment. Aspiring to protect the "uninhibited, robust, and wide open" debate on public issues that seminal First Amendment jurisprudence has articulated, FEF is particularly concerned about statutes, such as the Anti-Riot Act, that jeopardize both free speech and freedom of assembly.

FEF's commitment to the First Amendment is based on the belief that open and robust debate is essential to the health and survival of our democratic processes. FEF advocates that the federal courts are uniquely equipped and tasked to protect First Amendment freedoms. As a corollary to this, members of the legal profession have a special responsibility to assist the courts in defending unpopular viewpoints.

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[1]In accordance with Supreme Court Rule 37.6, FEF affirms that no counsel for a party authored FEF's amicus brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. In accordance with Supreme Court Rule 37.2(a), FEF's Counsel of Record provided Counsel of Record for all parties notice of FEF's intention to file its amicus brief more than 10 days prior to FEF's deadline to file its brief. All parties consented to FEF's filing.

FEF's mission is to be a true friend of the court by presenting First Amendment issues and arguments that are broader than may be presented by the parties. In this case in particular, FEF believes its amicus brief provides perspectives on the Anti-Riot Act different from those set forth in the briefs of the parties.

FEF's amicus briefs on the Anti-Riot Act were accepted by the Fourth Circuit in the case below; by the District Court in *United States v. Rundo*, --F. Supp. 3d--, 2019 WL 11779228 (C.D. Cal. June 3, 2019); and by the Ninth Circuit in *United States v. Rundo, et al.*, Case No. 19-50189.

SUMMARY OF ARGUMENTS AND STATEMENT OF THE CASE

The Anti-Riot Act – 18 U.S.C. §§ 2101-02 – is replete with nearly every flaw a statute should not contain, especially one that encroaches so perilously on core First Amendment freedoms. The statute is illogical – for example, by using a double negative in § 2102(b), it affirmatively criminalizes mere advocacy of violence, running afoul of such advocacy's well-established protected status. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). The statute improperly incorporates First Amendment doctrine that the Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), repudiated shortly after the Anti-Riot Act was first enacted, namely the clear and present danger doctrine. *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 ...."). And, as explained by the petitioners in this case, the legislative history of the

statute shows clearly that it was designed (and later used by the government) for the unconstitutional purpose of suppressing the expression of ideas that might foment later violence, not punishing the acts of violence themselves.

The Fourth Circuit in the case below – inadequately, FEF submits – addressed the flaws cited above. There is, however, another grave fault in the statute that neither the court below, nor any other court, nor the parties have addressed, namely the effect, in light of 1 U.S.C. § 112, of a 1996 amendment to the statute. As explained in this amicus brief, § 112 is foundational to our legal system because it provides to the courts, the public, and the Department of Justice the exact and controlling language of our federal laws. In light of the 1996 amendment to the statute, which is set forth in the Statutes at Large, the statute no longer states the elements of a crime. The Department of Justice, however, ignoring the impact of the 1996 amendment and interpreting the statute in a manner at odds with its plain language as stated in the Statutes at Large, has prosecuted and continues to prosecute persons based on the Department's own interpretation. The Department of Justice has essentially usurped a legislative function, in violation of Article I, Section 1 of the Constitution, which reserves such legislative power to Congress. Moreover, the Department of Justice has improperly assumed the power to apply its interpretation of the statute retroactively.

a) *Statutory Background*. The Anti-Riot Act, passed in 1968, has been amended three times by Congress. The third and last amendment was effected by the passage of Public Law 104-294, the Economic Espionage Act of 1996, signed into law

by President Bill Clinton on October 11, 1996.[2] The language of § 2101, as amended by Public Law 104-294, was and remains published in the United States Statutes at Large.

As published in the Statutes at Large, § 2101 creates an inchoate crime[3] prohibiting 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. This travel or use with intent is coupled with the requirement of the performance or attempted performance of an "overt act." The required overt act is described as "any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph." There are, however, no subparagraphs (A), (B), (C), or (D) in § 2101 as published. Thus, while an "other overt act" is required, the purpose of the "other overt act" is not given.

While one can speculate on the reasons for the third amendment to the statute, the language is unambiguous and precise. As published since 1996, § 2101 does not provide a complete legal description of a crime.

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[2] Public Law 104-294 (page 110 STAT. 3500 (h)) reads:
"Section 2101(a) of title 18, United States Code, is amended by striking (1) and by redesignating subparagraphs (A) through (D) as paragraphs (1) through (4), respectively." The extensive procedures of enactment are recorded at https://www.congress.gov/bill/104th-congress/house-bill/3723/actions.

[3] Generally, inchoate offenses require 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 v. United States*, 522 U.S. 52, 65 (1977).

b) *Brief History of the Government's Use of the Anti-Riot Act*. Section 2101 was used in four prosecutions between 1968 and 1990.[4] For 20 years after the enactment of the third amendment to the statute, there were no known prosecutions. In response to widespread outrage at the Charlottesville riot (August 11-12, 2017), the Justice Department revived the Anti-Riot Act in its pre-1996 form. Indictments were issued against eight alleged members of the Rise Above Movement ("RAM"), four allegedly involved in the events at Charlottesville and four allegedly involved in a riot in Berkeley, California in March 2017.

The RAM Indictments accused each defendant of holding an intent to aid and abet, incite, organize, promote, or encourage a riot while using facilities of interstate commerce. The RAM Indictments alleged various overt acts by defendants, such as a conference call, posting a news article on Facebook, and use of a credit card, all occurring in 2016 or 2017. *See generally United States v. Rundo*, --F. Supp. 3d--, 2019 WL 11779228 (C.D. Cal. June 3, 2019) (discussing indictments).

The government first raised the doctrine of Scrivener's Error as justification for its interpretation of § 2101 on December 12, 2019: "The reference to nonexistent subparagraphs (A), (B), (C), or (D) is a scrivener's error—apparently resulting from a

[4] The cases relied upon by the government to support its use of § 2101 all predate the 1996 amendment of § 2101: *In Re Shead*, 302 F. Supp. 560 (N.D. Cal. 1969), *Nat'l Mobilization Comm. To End War in Viet Nam v. Foran*, 411 F.2d 934 (7th Cir. 1969), *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *United States v. Hoffman*, 334 F. Supp. 504 (D.D.C. 1971), and *United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992).

well-meaning but poorly executed effort to fix a prior clerical error in the statute. It should instead be read as referring to paragraphs (1) through (4) of subsection (a)." Government's Opening Brief in *United States v. Rundo, et al.*, No. 19-50189 (9th Circuit) at page 13 (available on PACER as Item 11 on Docket).

On August 24, 2020 the Fourth Circuit in this case found that 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), 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). The court, however, severed key elements of the statute such that the convictions of the RAM defendants could be upheld.

On March 4, 2021 the Ninth Circuit in the parallel RAM case held that the Act by prohibiting protected speech tending to "organize," "promote" or "encourage" a riot and by expanding that prohibition to "urging" a riot and to mere advocacy, criminalizes a substantial amount of protected speech. The Ninth Circuit, however, also severed key elements of the statute such that the district court's dismissal of the indictment on grounds of the statute's unconstitutionality was reversed and the defendants again became vulnerable to prosecution under the statute.

There are thus currently four versions of § 2101 now circulating in the United States, namely:

- The pre-1996 version used by the Government in the RAM prosecutions;
- the severed version from the Fourth Circuit opinion;

- the severed version from the Ninth Circuit opinion; and
- the legal evidence of § 2101 as published in the Statutes at Large.

ARGUMENTS / REASONS TO GRANT PETITION

The actions of the Department of Justice in this prosecution raise Constitutional and statutory questions that should not be ignored.

I. The Department of Justice Does Not Have the Power to Ignore 1 U.S.C. § 112 and Create a Criminal Law When None Is Stated in the Statutes at Large.

a) The Department of Justice May Not Ignore 1 U.S.C. § 112.

Section 112 provides, in relevant part: "The United States Statutes at Large shall be legal evidence of laws…therein contained, in all the courts of the United States." Section 112 is foundational to our legal system because it provides to the courts, the public, and the Department of Justice the exact and controlling language of our federal laws. Its importance has been affirmed by this Court. *United States National Bank v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 448 (1993). Section 112 has not previously been brought to the attention of any court reviewing the Anti-Riot Act.

The Department of Justice has made clear that it regards itself as free to interpret § 2101 in a manner at odds with the plain language of that statute as set forth in the Statutes at Large, and to pursue prosecutions based on its interpretation. For example, in a letter to the Honorable Nancy Pelosi, Speaker of the U.S. House of Representatives, the Justice Department recently reaffirmed its independence to decide the meaning of § 2101:

> 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.

Letter dated February 18, 2021, Elizabeth B. Prelogar, Acting Solicitor General, to The Honorable Nancy Pelosi, Speaker of the U.S. House of Representatives (available at https://www.justice.gov/oip/foia-library/osg530d-letters/us_v_miselis_530d/download; see Petitioner's brief at 6). But the Department of Justice has no such power or authority. Granting the Justice Department power to construe § 2101 contrary to the language as published in the Statutes at Large essentially gives the Justice Department power to legislate. That is a violation of Article I Section 1 of the Constitution, which reserves all legislative power to Congress. The issue is simple: either the Justice Department must follow 1 U.S.C. § 112 and apply § 2101 as published in the Statutes at Large or it must be given the power to independently create criminal laws where no crime is described and to ignore language in laws that stands in its way. The first path is the only Constitutional and proper one.

b) The Department of Justice Does Not Have the Power to Retroactively Apply Its Interpretation of § 2101 to the Anti-Riot Act.

Moreover, on the facts of this case, the Department of Justice is applying its interpretation of "overt act" to acts done by the RAM defendants prior to the Department's announcement of its right to use the Scrivener's Doctrine. This retroactive application of the Justice Department's construction of § 2101 violates Article I, Section 9, Clause 3 of the Constitution prohibiting ex post facto laws. The

framework for the analysis of an ex post facto law is well established. If the intention of the law is to impose punishment, as the Anti-Riot Act obviously does, that ends the inquiry. *See Smith v. Doe*, 538 U.S. 84, 92 (2003).

Further, the mélange of contradictory interpretations of the Anti-Riot Act that have emerged from the Fourth Circuit, Seventh Circuit, Ninth Circuit, and Department of Justice, pursuant to which the RAM Defendants were indicted and charged for alleged overt acts that are not crimes in the Fourth and Ninth Circuits today nor when the indictments were issued, violates basic principles of Due Process. *See Rogers v. Tennessee*, 532 U.S. 451, 457-58 (2001) (recognizing the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime . . . Deprivation of the right to fair warning . . . can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face"); *see also id.* at 458 (recognizing that a construction of a statute that is clearly at odds with its plain language violates Due Process) and at 467-68 (Justice Scalia dissent) ("The Court today approves the conviction of a man for a murder that was not murder (but only manslaughter) when the offense was committed. It thus violates a principle-encapsulated in the maxim *nulla poena sine lege*-which 'dates from the ancient Greeks' and has been described as one of the most 'widely held value-judgment[s] in the entire history of human thought.'").

II. This Case Is a Unique Vehicle for Review of 1 U.S.C. § 112.

Because of what the government has called "the negligence of Congress," a highly unusual situation has arisen in which a criminal law was amended so that no crime is completely described. This case would be the first to consider the importance

of 1 U.S.C. § 112 in such a context. This case would also be the first to consider restrictions on the Justice Department in applying the doctrine of Scrivener's Error to a criminal law where the law as published does not describe all elements of a crime.

CONCLUSION

Petitioners have presented compelling reasons, firmly anchored in the First Amendment, for granting a Writ of Certiorari in this case. FEF submits that there are also additional powerful Constitutional and statutory reasons for the Court to consider this case. There is a strong tendency to wish to aid the Justice Department in what it calls its task of "investigating and prosecuting individuals and groups who, like the defendants in this case, pose a threat to public safety and national security." This tendency is particularly strong in times of social turmoil, such as the nation is now experiencing**.** The easy solution is to ignore 1 U.S.C. § 112. FEF urges that the policies served by § 112, of securing a source of published law on which the public, the courts, and the prosecutors can and must rely, far outweigh any importance of the Scrivener's Doctrine.

Ignoring one statute (§ 112) in order to uphold another statute (§ 2101) is an unconstitutional choice. The Court should underscore the wrongness of this choice by means of this case. For these reasons Amicus Free Expression Foundation, Inc. respectfully asks the Court to grant a Writ of Certiorari, as Petitioners request.

Respectfully submitted,

/s/ Glen K. Allen

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