In The

Supreme Court of the United States

BENJAMIN 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

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SUPPLEMENTAL BRIEF OF PETITIONER

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Dated March 16, 2021

TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.1(8), Petitioner Benjamin Daley alerts the Court to the Ninth Circuit Court of Appeals' recent decision in *United States v. Rundo*, __F.3d__, 2021 WL 821938 (9th Cir. March 4, 2021), issued on the same day the petition for writ of certiorari was filed in this case, as well as a decision from the District of Minnesota, issued on March 12, 2021, *United States v. Rupert*, No. 20-cr-104, 2021 WL 942101 (D. Minn. March 12, 2021). In *Rundo*, the Ninth Circuit deepened the three-way circuit split on the constitutionality of the Anti-Riot Act ("Act"). And the district court opinion from Minnesota, in a prosecution related to riots after the death of George Floyd, demonstrates continuing, and developing, confusion within the lower courts.

The Ninth Circuit agreed with the Fourth Circuit that the Act criminalized a substantial amount of protected speech. *Id.* at *8, citing *United States v. Miselis*, 972 F.3d 518, 540-41 (4th Cir. 2020). The Ninth Circuit also agreed that the unconstitutional portions of the Act were severable. *Rundo*, 2021 WL 821938 at *8 citing *Miselis*, 972 F.3d at 543-44. But the Ninth Circuit departed from the Fourth Circuit in two significant ways discussed in detail below. First, the Ninth Circuit adopted "the Seventh Circuit's approach to the 'overt act' provisions," disagreeing with the Fourth Circuit. *Rundo*, 2021 WL 821938 at *4. Second, the Ninth Circuit held that the verb "organize" is overbroad, in addition to the verbs "urge," "encourage," and "promote." *Id.* at *5.

With respect to the "overt act" provision, the Ninth Circuit rejected the argument that the Act's overt act requirement was "too far removed in time from any riot to satisfy *Brandenburg*'s imminence requirement" because "the Act is not a conspiracy statute." *Id.* at *4. Instead, the court reviewed the two options set out by the Seventh Circuit: (1) interpret the "for any purpose specified" language to mean that only a "step forward" towards one of the prohibited acts was required; or (2) interpret "overt act" to require the actual completion of one of the listed prohibited acts. *Id.* quoting *United States v. Dellinger*, 472 F.3d, 340, 361-62 (7th Cir. 1972). The four listed acts include:

> (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;

21 U.S.C. § 2101. "In other words," *Rundo* explained, the "overt act" requirement "could be construed to mean the acts in subparagraphs (1)–(4) are goals, or are themselves the required overt acts." *Rundo,* 2021 WL 821938 at *4. The Ninth Circuit explained that the first option—the goals option— "does not require 'an adequate relation' between speech and action," whereas the "second closely connects speech and actions such that any First Amendment concerns would arise from the conduct criminalized" in the subparagraphs "rather than the overt act provision itself." *Id.*

The Ninth Circuit joined the Seventh Circuit in holding that "the overt act requirement refers to acts that fulfill the elements themselves, and not mere steps toward, or related to, one or more of those requirements." *Id.; see United States v. Dellinger*, 472 F.2d 450, 361-62 (7th Cir. 1972). Therefore, "*Brandenburg*'s imminence requirement is not violated." *Rundo*, 2021 WL 821938 at *4. In so holding, the Ninth Circuit expressly noted disagreement "with the Fourth Circuit's conclusion that the 'overt act' provision in § 2101(a) indicates the Act is an attempt statute." *Id.* at n.8. And further noted that "[b]y analogizing to an attempt statute, the Fourth Circuit sidesteps—and ultimately fails to address—the need to construe the 'overt act' provision in such a way that satisfies *Brandenburg*'s imminence requirement." *Id.* Indeed, the Ninth Circuit, like the Seventh Circuit, believed that interpreting the overt act provision as anything short of requiring completed acts would not require an adequate connection between speech and action – for the entire statute. *Id.; see Dellinger*, 472 F.2d 450 at 62 ("[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").

In analyzing the individual completed acts required by the statute, the Ninth Circuit agreed with the Fourth Circuit that "urging," "encouraging," and "promoting" were protected First Amendment activities. Disagreeing with the Fourth Circuit, and over a partial dissent, the majority in *Rundo* also found

"organize" was similarly overbroad. *Rundo*, 2021 WL 821938 at *5. In particular, the Ninth Circuit found relevant that the speaker in *Brandenburg* stated "[t]his is an organizers' meeting." *Id.* quoting *Brandenburg v. Ohio*, 395 U.S. 444, 445-46 (1969); *compare Miselis*, 972 F.3d at 337 (holding "speech tending to 'organize' others to riot consists *not* of mere abstract advocacy, but rather of concrete aid" and "has crossed the line dividing abstract idea from material reality").

Ultimately the Ninth Circuit joined the Fourth Circuit in concluding that the overbroad aspects of the statute were severable and that "Congress would prefer severance over complete invalidation" without considering Congress's actual preferences as set out in the Act's legislative history. *Rundo*, 2021 WL 821938 at *8.

In *Rupert*, the district court in Minnesota agreed with *Miselis* and *Rundo* that "encouraging" and "promoting" were overbroad. Notably, the government conceded in this case that *Miselis* "governs the scope of Title 18, United States Code, Section 2101(a)(2)."[1] Of course the Solicitor General took the opposite position six days later—"[t]he 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"—in its letter explaining the decision not to seek certiorari in this case.[2] The *Rupert* court then noted the circuit disagreement as to "organizing" and

1 Government's Opposition to Defendant's Objections to Report & Recommendation, *United States v. Rupert*, No. 20-104, dkt 78 (D. Minn. Feb. 12, 2021) at p. 1, n. 1.

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-

sided with the Fourth Circuit. This court never reached the question of how to interpret the Act's "overt act" requirement.

As a result, the Act uniformly requires that a defendant travel in interstate commerce or use the instrumentalities of interstate commerce with a certain intent. Beyond this agreed threshold requirement:

- In the Seventh Circuit you can be prosecuted if you had the intent to incite, organize, promote, encourage, urge, instigate, participate in, or carry on a riot, or to commit any act of violence in furtherance of a riot – as long as you later completed one of those acts.
- In the Ninth Circuit, you can be prosecuted if you had the intent to incite, instigate, participate in, or carry on a riot, or commit any act of violence in furtherance of a riot – so long as you later completed one of those acts.
- In the Fourth Circuit, you can be prosecuted if you had the intent to incite, organize, instigate, participate in, or carry on a riot, or commit any act of violence in furtherance of a riot – if you merely *attempted* to do any one of those acts.

This law is so difficult to interpret and apply that neither the decision in the Ninth Circuit nor the Seventh Circuit was unanimous. Without this Court's intervention, the Seventh Circuit will continue to apply the Act in ways the Fourth and Ninth Circuits have held is unconstitutional. And the Fourth Circuit will apply the Act as an attempt statute – something the Ninth and Seventh Circuits have said is unconstitutional.

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Respectfully submitted,

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