No. 21-

IN THE
Supreme Court of the United States

ROBERT PAUL RUNDO, ROBERT BOMAN, TYLER LAUBE, AND AARON EASON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION APPENDIX

CUAUHTEMOC ORTEGA
FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA
BRIANNA MIRCHEFF*
ANDREW B. TALAI
321 East 2nd Street
Los Angeles, CA 90012
(213) 894-4784
Brianna_Mircheff@fd.org

Counsel for Robert Rundo

(Additional Counsel Listed on Next Page)

*Counsel of Record

October 8, 2021

JEROME HAIG
LAW OFFICE OF JEROME
J. HAIG
21143 Hawthorne Blvd.,
Suite 454
Torrance, CA 90503

Counsel for Tyler Laube

JOHN NEIL MCNICHOLAS
MCNICHOLAS LAW OFFICE
464 Palos Verdes Blvd.
Redondo Beach, CA 90277

Counsel for Aaron Eason

PETER CARL SWARTH
THE LAW OFFICE OF
PETER SWARTH
6520 Platt Avenue,
Suite 557
West Hills, CA 91307

Counsel for Robert Boman

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sis." *In re Edward D. Jones*, 2019 WL 5887209, at *5 (citation and internal quotation marks omitted). Whether Edward Jones did or did not conduct a suitability analysis is a question pertaining to the substance of the fiduciary duty claims. At this stage, we decide only whether the district court had jurisdiction over those claims pursuant to SLUSA. We must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party," the Plaintiffs. *Northstar*, 904 F.3d at 828 (citation and internal quotation marks omitted). Plaintiffs' Second Amended Complaint alleges that Edward Jones failed to conduct a suitability analysis. A defense that the questionnaires did amount to such an analysis might succeed at a later stage of the litigation, but not at this jurisdictional juncture.

IV. CONCLUSION

We hold that SLUSA does not bar bringing the state law fiduciary duty claims as a class action in Plaintiffs' Second Amended Complaint. Plaintiffs claim that Edward Jones breached its fiduciary duties under Missouri and California law by failing to conduct a suitability analysis. Plaintiffs allege that this lack of suitability analysis caused them to move their assets from commission-based accounts to fee-based accounts, which was not in their best financial interest as low-volume traders. Because the alleged failure to conduct a suitability analysis was not material to the decision to buy or sell any covered securities, Plaintiffs' state law claims are not based on alleged conduct that is "in connection with" the purchase or sale of any covered securities. SLUSA requires that all five elements outlined by this court be met if a class action is to be barred. *See Northstar*, 904 F.3d at 828. Because Plaintiffs' state law claims do not meet the fourth requirement,[11] we reverse the decision of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

**UNITED STATES of America,
Plaintiff-Appellant,**

v.

**Robert Paul RUNDO; Robert Boman; Tyler Laube; Aaron Eason,
Defendants-Appellees.**

No. 19-50189

United States Court of Appeals,
Ninth Circuit.

Submitted November 17, 2020
Pasadena, California

Filed March 4, 2021

Background: In prosecution for conspiracy to violate Anti-Riot Act, the United States District Court for the Central District of California, Cormac J. Carney, J., dismissed indictment, 2019 WL 11779228, and granted remaining defendant's motion to withdraw his guilty plea and to dismiss indictment, 2019 WL 11779227. Government appealed.

Holdings: The Court of Appeals held that:

11. Because we decide that Plaintiffs' claims are not "in connection with the purchase or sale of a covered security," 15 U.S.C. § 78bb(f)(1)(A), we need not analyze Plaintiffs' other contention that the lack of suitability analysis was not a misrepresentation or omission for the purposes of SLUSA. *See Banks*, 929 F.3d at 1055.

(1) Act's overt act requirement referred to acts that fulfilled elements themselves;

(2) Act's prohibition against speech that "incites" or "instigates" riot did not violate First Amendment;

(3) Act provision criminalizing speech urging riot was facially overbroad;

(4) provision criminalizing interstate or foreign travel or use of facility of interstate or foreign commerce to organize riot was facially overbroad;

(5) provision criminalizing interstate or foreign travel or use of facility of interstate or foreign commerce to "encourage" or "promote" riot was facially overbroad;

(6) "riot," as defined by Act, was not protected under First Amendment; and

(7) Act's prohibition against inciting riot did not violate heckler's veto doctrine.

Reversed and rendered.

Fernandez, Senior Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Criminal Law ⚿1139

Court of Appeals reviews de novo dismissal of indictment on the ground that underlying statute is unconstitutional.

2. Constitutional Law ⚿1801

First Amendment's guarantees of free speech and free press protect advocacy of use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. U.S. Const. Amend. 1.

3. Constitutional Law ⚿1164

Defendants alleging that statute is facially overbroad in violation of First Amendment have burden of establishing from both text language and actual fact that statute is substantially overbroad. U.S. Const. Amend. 1.

4. Constitutional Law ⚿1521

Statute is facially invalid under First Amendment if it prohibits substantial amount of protected speech. U.S. Const. Amend. 1.

5. Constitutional Law ⚿1165

Invalidation of statute for overbreadth in violation of First Amendment is strong medicine that is not to be casually employed, and thus court must construe statute as constitutional if it can reasonably do so. U.S. Const. Amend. 1.

6. Statutes ⚿1533

If statute contains constitutional infirmity, court must consider whether it is severable and, if so, invalidate only unconstitutional portions.

7. Constitutional Law ⚿990

It is court's duty to seek reasonable construction of statute that comports with constitutional requirements, so long as text is readily susceptible to such construction.

8. Riot ⚿1

Anti-Riot Act's overt act requirement referred to acts that fulfilled elements themselves, and not mere steps toward, or related to, one or more of those elements. U.S. Const. Amend. 1; 18 U.S.C.A. § 2101(a).

9. Statutes ⚿1122

When statute itself defines terms, court must apply definitions contained in statute and exclude any unstated meanings.

10. Constitutional Law ⚿1847
Riot ⚿1

Anti-Riot Act's prohibition against speech that "incites" or "instigates" riot fell within scope of First Amendment exception for advocacy of use of force di-

rected to inciting or producing imminent lawless action that is likely to incite or produce such action. U.S. Const. Amend. 1; 18 U.S.C.A. § 2101(a).

11. Constitutional Law ⚿1847
Riot ⚿1

Anti-Riot Act's provision criminalizing speech "urging" riot was facially overbroad under Brandenburg, 89 S.Ct. 1827; to "urge" meant only to advocate earnestly and with persistence, and earnestness and persistence did not suffice to transform forms of protected advocacy into speech likely to produce imminent lawless action. U.S. Const. Amend. 1; 18 U.S.C.A. § 2102(b).

12. Constitutional Law ⚿1847
Riot ⚿1

Anti-Riot Act's provision criminalizing interstate or foreign travel or use of facility of interstate or foreign commerce to "organize" riot was facially overbroad under *Brandenburg*, 89 S.Ct. 1827. U.S. Const. Amend. 1; 18 U.S.C.A. § 2101(a).

13. Constitutional Law ⚿1847
Riot ⚿1

First Amendment protected speech tending to encourage or promote riot, and thus Anti-Riot Act's provision criminalizing interstate or foreign travel or use of facility of interstate or foreign commerce to "encourage" or "promote" riot was facially overbroad under *Brandenburg*, 89 S.Ct. 1827. U.S. Const. Amend. 1; 18 U.S.C.A. § 2101(a).

14. Constitutional Law ⚿1847
Riot ⚿1

Anti-Riot Act's section providing that terms "to incite a riot," or "to organize, promote, encourage, participate in, or carry on a riot" "shall not be deemed to mean the mere oral or written advocacy of ideas or expression of belief, not involving advocacy of any act or acts of violence," meant to attach criminal consequences to advocacy of violence, and thus was overbroad under *Brandenburg*, 89 S.Ct. 1827. U.S. Const. Amend. 1; 18 U.S.C.A. § 2102(b).

15. Statutes ⚿1080

In construing statute, court must examine meaning of words to see whether one construction makes more sense than another as means of attributing rational purpose to Congress.

16. Constitutional Law ⚿1170

Acts of violence are not protected under First Amendment. U.S. Const. Amend. 1.

17. Constitutional Law ⚿1831

True threats, which involve subjective intent to threaten, are not protected by First Amendment. U.S. Const. Amend. 1.

18. Constitutional Law ⚿1847
Riot ⚿1

"Riot," as defined by Anti-Riot Act, was not protected under First Amendment; Act defined "riot" as public disturbance involving "act or acts of violence" or "threat or threats of the commission of an act or acts of violence" that presented "clear and present danger" to person or property of another individual. U.S. Const. Amend. 1; 18 U.S.C.A. § 2101(a).

19. Constitutional Law ⚿1552

"Heckler's veto" is impermissible content-based speech restriction where speaker is silenced due to audience's anticipated disorderly or violent reaction. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

20. Constitutional Law ⚿1847
Riot ⚿1

Anti-Riot Act's prohibition against inciting riot did not violate heckler's veto

doctrine; intent to engage in prohibited overt act was personal prerequisite to punishment under Act and necessarily rendered any challenge based on innocent intent wide of mark. U.S. Const. Amend. 1; 18 U.S.C.A. § 2101(a).

21. Statutes ⚿1533

When portion of statute is held to be unconstitutional, severance is remedy that must be applied when it is possible to do so.

West Codenotes

Held Unconstitutional

18 U.S.C.A. § 2101(a)(2); 18 U.S.C.A. § 2102(b)

Appeal from the United States District Court for the Central District of California, Cormac J. Carney, District Judge, Presiding, D.C. No. 2:18-cr-00759-CJC-1

Elana Shavit Artson (argued), David T. Ryan, and George E. Pence, Assistant United States Attorneys; Christopher D. Grigg, Chief, National Security Division; L. Ashley Aull, Chief, Criminal Appeals Section; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellant.

Brianna F. Mircheff (argued), Deputy Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; Peter Carl Swarth, West Hills, California; Jerome J. Haig, Torrance, California; John Neil McNicholas, Redondo Beach, California; for Defendants-Appellees.

Andrew Allen, Belvedere, California, for Amicus Curiae Free Expression Foundation Inc.

Before: FERDINAND F. FERNANDEZ and RICHARD A. PAEZ, Circuit Judges, and JON S. TIGAR,* District Judge.

Partial Concurrence and Partial Dissent by Judge FERNANDEZ

OPINION

PER CURIAM:

The United States (hereafter, "the government") appeals from the district court's dismissal of the indictment against Defendants Robert Paul Rundo, Robert Boman, Tyler Laube, and Aaron Eason.[1] The Defendants were charged with conspiracy to violate the Anti-Riot Act,[2] and Rundo, Boman, and Eason were also charged with substantively violating the Act. The district court held that the Act was unconstitutional on the basis of facial overbreadth under the First Amendment to the United States Constitution.[3] Because the Act is not facially overbroad except for severable portions, we reverse and remand.

BACKGROUND

The indictment charges that the Defendants are members of the "Rise Above Movement" or "RAM," an organization that represents itself "as a combat-ready, militant group of a new nationalist white supremacy and identity movement." RAM members post videos and pictures online of

* The Honorable Jon S. Tigar, United States District Judge for the Northern District of California, sitting by designation.

1. Hereafter, unless otherwise indicated, we will refer to them collectively as "the Defendants."

2. 18 U.S.C. §§ 2101–2102 (hereafter, "the Act").

3. The district court did not reach the Defendants' alternative arguments. Nor do we. *See, e.g., Amelkin v. McClure,* 205 F.3d 293, 296 (6th Cir. 2000).

their hand-to-hand-combat training, often interspersed with videos and pictures of their assaults on people at political events and messages supporting their white supremacist ideology.

Count One of the indictment charged the Defendants with conspiring and agreeing to riot. It alleged that in furtherance of the conspiracy, Rundo, Boman, and Eason recruited new members to join RAM, which conducted combat training to prepare them to commit violent acts at political rallies. The Defendants participated in that combat training and traveled to political rallies in Huntington Beach, California, and Berkeley, California, where they attacked people. Rundo also traveled to a political rally in San Bernardino, California, where he confronted and pursued people. For RAM recruitment purposes, Rundo and Boman posted information about those violent acts on social media.

Count Two of the indictment charged Rundo, Boman, and Eason with aiding and abetting one another in using facilities of interstate commerce (the internet, a telephone, and a credit card) with intent to riot from March 27, 2017, through April 15, 2017, and committing additional overt acts for that purpose. During that time, Eason used a credit card to rent a van and transported Rundo, Boman, and other RAM members to the Berkeley rally. Eason also used text messages to recruit individuals to attend combat training and the rally.

Laube pled guilty to the only charge against him, Count One. The remaining defendants moved to dismiss the indictment. The district court granted their motion and dismissed the indictment based on its conclusion that the Act is facially overbroad. Laube thereafter moved to withdraw his guilty plea and to dismiss the indictment against him for the same reason. The district court granted Laube's motion. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 18 U.S.C. § 3731.

[1] We review de novo the dismissal of an indictment on the ground that the underlying statute is unconstitutional. *See United States v. Afshari*, 426 F.3d 1150, 1153 (9th Cir. 2005).

DISCUSSION

[2] "[T]he constitutional guarantees of free speech and free press" protect "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969) (per curiam).[4] The Defendants contend that the Act is facially overbroad in violation of the First Amendment because it prohibits advocacy that does not incite an imminent riot.

[3–6] The Defendants have the burden of establishing from both "the text" language and "actual fact" that the Act is substantially overbroad. *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198, 156 L. Ed. 2d 148 (2003) (citation omitted). We first construe the provisions of the Act. *See United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650 (2008). "[A] statute is facially invalid if it prohibits a substantial amount of protected speech." *Id.* at 292, 128 S. Ct. at 1838. However, "[i]nvalidation for overbreadth is strong medicine that is not to

4. Hereafter, sometimes referred to as "*Brandenburg*'s imminence requirement."

be casually employed." *Id.* at 293, 128 S. Ct. at 1838 (citation and internal quotation marks omitted). Thus, we construe the Act as constitutional if we can reasonably do so. *See United States v. Harriss*, 347 U.S. 612, 618, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954).[5] If there is a constitutional infirmity, we must consider whether the Act is severable and, if so, invalidate only the unconstitutional portions. *See New York v. Ferber*, 458 U.S. 747, 769 n.24, 102 S. Ct. 3348, 3361 n.24, 73 L. Ed. 2d 1113 (1982).

The Act does have some constitutional defects. However, those defects are severable from the remainder of the Act. Thus, the district court erred when it dismissed the indictment. We will explain.

I. *Most of the provisions of the Act are reasonably construed as constitutional*

At its core, the Act states:

> (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) 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.

18 U.S.C. § 2101(a)–(b).[6] It continues:

> (a) As used in this chapter, the term "riot" means a public disturbance involv-

5. *See also Skilling v. United States*, 561 U.S. 358, 408–09, 130 S. Ct. 2896, 2931, 177 L. Ed. 2d 619 (2010); *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 616–18, 93 S. Ct. 2908, 2916, 2918–19, 37 L. Ed. 2d 830 (1973); *United States v. Cassel*, 408 F.3d 622, 634–35 (9th Cir. 2005); *cf. Iancu v. Brunetti*, —— U.S. ——, 139 S. Ct. 2294, 2301, 204 L. Ed. 2d 714 (2019); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811–17 (9th Cir. 2013) (per curiam).

6. In the original statute, § 2101(a) was labeled § 2101(a)(1) and subparagraphs (1)–(4) were labeled subparagraphs (A)–(D). Pub. L. No. 90-284, Title I, § 104; 82 Stat. 75-76 (1968). In 1996, perhaps recognizing that § 2101(a) contained only one paragraph, Congress amended § 2101(a) "by striking '(1)' and by redesignating subparagraphs (A) through (D) as paragraphs (1) through (4), respectively." Pub. L. No. 104-294, Title VI, § 601(f)(15); 110 Stat. 3488 (1996). Congress failed, however, to amend the remaining text that refers back to "subparagraph[s] (A), (B), (C), or (D)." *See* §§ 2101(a)–(b). We read the statute's references to subparagraphs (A)–(D) as referring to subparagraphs (1)–(4) in § 2101(a). The parties do not dispute that interpretation. *Cf. Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wil-*

ing (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.

18 U.S.C. § 2102.[7]

[7] The Defendants attack the Act on a number of bases: (A) the overt act provisions; (B) the provisions of subparagraphs (1), (2), and (4) of § 2101(a); (C) the definition of a riot; and (D) the heckler's veto doctrine. We will now consider each basis. In doing so, we emphasize that our duty is to seek a reasonable construction of the Act that comports with constitutional requirements, so long as the text is "readily susceptible to such a construction." *United States v. Stevens*, 559 U.S. 460, 481, 130 S. Ct. 1577, 1591–92, 176 L. Ed. 2d 435 (2010) (citation and internal quotation marks omitted); *see Harriss*, 347 U.S. at 618, 74 S. Ct. at 812.

A. *Overt act provisions*

The Defendants argue that the travel in or use of any facility of interstate or foreign commerce and "any other overt act for any purpose specified in subparagraph [(1), (2), (3), or (4)] of [subsection (a)]" are too far removed in time from any riot to satisfy *Brandenburg*'s imminence requirement. They liken the "overt act" in the Act to an overt act for a conspiracy. *See United States v. Harper*, 33 F.3d 1143, 1148 (9th Cir. 1994). However, the Act is not a conspiracy statute. And the travel in or use of a facility of interstate or foreign commerce includes conduct, not just speech. The government argues that the Seventh Circuit Court of Appeals correctly read the references to the somewhat unusual "overt act" language as more limited than the scope envisioned by the Defendants.

We adopt the Seventh Circuit's approach to the "overt act" provisions. *See United States v. Dellinger*, 472 F.2d 340, 361–62 (7th Cir. 1972). In *Dellinger*, the court reasoned that the "overt act" provision in § 2101(a) was amenable to two meanings. In the first interpretation, "for any purpose specified" could include speech that was only "a step toward" one

son, 559 U.S. 280, 287 n.6, 130 S. Ct. 1396, 1402 n.6, 176 L. Ed. 2d 225 (2010).

7. The legislative history of the Act has been widely discussed elsewhere. *See United States v. Dellinger*, 472 F.2d 340, 358–59, 363 (7th Cir. 1972); *id.* at 410–12 (Pell, J., concurring in part and dissenting in part); *Miselis*, 972 F.3d at 527–28; Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 Vill. L. Rev. 897, 911–16 (1975).

of the acts in subparagraphs (1)–(4). *Id.* at 362. In the second, the words could reasonably be read to limit the meaning of "overt act" to one of the specific acts contemplated in subparagraphs (1)–(4). *Id.* In other words, the provision could be construed to mean the acts in subparagraphs (1)–(4) are goals, or are themselves the required overt acts. *Id.* Although the first meaning does not require "an adequate relation" between speech and action, the second closely connects speech and action such that any First Amendment concerns would arise from the conduct criminalized in subparagraphs (1)–(4), rather than the overt act provision itself. *See id.* Significantly, § 2101(b) also supports that construction by specifically referring to "the overt acts described in subparagraph [(1), (2), (3), or (4)] of subsection (a)." *See id.*

[8] We hold 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 elements. Thus, *Brandenburg*'s imminence requirement is not violated.[8]

B. *Section 2101(a), subparagraphs (1)–(2), (4)*

The Defendants contend that subparagraphs (1), (2), and (4) of § 2101(a) are facially overbroad because they criminalize speech that "urg[es]," "instigat[es]," "organize[s]," "promote[s]," or "encourage[s]" a riot and "advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts." We will explain why we agree in part and disagree in part.

[9] In effect, § 2102(b) indicates that the definitions of the terms "to incite a riot" (from subparagraph 2101(a)(1)) and "to organize, promote, encourage, participate in, or carry on a riot" (from subparagraph 2101(a)(2)) together encompass but are "not limited to, urging or instigating other persons to riot" but do not encompass "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." Because the statute itself defines these terms, we apply the definitions contained in the statute and exclude any unstated meanings.[9] *See Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S. Ct. 2597, 2615, 147 L. Ed. 2d 743 (2000).

[10] (1) *Instigate*: "Instigate" means "to goad or urge forward : set on : PROVOKE, INCITE."[10] Likewise, "incite" means "to move to a course of action : stir up : spur on : urge on."[11] Like the Fourth

8. We disagree with the Fourth Circuit's conclusion that the "overt act" provision in § 2101(a) indicates the Act is an attempt statute. *See Miselis,* 972 F.3d at 534–35. By 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.

9. Treating subparagraphs (1) and (2) alike, the Defendants argue, would render the terms "organize," "promote," and "encourage" mere surplusage. We think not. In any event, "statutes often contain overlapping provisions .... Congress may have acted similarly in drafting these statutes out of an understandable desire to make sure that no form of [incitement to riot] be left out." *United States v. Carona,* 660 F.3d 360, 369 (9th Cir. 2011); *see also United States v. Corrales-Vazquez,* 931 F.3d 944, 957–58 (9th Cir. 2019) (Fernandez, J., dissenting); *cf. Marinello v. United States,* —— U.S. ——, 138 S. Ct. 1101, 1107, 200 L. Ed. 2d 356 (2018); *United States v. Cabaccang,* 332 F.3d 622, 628 (9th Cir. 2003) (en banc).

10. *Instigate,* Webster's Third New International Dictionary (unabridged ed. 1986).

11. *Incite,* Webster's Third New International Dictionary § 1 (unabridged ed. 1986); *see also*

Circuit and the Seventh Circuit, we conclude that speech that "incites" or "instigates" a riot satisfies *Brandenburg*'s imminence requirement. *See Miselis*, 972 F.3d at 536, 538; *Dellinger*, 472 F.2d at 361–62. Because even advocacy that is likely to cause an imminent riot is unprotected,[12] the Defendants' argument that "instigate" does not demand imminence because it means "to cause an event or situation to happen"[13] fails.

[11] (2) *Urging*: Urge "means simply to 'encourage,' 'advocate,' 'recommend,' or 'advise ... earnestly and with persistence.' " *Miselis*, 972 F.3d at 538 (alteration in original) (citations omitted). We agree with the Fourth Circuit that, "because earnestness and persistence don't suffice to transform such forms of protected advocacy into speech that is likely to produce imminent lawless action, *Brandenburg* renders the purpose of 'urging' others to riot overbroad." *Id.*

[12] (3) *Organize*: The verb "organize" is similarly overbroad. Like "urge," "organize" is not susceptible to a limiting construction that brings it within *Brandenburg*'s strictures.

In *Brandenburg*, the Supreme Court considered a speech given at a Ku Klux Klan rally. 395 U.S. at 445–46, 89 S. Ct. at 1828–29. The speaker stated (1) "This is an organizers' meeting," (2) if the government "continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken," and (3) "[w]e are marching on Congress July the Fourth, four hundred thousand strong." *Id.* at 446, 89 S. Ct. at 1829. The Court concluded that such speech was protected under the First Amendment. *Id.* at 449, 89 S. Ct. at 1830 (holding the statute of conviction, "by its own words and as applied, purports to punish mere advocacy"). Thus, the use of the verb "organize" in subparagraph 2101(a)(2) punishes protected speech.

[13] (4) *Encourage and promote*: Moreover, like the Fourth Circuit, we conclude that the First Amendment protects speech tending to "encourage" or "promote" a riot. *See Miselis*, 972 F.3d at 536–37. Black's Law Dictionary defines "encourage" as meaning "[t]o instigate; to incite to action; to embolden; to help" and cross-references aiding and abetting.[14] The Oxford English Dictionary's definition of "encourage" is similar but also includes "to recommend, advise."[15] The latter definition fails *Brandenburg*'s imminence requirement. The same is true for "promote," which is synonymous with "encourage."[16] *See Miselis*, 972 F.3d at 536–37; *cf. Williams*, 553 U.S. at 299–300, 128 S. Ct. at 1842 (explaining that "the statement ... 'I encourage you to obtain child pornography' " is "abstract advocacy" and is protected, but "promotes," when construed as "the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer," is not protected speech).

Incitement, Black's Law Dictionary (11th ed. 2019).

12. *See White v. Lee,* 227 F.3d 1214, 1227 (9th Cir. 2000).

13. *Instigate,* Cambridge Advanced Learner's Dictionary (4th ed. 2013).

14. *Encourage,* Black's Law Dictionary (11th ed. 2019).

15. *Encourage,* The Compact Oxford English Dictionary § 2(b) (2d ed. 1991).

16. *See Promote,* Webster's Third New International Dictionary § 4(a) (unabridged ed. 1986); *see also Promote,* The Compact Oxford English Dictionary § 2(a) (2d ed. 1991).

[14] (5) *Effect of § 2102(b) limitations*: Additionally, § 2102(b) states that the terms in question "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 Defendants argue that the double negative cancels itself out and that the Act therefore proscribes mere "advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts." *See Miselis*, 972 F.3d at 539; *see also Lester v. Parker*, 235 F.2d 787, 790 n.5 (9th Cir. 1956) (per curiam). We agree. The First Amendment protects that kind of advocacy. *See Brandenburg*, 395 U.S. at 447, 89 S. Ct. at 1829.

We recognize that the Seventh Circuit construed the exclusion to merely "forestall any claim ... [that] advocacy and assertion constitute mere advocacy of ideas or expression of belief excluded under" § 2102(b) in the context of "a truly inciting, action-propelling speech [that] include[d] advocacy of acts of violence and assertion of the rightness of such acts." *Dellinger*, 472 F.2d at 363; *see also In re Shead*, 302 F. Supp. 560, 566 (N.D. Cal. 1969), *aff'd on other grounds sub nom. Carter v. United States*, 417 F.2d 384 (9th Cir. 1969). We do not believe that the words of the Act will reasonably bear that construction.

[15] "We must examine the meaning of the words to see whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1311 (9th Cir. 1992). The "clear and present danger" test in the definition of a riot illuminates Congress's intent here. *See* § 2102(a). At one time, in deciding whether a statute violated the First Amendment, courts considered "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470 (1919). For example, under that test, the First Amendment "would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.* But, mere advocacy of Communism also satisfied the clear and present danger test. *See Whitney v. California*, 274 U.S. 357, 366, 371–72, 47 S. Ct. 641, 645, 647, 71 L. Ed. 1095 (1927), *overruled by Brandenburg*, 395 U.S. 444, 89 S. Ct. 1827.

Brandenburg's imminence requirement is more exacting than the prior clear and present danger test. *See Miselis*, 972 F.3d at 532–33; *Turney v. Pugh*, 400 F.3d 1197, 1202 (9th Cir. 2005); *see also United States v. Viefhaus*, 168 F.3d 392, 397 n.3 (10th Cir. 1999); *Shackelford v. Shirley*, 948 F.2d 935, 937 (5th Cir. 1991). However, because *Brandenburg*'s imminence requirement was not adopted until after Congress passed the Act, there is no reason to determine that use of the double negative was a drafting error. *Cf. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 1397–98, 99 L. Ed. 2d 645 (1988) (stating "courts will ... not lightly assume that Congress intended to infringe constitutionally protected liberties"). Therefore, there is no reason to deviate from the usual principle that Congress said what it meant and meant what it said [17] when it used the double negative in § 2102(b).

17. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 1947, 147 L. Ed. 2d 1 (2000).

(6) *Aid or abet*: The Defendants assert that "to aid or abet any person in inciting . . . a riot" (from subparagraph 2101(a)(4)) is subject to the same definition as "to incite a riot" (from subparagraph 2101(a)(1)). Thus, for the foregoing reasons, aiding or abetting inciting a riot satisfies *Brandenburg*'s imminence requirement.

In sum, subparagraphs (1), (2), and (4) of § 2101(a) do not violate the First Amendment except insofar as subparagraph (2) prohibits speech tending to "organize," "promote," or "encourage" a riot, and § 2102(b) expands the prohibition to "urging" a riot and to mere advocacy.

C. *Riot and threat of riot*

The Defendants assert that the very definition of a "riot" is unconstitutional. We do not agree.

A "riot" requires either one or more "acts of violence" or one or more "threats" to commit one or more acts of violence. § 2102(a). The completed acts of violence (or the threatened acts of violence) must "constitute a clear and present danger of, or . . . result in, damage or injury to the property . . . or to the person of any other individual." *Id.*

[16, 17] Acts of violence are not protected under the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916, 102 S. Ct. 3409, 3427, 73 L. Ed. 2d 1215 (1982). Nor are "true threats," which involve subjective intent to threaten. *See Cassel*, 408 F.3d at 633; *see also Virginia v. Black*, 538 U.S. 343, 359–60, 123 S. Ct. 1536, 1547–48, 155 L. Ed. 2d 535 (2003). "True threats" are not limited to bodily harm only but also include property damage. *See Cassel*, 408 F.3d at 636–37; *see also Miselis*, 972 F.3d at 540; *United States v. Coss*, 677 F.3d 278, 283–84, 289–90 (6th Cir. 2012); *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008).

[18] "[W]e do not hesitate to construe" a statute punishing threats "to require . . . intent" to threaten. *Cassel*, 408 F.3d at 634; *cf. Elonis v. United States*, 575 U.S. 723, 755, 135 S. Ct. 2001, 2012, 192 L. Ed. 2d 1 (2015). By requiring proof of "intent" and proof that the overt act was committed "for [the] purpose" of a riot,[18] which also indicates subjective intent,[19] Congress limited the "threats" part of the definition of a riot to "true threats." Thus, a "riot," as defined in the Act, is not protected under the First Amendment.

D. *Heckler's veto*

The Defendants assert that the provisions of the Act violate the heckler's veto doctrine.

[19, 20] "A 'heckler's veto' is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience." *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35, 112 S. Ct. 2395, 2404, 120 L. Ed. 2d 101 (1992) ("Speech cannot be . . . punished . . . simply because it might offend a hostile mob."). The Defendants argue that the Act violates that rule. Not so. Under its provisions, "the intent to engage in one of the prohibited overt acts is a personal prerequisite to punishment under [the Act] and necessarily renders any challenge based on innocent intent . . . wide of the mark." *Nat'l Mobilization Comm. to End the War in Viet Nam v. Foran*, 411

18. 18 U.S.C. § 2101(a).

19. *Cf. United States v. Wells*, 519 U.S. 482, 489–90, 499, 117 S. Ct. 921, 926–27, 931, 137 L. Ed. 2d 107 (1997).

F.2d 934, 938 (7th Cir. 1969); *see also Lewis v. Wilson*, 253 F.3d 1077, 1081 (8th Cir. 2001); *Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994). Simply put, knowing that some might choose to become violent is not at all the same as intending that they do so.

II. *The Act criminalizes a substantial amount of protected speech*

Again, when we apply the above construction, the Act prohibits protected speech tending to "organize," "promote" or "encourage" a riot [20] and expands that prohibition to "urging" a riot and to mere advocacy.[21] To that extent, we agree with the Fourth Circuit that the Act criminalizes a substantial amount of protected speech. *See Miselis*, 972 F.3d at 540–41; *cf. Williams*, 553 U.S. at 298–99, 128 S. Ct. at 1842.

III. *The unconstitutional portions of the Act are severable*

[21] Because the Act is not facially overbroad except as indicated in parts I and II of this opinion, we must determine whether the remainder of the Act may be salvaged by severance. We are satisfied that it can be. Indeed, severance is the remedy that must be applied when it is possible to do so. *See United States v. Booker*, 543 U.S. 220, 258–59, 125 S. Ct. 738, 764, 160 L. Ed. 2d 621 (2005). And that can be accomplished by severing small portions of the statutory language—even words or phrases. For instance, last year, "seven Members of the Court"[22] concluded that, even if the Court did not utilize a robocall statute's severability clause, "the presumption of severability"[23] required severance of the following exception from the remainder of the statute: " '*unless such call is made solely to collect a debt owed to or guaranteed by the United States*.' "[24] We also have applied the severance principle in that manner. *See United States v. Taylor*, 693 F.2d 919, 921–22 (9th Cir. 1982) (severing a single clause from a statutory provision); *cf. Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 865–66 (9th Cir. 2017) (stating that courts have "severed" unconstitutional provisions "within single sentences"). Other courts of appeals have done the same. *See, e.g.*, *Miselis*, 972 F.3d at 541–43; *Lipp v. Morris*, 579 F.2d 834, 835 & n.2, 836 (3d Cir. 1978) (per curiam).

Here, § 2101(a)(2)'s inclusion of "organize," "promote" and "encourage" and § 2102(b)'s inclusion of "urging or" and "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" are severable from the remainder of the Act. *See Miselis*, 972 F.3d at 542–43. We agree with the Fourth Circuit and conclude that Congress would prefer severance over complete invalidation. *See id.* at 543–44.

So severed, § 2101(a) states:

> 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

20. § 2101(a)(2).

21. 18 U.S.C. § 2102(b).

22. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, —— U.S. ——, 140 S. Ct. 2335, 2343, 207 L. Ed. 2d 784 (2020).

23. *Id.* at ——, 140 S. Ct. at 2354.

24. *Id.* at —— n.2, 140 S. Ct. at 2345 n.2.

(2) to 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.

So severed, § 2102(b) states:

As used in this chapter, the term "to incite a riot", or "to participate in, or carry on a riot", includes, but is not limited to, 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.

With the above construction and severance, the Act is not facially overbroad. Rather, the Act prohibits unprotected speech that instigates (incites, participates in, or carries on) an imminent riot, unprotected conduct such as committing acts of violence in furtherance of a riot, and aiding and abetting of that speech or conduct.

CONCLUSION

Once the offending language is elided from the Act by means of severance, the Act is not unconstitutional on its face. We recognize that the freedoms to speak and assemble which are enshrined in the First Amendment are of the utmost importance in maintaining a truly free society. Nevertheless, it would be cavalier to assert that the government and its citizens cannot act, but must sit quietly and wait until they are actually physically injured or have had their property destroyed by those who are trying to perpetrate, or cause the perpetration of, those violent outrages against them. Of course, the government cannot act to avert a perceived danger too soon, but it can act before it is too late. In short, a balance must be struck. *Brandenburg* struck that balance,[25] and the Act (after the elisions) adheres to the result. Therefore, we reverse the district court's dismissal of the indictment and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

FERNANDEZ, Circuit Judge,
concurring in part and dissenting in part:

I concur in the per curiam opinion with two exceptions. That is, I would not strike the concepts of organizing and urging from the Act, and, to that extent, I dissent.

(1) I dissent from Part I.B.(2) of the per curiam opinion, which eliminates the concept of urging from the Act. Webster's defines "urge," in relevant part, as:

> *vt* **1 :** to present in an earnest or pressing manner : press upon attention : insist upon : plead or allege in or as if in argument or justification : advocate or demand with importunity ... **[3] b :** to be a compelling, impelling, or constraining influence upon : serve as a motivating impulse or reason for ... **5 :** to rouse from a dormant state or into life, expression, or action : STIMULATE, PROVOKE ... ~ *vi* ... **3 :** to exercise an inciting, constraining, or stimulating influence.

25. *Brandenburg,* 395 U.S. at 447, 89 S. Ct. at 1829 (explicating the imminence requirement).

Urge, Webster's Third New International Dictionary (unabridged ed. 1986). Likewise, the Oxford English Dictionary defines "urge," in relevant part, as "[t]o act as an impelling or prompting motive, stimulus, or force; to incite or stimulate; to exercise pressure or constraint." *Urge*, The Compact Oxford English Dictionary § 11 (2d ed. 1991). Not only do those definitions include the concept of inciting, but also their link to action denotes imminence. Further, speech that urges violence or physical disorder in the nature of a riot does not have the protection of the First Amendment. *Cf. White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). Based on the foregoing, I am not persuaded by the Fourth Circuit's contrary interpretation of "urge"—that *Brandenburg*[1] protects speech that " 'urge[s],' " which "means simply to 'encourage,' 'advocate,' 'recommend,' or 'advise . . . earnestly and with persistence.' " *United States v. Miselis*, 972 F.3d 518, 538 (4th Cir. 2020); *cf. United States v. Dellinger*, 472 F.2d 340, 361–62 (7th Cir. 1972). Rather, in the context of this statute, "urge" indicates imminence of the riot danger.

(2) I dissent from Part I.B.(3) of the per curiam opinion, which eliminates the concept of organizing from the Act. In the context of an event or activity, like a riot, "organize" means "to unify into a coordinated functioning whole : put in readiness for coherent or cooperative action,"[2] or "to arrange by systematic planning and coordination of individual effort."[3] Simply put, "organize" means "[t]o arrange (personally); to take responsibility for providing (something); to 'fix up.' " *Organize*, The Compact Oxford English Dictionary § 2(d) (2d ed. 1991). I agree with the Fourth Circuit that "speech tending to organize a riot serves not to persuade others to engage in a hypothetical riot, but rather to facilitate the occurrence of a riot that has already begun to take shape," indicating imminence. *Miselis*, 972 F.3d at 537. It is far from mere speech. It is the very purposeful, physical, and concrete action of structuring people into an intentionally physically violent force, which is at least on the brink of carrying out its mission. Although it might be reasonable to organize some events into the far future, as I see it, organizing a riot does not reasonably lend itself to that interpretation.

Thus, I respectfully concur in part and dissent in part.

1. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969) (per curiam).

2. *Organize*, Webster's Third New International Dictionary § 2(b) (unabridged ed. 1986).

3. *Id.* § 4(a).

Plaintiff is awarded $2,309.74 in attorney fees, and $400 for filing fee costs. The Commissioner shall pay such EAJA fees, subject to any offset to which the Government is legally entitled, to Plaintiff, which Plaintiff shall then pay to Counsel. Astrue v. Ratliff, 560 U.S. 586, 591, 597-98, 130 S.Ct. 2521, 177 L.Ed.2d 91 (2010).

IT IS SO ORDERED.

UNITED STATES of America, Plaintiff,

v.

Robert RUNDO, Robert Boman, Aaron Eason, and Tyler Laube, Defendants.

Case No.: CR 18-00759-CJC

United States District Court, C.D. California.

Signed 06/03/2019

Background: Defendants moved to dismiss charges for conspiracy to commit rioting and use of interstate commerce with intent to riot, alleging that Anti-Riot Act, under which charges were brought, was facially overbroad in violation of First Amendment.

Holdings: The District Court, Cormac J. Carney, J., held that:

(1) Act did not fall under incitement exception to First Amendment, and

(2) Act criminalized substantial amount of protected activity in relation to legitimate sweep, and thus was facially overbroad.

Motion granted.

Opinion reversed on appeal, 2021 WL 821938.

1. Constitutional Law ⚿1430, 1435, 1550

Without First Amendment protections, individuals could not criticize the government, assemble together for common causes, or petition the government for redress of grievances. U.S. Const. Amend. 1.

2. Constitutional Law ⚿1490, 1507

While it is easy to champion free speech advocating an agreeable viewpoint, it is harder to champion speech that promotes disagreeable ideas; but an essential function of free speech, as protected by the First Amendment, is to invite dispute. U.S. Const. Amend. 1.

3. Constitutional Law ⚿1491

Free speech, as protected by the First Amendment, may best serve its high democratic purpose when it induces unrest, creates dissatisfaction with conditions, or even stirs people to anger. U.S. Const. Amend. 1.

4. Constitutional Law ⚿1520

Because of the sensitive nature of protected expression, the Constitution protects against overbroad laws that chill speech within the First Amendment's vast and privileged sphere. U.S. Const. Amend. 1.

5. Constitutional Law ⚿1520

To implement First Amendment protection against overbroad laws that chill speech, general rules governing facial attacks on statutes are relaxed; typically, to succeed in such attack, party must establish that no set of circumstances exists under which statute would be valid, or that statute lacks any plainly legitimate sweep. U.S. Const. Amend. 1.

6. Constitutional Law ⚿1521

Law may be invalidated for overbreadth in violation of First Amendment if law prohibits substantial amount of protected speech. U.S. Const. Amend. 1.

7. Constitutional Law ⚿1800

Invalidation of law prohibiting substantial amount of speech protected by First Amendment is based on idea that speakers may be chilled from expressing themselves if overbroad criminal laws are on the books. U.S. Const. Amend. 1.

8. Constitutional Law ⚿1521

To combat chilling effect of a law that prohibits substantial amount of speech, even person whose activity is not clearly protected under First Amendment may challenge law on overbreadth grounds. U.S. Const. Amend. 1.

9. Constitutional Law ⚿1163

In determining whether to invalidate statute for overbreadth in violation of First Amendment, reviewing court must first construe statute. U.S. Const. Amend. 1.

10. Riot ⚿1

Anti-Riot Act has two elements: (1) travel or use of interstate commerce with a certain intent and (2) an overt act for a certain purpose. 18 U.S.C.A. § 2101(a).

11. Riot ⚿1

Anti-Riot Act covers far more than merely acts of violence; it also criminalizes activities that precede any violence, so long as the individual acts with the required purpose or intent. 18 U.S.C.A. § 2101.

12. Riot ⚿1

Under the Anti-Riot Act, a "riot" is a public disturbance involving acts of violence, committed by at least one person in a group, which results in property damage or personal injury; a riot may also include a public disturbance involving the threat of violence, by persons in a group, so long as at least one person could immediately act upon the threat. 18 U.S.C.A. § 2102(a).

See publication Words and Phrases for other judicial constructions and definitions.

13. Constitutional Law ⚿1520

In determining whether to invalidate a statute restricting speech for overbreadth in violation of First Amendment, reviewing court must first construe statute, then determine whether statute reaches protected speech. U.S. Const. Amend. 1.

14. Constitutional Law ⚿1498

Not all speech is protected under the First Amendment. U.S. Const. Amend. 1.

15. Constitutional Law ⚿1801

Under incitement exception to First Amendment's free speech protections, government may prohibit advocacy of use of force of violating law only where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. U.S. Const. Amend. 1.

16. Constitutional Law ⚿1847
Riot ⚿1

Incitement exception to First Amendment free speech, permitting regulation of speech inciting imminent lawless action, did not apply to Anti-Riot Act, when determining whether Act violated First Amendment; Act, which punished wide range of pre-riot expression, communications, and advocacy, lacked requirement that those activities be directed toward inciting imminent lawless action. U.S. Const. Amend. 1; 18 U.S.C.A. § 2101.

17. Constitutional Law ⚿1800

In determining whether statute is overbroad in violation of First Amendment, if reviewing court determines that statute reaches protected expression, court must then determine whether statute criminalizes substantial amount of protected expressive activity in relation to its legitimate sweep. U.S. Const. Amend. 1.

18. Constitutional Law ⚿1847
Riot ⚿1

Anti-Riot Act criminalized substantial amount of protected, expressive activity in relation to its legitimate sweep, and, thus, was facially overbroad and violated First Amendment freedom of speech; rather than punishing imminent threats of violence, Act punished wide range of pre-riot communications and activities, violence need not even occur in some situations, and Act's chilling effect on expression was heightened by its context, due to the connection between political activity, expression of ideas, and riots. U.S. Const. Amend. 1; 18 U.S.C.A. § 2101.

19. Constitutional Law ⚿1430, 1507

To protect citizens' important First Amendment rights to speech and assembly, courts must be wary of government attempts to censor a particular view, especially on the basis that certain ideas cause disturbances. U.S. Const. Amend. 1.

West Codenotes

Held Unconstitutional

18 U.S.C.A. § 2101

David T. Ryan, George Emel Pence, IV, AUSA—Office of US Attorney General Crimes Section, Los Angeles, CA, for Plaintiff.

ORDER GRANTING DEFENDANTS ROBERT RUNDO, ROBERT BOMAN, AND AARON EASON'S JOINT MOTION TO DISMISS THE INDICTMENT [Dkt. 134]

CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

[1] The First Amendment safeguards personal liberty, providing that Congress shall make no law abridging the freedom of speech or the right of the people to assemble peaceably. Without it, individuals could not criticize the government, assemble together for common causes, or petition the government for redress of grievances. The vitality of our democratic and public institutions depends on free and vigorous discussion.

[2, 3] It is easy to champion free speech when it advocates a viewpoint with which we agree. It is much harder when the speech promotes ideas that we find abhorrent. But an essential function of free speech is to invite dispute. Speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Frequently, the public arena is the stage for these disputes. In the Civil Rights Era, for instance, protestors took to the streets to contest segregation and Jim Crow. Today, people continue to take their message to the streets, advocating on hotly contested issues, whether it be abortion, Black Lives Matter, climate change, or healthcare. One person's protest might be another person's riot.

The motion before the Court implicates a statute that threatens these important freedoms: the Anti-Riot Act, 18 U.S.C. § 2101. Congress passed the Anti-Riot Act in 1968, at the height of public advocacy over civil rights and the Vietnam War. Since then, prosecutions under the Anti-Riot Act have been rare. Only a handful of courts have ever evaluated the constitutionality of the statute.

On November 1, 2018, the Grand Jury returned a two-count Indictment charging Defendants with conspiracy to commit ri-

oting, in violation of 18 U.S.C. § 371, and travel or use of interstate commerce with intent to riot, in violation of 18 U.S.C. § 2101. (Dkt. 7 [Indictment].) Defendants Robert Rundo, Robert Boman, and Aaron Eason now move to dismiss the Indictment. Because the Anti-Riot Act regulates a substantial amount of protected speech and assembly, the Court finds the Anti-Riot Act is unconstitutionally overbroad. Accordingly, the Court **GRANTS** Defendants' motion to dismiss.

II. BACKGROUND

Defendants are allegedly members of a white supremacist organization known as the "Rise Above Movement," or "RAM." (Dkt. 47 [Indictment] ¶ 2.) RAM is a "combat-ready, militant group of a new nationalist white supremacy and identity movement." (*Id.* ¶ 2.) Defendants and other RAM members allegedly used the internet to post videos and pictures of themselves conducting training in hand-to-hand combat, accompanied by messages in support of their white supremacist ideology. (*Id.* ¶ 3.) Between December 2016 and October 2018, Defendants allegedly attended three political rallies in California. (*Id.* ¶¶ 5–6.)

Count One of the Indictment alleges that Defendants conspired and agreed with each other to riot in violation of 18 U.S.C. § 2101. Under the conspiracy, Defendants allegedly recruited members to join RAM and conducted hand-to-hand combat training sessions for RAM members. (*Id.* ¶ 6.) RAM's goal was apparently to provide "security" at right-wing political rallies, where there were often left-wing counterprotestors, known as the "Antifa." (*See id.* ¶¶ 7(1), 7(9).) Defendants and other RAM members traveled to political rallies in Huntington Beach, Berkeley, and San Bernardino. (*Id.* ¶¶ 7(1)–7(29).) In Huntington Beach and Berkeley, Defendants allegedly assaulted persons at the rallies. (*Id.* ¶¶ 7(4)–7(6), 7(15)–7(17).) In San Bernardino, however, none of the Defendants apparently acted violently or committed property damage. After the rallies, Defendants and other RAM members boasted about their actions at these rallies in text messages and on social media. (*Id.* ¶¶ 7(18)–(21), 7(29), 7(38)–7(47).)

Count Two of the Indictment alleges that Defendants used a facility of interstate commerce with the intent to riot. (*Id.* ¶¶ 9–10.) Count Two incorporates the overt acts alleged in Count One. (*Id.* ¶ 9.) Eason allegedly used a credit card to rent a passenger van to travel from Southern California to the rally in Berkeley. (*Id.* ¶¶ 7(12), 9.) Defendants then committed one or more overt acts with the purpose to incite, organize, promote, encourage, participate in, and carry on a riot. (*Id.* ¶¶ 9–10.)

III. ANALYSIS

[4–8] Defendants challenge the Anti-Riot Act on its face. Because of the "sensitive nature of protected expression," *New York v. Ferber*, 458 U.S. 747, 768, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere," *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). To implement this protection, the general rules governing facial attacks on statutes are relaxed. Typically, to succeed in a facial attack, a party must establish "that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (internal quotation marks and citations omitted). In the First Amendment context, however, a law may be invalidated as overbroad if "it prohibits a sub-

stantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). This exception is "based on the idea that speakers may be chilled from expressing themselves if overbroad criminal laws are on the books." *United States v. Sineneng-Smith*, 910 F.3d 461, 470 (2018). "To combat that chilling effect, even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment." *Id.*

[9–11] In determining whether a statute is overbroad, the Court must first construe the statute. *See Williams*, 553 U.S. at 293, 128 S.Ct. 1830. The Anti-Riot Act provides that:

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent –
>
> (1) to incite a riot; or
>
> (2) to organize, promote, encourage, participate in, or carry on a riot; or
>
> (3) to commit any act of violence in furtherance of a riot; or
>
> (4) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;
>
> and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph [(1)–(4)] ... [s]hall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. § 2101(a). To summarize, the Anti-Riot Act has two elements: (1) travel or use of interstate commerce with a certain intent and (2) an overt act for a certain purpose. Notably, the Anti-Riot Act covers far more than acts of violence. It also criminalizes activities that precede any violence, so long as the individual acts with the required purpose or intent. And, importantly, as the government concedes, the Anti-Riot Act reaches speech and expressive conduct. *See United States v. Dellinger*, 472 F.2d 340, 359 (7th Cir. 1972) (finding the Anti-Riot Act implicates the First Amendment).

[12] The next question is what qualifies as a "riot." The Anti-Riot Act defines the term "riot" as:

> 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.

18 U.S.C. § 2102(a). To simplify, the Anti-Riot Act defines "riot" in two ways. A riot is a public disturbance involving acts of violence, committed by at least one person in a group, which results in property damage or personal injury. This first definition coincides with the common understanding of a riot—for instance, a crowd taking to the streets and smashing windows of a business. A riot also includes a public disturbance involving the threat of violence, by persons in a group, so long as at least one person could immediately act upon the

threat. This second definition, for example, would apply to a group threatening to break the windows of a business, while the group is outside the business and holding rocks in their hands.

The Anti-Riot Act, however, does not just criminalize the behavior of those in the heat of a riot. It also criminalizes acts taken long before any crowd gathers, or acts that have only an attenuated connection to any riot, so long as the individual acts with the required purpose. *See* 18 U.S.C. § 2101(a). No violence even need to occur. 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. The Anti-Riot Act offers some clarification as to how far it extends:

> [T]he 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.

18 U.S.C. § 2102(b). Pursuant to this clause, a defendant cannot be convicted under the statute if he merely advocates ideas or expresses a belief. The double negative, however, places a significant limit on this exception. Although it is *not* a crime merely to advocate ideas, it may *still* be a crime to advocate acts of violence or assert the rightness of, or the right to commit, any such acts.[1]

[13–15] After construing the statute, the Court must then ask whether the statute reaches protected speech. *Sineneng-Smith*, 910 F.3d at 479. Not all speech is protected under the First Amendment. Here, the government asserts that speech criminalized by the Anti-Riot Act falls under the incitement exception to the First Amendment. Under this narrow exception, the government may prohibit advocacy of the use of force or of violating the law only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

[16] Returning back to the statute, however, there is a problem. The Anti-Riot Act has no imminence requirement. The Anti-Riot does not require that advocacy be directed toward inciting or producing imminent lawless action. It criminalizes advocacy even where violence or lawless action is not imminent. And in doing so, the Anti-Riot Act eviscerates *Brandenburg*'s protections of speech.

Consider the overt acts alleged just in the Indictment: A RAM member held a

1. The three decisions construing the Anti-Riot Act have struggled with how to interpret the double negative in section 2102(b). To distinguish the statute from the one found unconstitutional in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), these courts have concluded that section 2102(b) does not punish the *mere* advocacy of violence. Rather, section 2102(b) apparently clarifies that *certain* advocacy of violence may be a crime. *See Dellinger*, 472 F.2d at 363; *In re Shead*, 302 F. Supp. 560, 566 (N.D. Cal. 1969); *see also United States v. Daley*, 378 F. Supp. 3d 539, 556–57 (W.D. Va. 2019). The Court notes, however, that Congress passed the Anti-Riot Act in 1968, before the Supreme Court held implicitly in *Brandenburg*, 395 U.S. at 447–48, 89 S.Ct. 1827, and explicitly in *Hess v. Indiana*, 414 U.S. 105, 108–09, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973), that the mere advocacy of violence is protected speech. The dissent in *Dellinger* also offers compelling reasons to suggest that Congress intended to punish the mere advocacy of violence through the Anti-Riot Act. *See Dellinger*, 472 F.2d at 412 (Pell, J., dissenting).

conference call three months before any political rally. (Indictment ¶ 7(1).) Boman posted a news article on Facebook the day after the rally in Huntington Beach. (*Id.* ¶ 7(7).) Several weeks before the Berkeley rally, Eason texted RAM members about attending and providing "security." (*Id.* ¶¶ 7(9)–(10).) After the Berkeley rally, Defendants posted photos on Facebook and Twitter and sent text messages about the Berkeley rally. (*Id.* ¶¶ 7(18)–7(22).) Eason sent text messages about attending another rally in Berkeley, which he apparently never attended. (*Id.* ¶ 7(23).) Nine days before the San Bernardino rally, a RAM member sent a Facebook message sharing photographs of the signs that RAM members planned to carry. (*Id.* ¶ 7(25).) Three days after the San Bernardino rally, RAM members sent text messages about events at the rally, boasting about beating Antifa. (*Id.* ¶ 7(29).) Months after the Huntington Beach and Berkeley rallies, Rundo shared a video showing RAM members at those rallies. (*Id.* ¶ 7(31), 7(40).) He also posted a photo on Twitter of RAM members with the message, "When the squads not out smashing commies . . . #nationalist #lifestyle." (*Id.* ¶ 7(43).) And almost a year after any rally, Rundo sent a Twitter message in response to a proposal to interview RAM leaders on a podcast. (*Id.* ¶ 7(47).) This is all protected speech. So long as Defendants acted with a purpose to incite, organize, promote, encourage, participate, or carry on a riot, however, these acts amount to a crime under the Anti-Riot Act.[2]

The government attempts to save the statute by relying on the definition of "riot." Because the statute defines riot as a "public disturbance involving" either acts or threatened acts of violence that create a "clear and present danger," the government asserts that the overt acts must also pose a clear and present danger. Other courts have strained to reach similar interpretations. *See Dellinger*, 472 F.2d at 361–62; *United States v. Daley*, 378 F. Supp. 3d 539, 556–57 (W.D. Va. 2019); *In re Shead*, 302 F. Supp. 560, 566 (N.D. Cal. 1969). But this ignores the statute's structure and confuses what the Anti-Riot Act actually criminalizes. The "riot" is some event in the future. What is a crime is the "overt act" made with the purpose of urging or instigating that future event. For instance, imagine someone posts on social media, urging others to attend a rally, and he posts with the purpose of promoting or organizing a riot. Assume, however, that the rally is six months away, so there is no imminent lawless action. Even if the riot itself would eventually pose a clear and present danger, the overt act does not. Just consider the way in which the government applies the Anti-Riot Act in its own Indictment. Defendants are charged with renting a van with a credit card and sending text messages to one another *weeks* before the Berkeley political rally. These acts cannot reasonably be thought to pose an *imminent* threat of violence or lawless conduct.

The government also asserts that the terms "incite," "organize," "promote," and "encourage" create an imminence requirement, in that these terms imply a relationship between expression and action. The Anti-Riot Act defines these terms to include "urging or instigating other persons to riot." 18 U.S.C. § 2012(b). In one of the few decisions construing the Anti-Riot Act,

2. These overt acts appear in Count One of the Indictment, which alleges the conspiracy charge. Count Two does not specify which overt acts form the basis of the rioting charge, and some of the alleged overt acts do not involve speech. Even if the statute is constitutional as applied to Defendants, however, these examples indicate how broadly the Anti-Riot Act on its face criminalizes speech.

the Seventh Circuit concluded 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." *Dellinger*, 472 F.2d at 362. Assuming this is true, it still does not solve the Anti-Riot Act's imminence problem. Even if terms like "organize" or "promote" imply *some* degree of action—like urging people to attend an event—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. And recently in *Sineneng-Smith*, the Ninth Circuit did not find words like "encourage" or "induce" created an imminence requirement. 910 F.3d at 480 (finding statute that made it a crime to "encourage" or "induce" an alien to reside in the country did not require that an alien imminently violate immigration law). Ultimately, the government asks this Court to engage in grammatical gymnastics—and some degree of hand waving—to read an imminence requirement into the Anti-Riot Act. The Court will not do so.

[17, 18] Since the Anti-Riot Act criminalizes protected speech, the Court must next ask whether the statute criminalizes a substantial amount of protected expressive activity in relation to the statute's legitimate sweep. *Williams*, 553 U.S. at 292, 128 S.Ct. 1830; *Sineneng-Smith*, 910 F.3d at 479. Congress passed the Anti-Riot Act over concerns in the late 1960s about public disturbances associated with the Civil Rights Movement and anti-Vietnam War protests. Criminalizing acts and imminent threats of violence is a legitimate aim. But the Anti-Riot Act does not focus on the regulation of violence. Rather, it focuses on *pre*-riot communications and actions. And in doing so, it sweeps in a wide swath of protected expressive activity as part of its efforts to punish rioting.

Although the Supreme Court is skeptical of "fanciful hypotheticals" in overbreadth cases, *see Williams*, 553 U.S. at 301, 128 S.Ct. 1830, one need look no farther than the overt acts alleged in the Indictment. Although some alleged overt acts create no First Amendment problem, the Indictment also contains a substantial amount of protected expressive activity. It charges the Defendants with making social media posts months before—and months after—any political rallies. Some posts express repugnant, hateful ideas. Other posts advocate the use of violence. Most, if not all, are protected speech.

Applying the Anti-Riot Act to some of the seminal cases on incitement underscores the problem. Consider *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). There, a civil rights activist faced civil liability for an impassioned speech, which was later followed by acts of violence. *See id.* at 928, 102 S.Ct. 3409. The Supreme Court found the activist's speech did not transcend *Brandenburg*'s boundaries of protected speech, partly because the actual acts of violence occurred weeks or months after the speech. *Id.* Here, the Anti-Riot Act criminalizes speech even if violence occurs weeks or months after the speech—or even if violence never occurs. The Anti-Riot Act creates a similar tension with *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973). In that case, the defendant faced a disorderly conduct charge for telling a crowd, "We'll take the fucking street later (or again)," in the middle of an antiwar demonstration, as police attempted to clear the street. *Id.* at 106–07, 94 S.Ct. 326. The Supreme Court held the statement was protected speech because there was no evidence that his words were likely to produce imminent disorder. *Id.* at 108–09, 94 S.Ct. 326. That same

statement could possibly be a crime under the Anti-Riot Act.

[19] The Anti-Riot Act's chilling effect is heightened by its context. "[R]ioting, 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. A riot is closely intertwined with political activity. A rioting crowd is often protesting the policies of a government, an employer, or some other institution, or the social fabric in general. *Id.* A riot may well erupt out of an originally peaceful demonstration. The political nature of a riot increases the risk that the Anti-Riot Act criminalizes a substantial amount of protected expressive activity. To protect citizens' important rights of speech and assembly, courts must be wary of government attempts to censor a particular view, especially on the basis that certain ideas cause "disturbances." New ideas, more often than not, create disturbances. And to this end, speech may best serve its "high purpose." *See Terminiello*, 337 U.S. at 4, 69 S.Ct. 894.

These same concerns animate the last step of the Court's overbreadth analysis, in which the Court balances the social costs of upholding the statute against the costs of striking it down. Invalidating the Anti-Riot Act would not limit the ability of federal and local law enforcement to protect the public from violence or public disturbances. Law enforcement has its pick of statutes to employ towards these ends. *See, e.g.*, Cal. Pen. Code § 404 (incitement of a riot); Cal. Pen. Code § 405 (participation in a riot); 18 U.S.C. § 113 (assault crimes); 18 U.S.C. § 231 (civil disorders); 18 U.S.C. § 241 (conspiracy to "injure, oppress, threaten, or intimidate" any person in the free exercise or enjoyment of rights); 18 U.S.C. § 249 (hate crime acts); 42 U.S.C. § 1985 (conspiracy to interfere with civil rights). Upholding the statute, however, substantially infringes on the rights to free speech and freedom of assembly. The Anti-Riot Act is unconstitutionally overbroad.

Make no mistake that it is reprehensible to throw punches in the name of teaching Antifa some lesson. Nor does the Court condone RAM's hateful and toxic ideology. But the government has sufficient means at its disposal to prevent and punish such behavior without sacrificing the First Amendment.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Indictment is **GRANTED**. The Court finds that the Anti-Riot Act is unconstitutionally overbroad in violation of the First Amendment.[3]

Jayson G. MIRANDA, Plaintiff,

v.

FCA US, LLC; Sacramento Chrysler Dodge Jeep Ram; and Does 1 through 10, Inclusive, Defendants.

No. 2:20-cv-00803 WBS EFB

United States District Court, E.D. California.

Signed 07/16/2020

Filed 07/17/2020

Background: Automobile owner, a California citizen, brought state court action

3. Since this is a sufficient reason to dismiss the Indictment, the Court does not reach Defendants' other arguments.

2019 WL 11779227
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

UNITED STATES of America, Plaintiff,
v.
Tyler LAUBE, Defendant.

Case No.: CR 18-00759-CJC
|
Signed 06/11/2019

Attorneys and Law Firms

David T. Ryan, George Emel Pence, IV, AUSA - Office of US Attorney General Crimes Section, Los Angeles, CA, for Plaintiff.

ORDER GRANTING DEFENDANT TYLER LAUBE'S MOTION TO WITHDRAW GUILTY PLEA AND DISMISS INDICTMENT [Dkt. 147]

CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION & BACKGROUND

***1** Defendant Tyler Laube is charged in the Indictment with one count of conspiracy to commit rioting, in violation of 18 U.S.C. §§ 371, 2101. (Dkt. 47 [Indictment].) On November 20, 2018, he pled guilty to this single count, and he was subsequently released on bond. (Dkts. 72, 79.) Mr. Laube's sentencing is scheduled for August 12, 2019.

On June 3, 2019, the Court granted a joint motion brought by the other defendants, Robert Rundo, Robert Boman, and Aaron Eason, to dismiss all counts in the Indictment. (Dkt. 145.) The Court found that the Anti-Riot Act, 18 U.S.C. § 2101, was unconstitutionally overbroad on its face. Under the First Amendment, the government may not prohibit advocacy of the use of force or of violating the law "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Anti-Riot Act is not limited in this way. It criminalizes advocacy of the use of force or of lawless action even where violence or lawless action is not imminent or likely. Because the statute criminalizes a substantial amount of protected expressive activity in relation to its legitimate sweep, the Court found the Anti-Riot Act was unconstitutionally overbroad in violation of the First Amendment. The Court then dismissed the Indictment with respect to Mr. Rundo, Mr. Boman, and Mr. Eason.

Mr. Laube now moves to withdraw his guilty plea and dismiss the Indictment on the same grounds as those raised in the other defendants' joint motion to dismiss. (Dkt. 147.) The government opposes Mr. Laube's motion. (Dkt. 150.) For the following reasons, the motion is **GRANTED**. [1]

1 Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Crim. P. 57(b).

II. ANALYSIS

A. Withdrawal of Guilty Plea

Mr. Laube requests to withdraw his guilty plea. A defendant may withdraw a guilty plea after a district court accepts the plea but before sentencing if "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). This standard is "applied liberally." *United States v. Ortega-Ascanio*, 376 F.3d 879, 883 (9th Cir. 2004). "[T]he decision to allow withdrawal of a plea is solely within the discretion of the district court." *United States v. Nostratis*, 321 F.3d 1206, 1208 (9th Cir. 2003). Fair and just reasons for withdrawal include "newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered his plea." *Ortega-Ascanio*, 376 F.3d at 883.

There is no question that there is a fair and just reason to withdraw Mr. Laube's plea. Mr. Laube pled guilty to conspiring to violate the Anti-Riot Act. Since he entered his guilty plea, however, the Court found the Anti-Riot Act was unconstitutionally overbroad and dismissed the Indictment with respect to the rest of the defendants. It would be grossly unjust to proceed with sentencing and have Mr. Laube possibly serve time in custody for conspiring to violate a statute that this Court has declared unconstitutional. In opposing Mr. Laube's request, the government seems to suggest Mr. Laube should suffer because he took an early guilty plea instead of joining the other defendants' motion. The government may be unhappy with the Court's June 3, 2019 Order. The dictates of fairness and justice, however, clearly require this Court to allow Mr. Laube to withdraw his guilty plea.

B. Dismissal of the Indictment

***2** Mr. Laube also asks the Court to dismiss the Indictment on the basis that the Anti-Riot Act is unconstitutionally overbroad in violation of the First Amendment. The Court agrees and adopts by reference its analysis in the June 3, 2019 Order. In opposition, the government contends that the Anti-Riot Act is constitutional as applied to Mr. Laube, based on the acts to which he admitted in his plea agreement and his Federal Rule of Criminal Procedure 11 colloquy. This misses the point. The Court held the Anti-Riot Act was unconstitutional *on its face*, not as applied. It does not matter whether the statute may be constitutional in *certain* applications, such as the specific acts to which Mr. Laube pled guilty. Due to concerns over the chilling effect of overbroad statutes, "even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment." *United States v. Sineneng-Smith*, 910 F.3d 461, 470 (9th Cir. 2018). Here, because the Anti-Riot Act criminalizes a substantial amount of protected expressive activity in relation to its legitimate sweep, the Anti-Riot Act violates the First Amendment. It cannot serve as a legal basis for the Indictment.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to withdraw his guilty plea and dismiss the Indictment is **GRANTED**. The Court hereby **EXONERATES** his bond.

All Citations

Slip Copy, 2019 WL 11779227

FILED

MAY 13 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ROBERT PAUL RUNDO; et al., Defendants-Appellees.	No. 19-50189 D.C. No. 2:18-cr-00759-CJC-1 Central District of California, Los Angeles ORDER

Before: FERNANDEZ and PAEZ, Circuit Judges, and TIGAR,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Paez voted to deny the petition for rehearing en banc, and Judge Fernandez and Judge Tigar so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Jon S. Tigar, United States District Judge for the Northern District of California, sitting by designation.