Nos. 20-1241 and 20-7377

In The
Supreme Court of the United States

MICHAEL PAUL MISELIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Average citizens who want to protest and organize rallies or public demonstrations of any kind currently do so under a cloud of uncertainty about what may or may not be criminal behavior under the Anti-Riot Act ("Act"). Circuits disagree on how to interpret this constitutionally-dubious law, yet prosecutions under it have only increased. In a time of widespread social unrest, it is difficult to predict whether a peaceable gathering will turn into a violent protest. It is even more difficult to determine whether a gathering will include one or more people who threaten violence to person or property. As a result, protected expression and speech is currently chilled. The overbreadth of the Act creates a particular tension with the Second Amendment. The Constitution affords the right to both assemble and to bear arms. The combination will always result in the presence of a group with the "ability of immediate execution" of a threat of violence to person or property exists. Or a "riot" under 18 U.S.C. § 2102(a).

The government's brief in opposition does not dispute the recently renewed national importance of the sweeping constitutional issues encompassed in the Act. Or that the circuits have split three ways in trying to interpret it. Instead, the government presupposes that Congress, limited to its enumerated powers, intended to enact what amounts to a federal assault statute. That is wrong as a matter of history and statutory interpretation; partial invalidation is a flawed remedy; and this Court should grant certiorari just it would when the government (ordinarily) seeks it whenever a federal appeals court invalidates any part of a federal statute on constitutional grounds.

The Fourth Circuit's interpretation of the Act places at risk the person who sends an email or text message to organize any potentially divisive gathering of three or more people. Those who "attempt" such organization and take "any overt act" towards the same are likewise at risk. This standard differs from those separately established in the Seventh and Ninth Circuits – although both agree that the Fourth Circuit's interpretation of the "any overt act" requirement dooms the entire law.

The patchwork of decisions from the Circuits will chill legitimate protest. This suppression of protected speech and expression strikes at the heart of why this Court's precedents authorize facial challenges on First Amendment overbreadth grounds and why litigants, such as the petitioners, can rely entirely on the rights of people not before the Court. And it is why the government's argument that the petitioners' particular conduct would be illegal under any circuit's interpretation is not germane. Where, by contrast, a petitioner bring a facial challenge to a state regulation that bears civil consequences, there may likely be other potential remedies to resolve issues of vagueness or overbreadth short of full invalidation. For example, a state may create exceptions or allow other opportunities for individualized review. A criminal statute, with criminal consequences, is different.

I. The (different) severed statutes in the Fourth and Ninth Circuits are judicially-created laws that Congress would not have passed.

The government, like the Fourth and Ninth Circuits, relies on a plurality opinion of this Court which affirmed a "strong presumption of severability." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350 (2020). Yet, unlike the Act at issue, the Telephone Consumer Protection Act analyzed in the *Barr* decision expressly included a severability clause. *See* 47 U.S.C. § 608.[1] A severability clause is so important because it conclusively answers the question of Congress's intent – would Congress prefer the law exist precisely as it was enacted or would Congress want any unconstitutional parts removed with a partial law to remain. Because it is such a clear indication of Congress's intent, "[w]hen Congress includes an express severability clause [ ] in the relevant statute, the judicial inquiry is straightforward." *Barr*, 140 S. Ct. at 2349; *see also Brockett v. Spokane Arcades*, 472 U.S. 491, 506-07 (1985) (partial invalidation proper when the statute contains a severability clause but constitutes impermissible rewriting of a statute when a legislature passes one where its structure is inseverable or the legislature would not have passed it if it was known that the challenged parts were unconstitutional).

The Act presents no similar "straightforward inquiry." And it is distinct from *Barr* in another

[1] In dicta, the Supreme Court's plurality opinion noted that it would have also excised the offending portion of the Telephone Consumer Protection Act under the general "presumption of severability…" *Barr*, 140 S. Ct at 2252-53.

significant way. *Barr* also explored the tradition of applying severability doctrine to an unconstitutional portion of a statute that was added on as an amendment to an otherwise long-standing, and well-operating, statutory scheme. *Id*. at 2353. In such circumstances, like that in *Barr,* this Court has treated the original, pre-amendment statute as the "valid expression of the legislative intent" and struck down only the constitutionally-offensive amendment. *Id.* (internal citation omitted). The Act, in contrast, including the differing parts that the Fourth and Ninth Circuits have struck down as substantially overbroad, was enacted as one statutory scheme. There is no pre-amendment statute that can be construed as the "valid expression of legislative intent."

In the absence of a severability clause, and without the circumstance of a pre-existing constitutional statute that was later amended, other evidence of Congressional intent would be required to conclude that Congress would prefer a severed statute. The *Barr* plurality pointed to the difficulty of gleaning Congressional intent absent a severance clause; "courts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent. In other words, absent a severability or non-severability clause, a court often cannot really know what the two Houses of Congress and the President from the time of original enactment of a law would have wanted if one provision of a law were later declared unconstitutional." *Barr*, 140 S. Ct. at 2350. In the case of the Act, however, the text of the statute and the legislative history make Congress' intent clear. Faced with this difficulty, it is unsurprising that the Fourth Circuit cited to nothing but its own assumption that

Congress would have preferred to "encompass the full scope of such unprotected speech as of 1968" and that Congress must have wanted to "enact this appropriately narrowed version of the statute" instead of "none at all." App. 43a. The Ninth Circuit skipped the question of Congressional intent all together. *United States v. Rundo,* 990 F.3d 709, 720 (9th Cir. 2021).

It is far from "evident" that the enacting Congress would have enacted a federal assault statute. It is far from "evident" that Congress would want to avoid criminalizing the advocacy of the rightness of the use of force and violence when it specifically said the opposite of that. There is no need to guess at Congress's intent in this case. Inciting a riot, organizing a riot, promoting a riot, encouraging a riot, participating in a riot, and carrying on a riot, all meant expressing beliefs about the right to commit acts of violence. Therefore, in redefining these terms to try to reconcile the Act with First Amendment speech and assembly protections, *see Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement is unprotected only if the speech is directed at producing imminent lawlessness, and likely to do so), the effect is the *opposite* of what Congress clearly intended. In 1968, Congress wanted a law that runs afoul of the First Amendment incitement test this Court outlined a year later in *Brandenburg*. The Fourth and Ninth Circuit's rewriting is the judicially forbidden rewriting of a statute "giv[ing] 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).

Relying on severability as a remedy for constitutional overbreadth in this way invokes a serious constitutional concern about the authority of courts to invoke it as doing so encroaches on the prohibition of courts rewriting the law. *Barr*, 140 S. Ct. at 2365-66 (Gorsuch, J., dissenting in part) (internal citations omitted). Unlike the cases principally relied on by the government, the Act is far more similar to the animal cruelty law this Court struck down entirely in *United States v. Stevens*, 559 U.S. 460, 481 (2010). The structure of the laws are comparable – and both are criminal laws. The proper result is to invalidate the entire statute 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 only constitutional result is complete invalidation. Instead, "[t]he series of steps" that the Fourth Circuit undertook to only partially invalidate the Act "is troubling still for another reason…", because the government admittedly does not "agree[] with the [Fourth Circuit's] interpretation [of the Act] it wants [this Court] to consider." *Citizens United v. FEC*, 558 U.S. 310, 327-29 (2010); *see* Gov. Br. in Opposition at 9. Such a troubling position confirms that neither the Fourth Circuit nor this Court can "resolve this case on a narrower ground [than facial invalidation] without chilling political speech, speech that is central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329 (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007)).

II. The differing circuit interpretations of the overt act requirement require resolution from this Court.

The Ninth Circuit's construction of the Act depended on its threshold decision to read "overt act" as completed act. Like the Seventh Circuit before it, the Ninth Circuit recognized that huge swaths of the statute—even more than the ones already struck down—would be in peril if "overt act" meant something less than fulfillment of one of the acts in (a)(1)-(4). *See Rundo*, 990 F.3d at 716; *see also United States v. Dellinger*, 472 F.2d 340, 362 (7th Cir. 1972). If completing an overt act in furtherance of inciting a riot requires only an outward act manifesting that a riot plan is afoot, then *Brandenberg*'s imminence requirement is not met as to any of the provisions. But if the statute could be read to require a completed act of incitement or violence or participation, some of the statute's problematic features fall away.

For this reason, the Ninth Circuit ignored the text of the statute, and the settled meaning of "overt act," to avoid these constitutional problems. But this is wrong as a matter of statutory interpretation. So too did the Fourth Circuit err in reading the Act as an attempt statute. Attempt requires more than a mere overt act; it requires a substantial step. If Congress had intended an attempt statute, it would not have included this false clue. Congress certainly knows this legal term of art and how to write an attempt statute. *E.g.*, 8 U.S.C. § 1324(a)(1)(A); 18 U.S.C. § 1512(a)(2); *see also Rundo*, 990 F.3d at 716 n.8.

Today, and at the time of the drafting of the Act, conspiracy is where "overt act" most frequently

arises in federal criminal law; it is the "meaning" the phrase "convey[s] to the judicial mind." *Morissette v. United States*, 342 U.S. 246, 263 (1952). And in the common law, and in its modern association with conspiracy, the meaning is the same: an overt act need not fulfill the aspirations of the plan, so long as it is an overt manifestation of the plan.[2]

When Congress "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," it is presumed to "adopt[ ] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Id.* Thus, absent contrary instructions, "if a word is obviously transported from another legal source, . . . it brings its soil with it." *Moskal v. United States*, 498 U.S. 103, 121 (1990) (citation omitted). Here, the "soil" is the overt act's long-standing interpretation as requiring less than a completed act.

The reason the Circuits have struggled to give overt act an atextual meaning is clear: if the statute means what it says, then there are serious constitutional problems. An overt act used in its common-law sense would not come close to satisfying First Amendment requirements set out in *Brandenburg*, 395 U.S. at 444. *Brandenburg* permits

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[2] *See, e.g.,* Sir Edward Coke, Third Part of the Institute of the Laws of England 5 (1644) ("But if a man had imagined to murder, or rob another, and to that intent had become infidiator viarum, and assaulted him, though he killed him not nor took any thing from him, yet was it felony for there was an overt deed"); *Rex v. Sutton*, 95 Eng. Rptr. 240, 241 (1736) ("[T]he common law takes no notice of a bare intention, as a crime, unless coupled with some overt act to shew that intention. . . . And so, an action innocent in itself may be made punishable by an intention joined to it.")

the state to prescribe incitement without running afoul of the First Amendment, but only if the speech is directed at producing imminent lawlessness, and likely to do so. *Id.* at 447. If the statute only requires an overt act in the direction of these purposes, then the portions of the statute left intact by the panel decision don't satisfy *Brandenburg*. Take, for example, the charges filed in *United States v. Peavy*, 4:20-mj-6092 (N.D. Ohio 2020), which applied a conspiracy-type overt act definition. There, the defendant posted to his Facebook page twice that his local police force was racist and called on followers to attend a rally five days in the future, where we will "endure on destruction" and launch attacks on local stores. He was arrested before the date arrived. The complaint alleged that the first post was the use of interstate commerce, and the second post was the subsequent overt act. But that conduct comes nowhere near a likelihood of imminent lawlessness. *See also United States v. Howe*, 6:20-mj-4198-MWP (W.D.N.Y 2020) (charge consisted of posting, first, a HuffPo article on the shooting of Breonna Taylor, with the words "Burn this sh— to the f—ing ground," and second, posting a Molotov cocktail recipe).[3]

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[3] The problem is also evident in the *Rundo* case. Count Two of the Indictment alleges an interstate-commerce element, use of a credit card to rent a van, plus one identified overt act which was traveling together on or about April 14, 2017, to Berkeley, California to engage in a riot. *Rundo*, 990 F.3d at 213; *see also United States v. Rundo*, 497 Supp. 3d 872, 877-78 (C.D. Cal. 2019), *overturned by Rundo*, 990 F.3d 709. Texting and renting a van, and then getting in that van may be overt acts toward participating in a violent riot. And yet, if the offense is complete once Appellees got in the van, it does not satisfy *Brandenburg*'s requirement of imminence or likelihood.

CONCLUSION

There are many ways to prosecute the purely intrastate conduct of rioting. State law covers most completed acts of riot and violence, and that's where Congress wanted such prosecutions to remain. 112 Cong. Rec. 17659 (Rep. Edwards) ("keeping of the public peace in our cities has always been traditionally a matter of local control"). And, notably, though the government has argued in the cases below that the Act is necessary to prosecute multi-jurisdictional conspiracies, counsel could not locate a single prosecution under the Act among the 525 people charged based on their presence at the U.S. Capitol on January 6th.[4] The chilling effect that the Act imposes on people wanting to put together political demonstrations and other forms of protected speech and assembly is too profound for this Court to not intervene. This Court should grant certiorari.

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[4] *See generally* The Prosecution Project, https://docs.google.com/spreadsheets/d/e/2PACX-1vQ-NJiMr9_MVxsqTSB1sYkzOZSfg59m6ViR7qvjXef3O4txMuWYxh7TlTVcQAxzduCjhLxKP3dlXUhX/pub?output=csv (last checked May 23, 2021). The only apparent January 6th-related Anti-Riot Act charge occurred far from the Capitol, in Kentucky. *United States v. Subleski*, 3:21-mj-65 (W.D. Ky. 2021).

Respectfully submitted,

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