NO. _____

In The Supreme Court of the United States

BENJAMIN DRAKE DALEY,

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

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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 Benjamin Daley who was a criminal defendant in the court below.

RELATED PROCEEDINGS

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 Michael Miselis who has retained 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)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Benjamin Daley 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 56a. 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 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

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[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

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 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

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[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.

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

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 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

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[6] H.R. 2516, 90th Cong., Amdt. No. 589.
[7] 114 Cong. Rec. S2225 (March 5, 1968)

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 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

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[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"

[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.*

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 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

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

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

[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).

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 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. 1a. 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. 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. 4a. 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,

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[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).

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

ruling the law was constitutional, the petitioner below pled guilty to Count One of the indictment, conspiracy to violate the Act. App. 7a. 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. 45a. 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. 45a-46a.

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. 1a. 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. 23a-26a. 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. 29a-30a. 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. 37a.

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. 38a. 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. 20a. 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. 21a. *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. 30a.

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. 45a.

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."

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[17] *United States v. Daley*, No. 3:18-cr-25, dkt #206 (W.D. Va.) (Transcript of Guilty Plea hearing)

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*, 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

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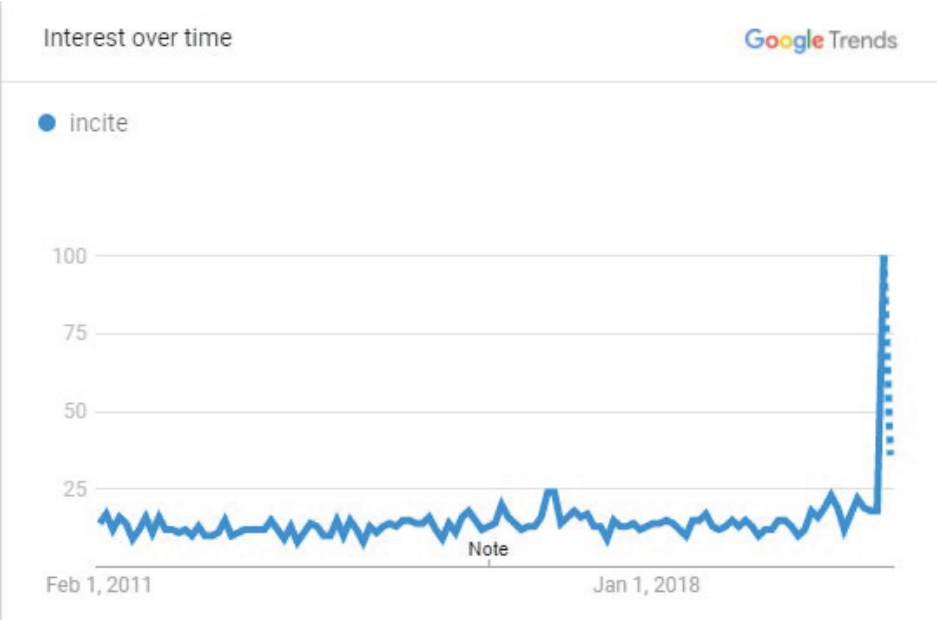
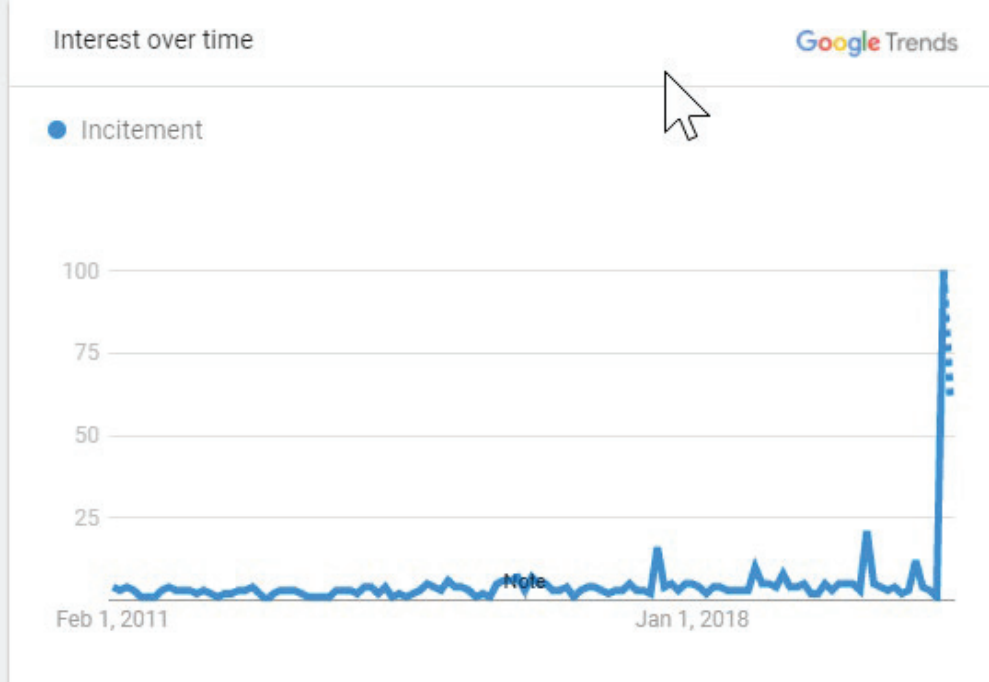
[18] The Act itself contains an express requirement that the Department of Justice "shall proceed as speedily as possible . . .with any appeal which may lie from any decision adverse to the Government resulting from such prosecution" under the Act. 18 U.S.C. § 2101(d).

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

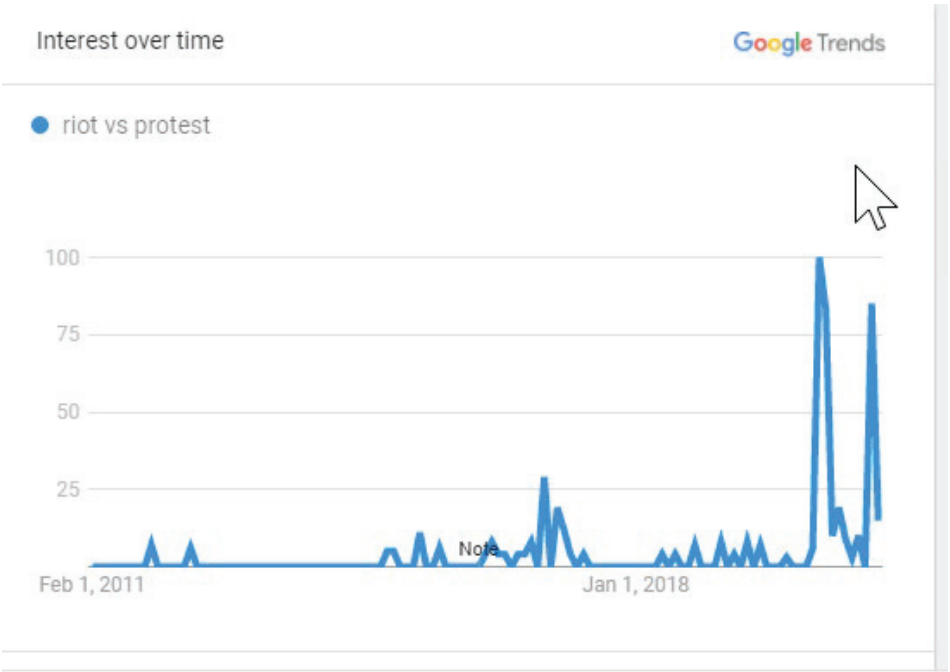
living in the United States in the last year intuitively knows that these topics have been the source of national interest. Google Trends data supports the same, reflecting internet search queries within the United States for the terms "incite" (the first graph) and "incitement" (the second graph) over the last 10 years:[20]

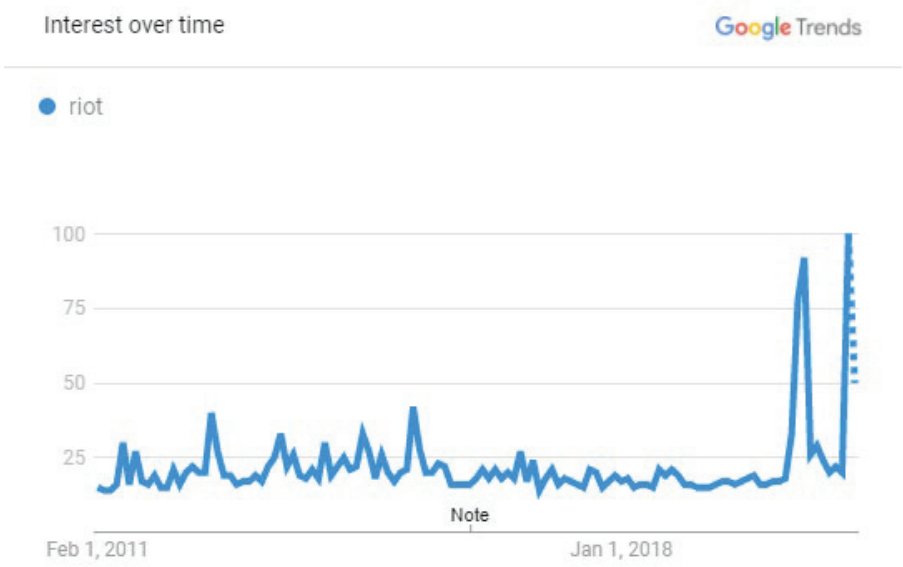


[20] Google Trends data may be generated at https://trends.google.com/trends/?geo=US. According to Google, the numbers "represent search interest relative to the highest point on the chart for the given region and time. A value of 100 is the peak of popularity for the term. A value of 50 means that the 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 *4. Prosecutions under the Act for internet speech of this kind are no longer mere hypotheticals.[23]

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[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/

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

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,

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