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 FOR A WRIT OF CERTIORARI

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

QUESTION PRESENTED

The Anti-Riot Act, 18 U.S.C. § 2101, criminalizes the combination of two acts: (1) an interstate-commerce act undertaken with intent to incite, organize, promote, encourage, participate in, or carry on a riot, to commit any act of violence in furtherance of a riot, or to aid and abet any of these purposes; and (2) an "overt act" performed for any of those same purposes. The Act expressly includes within its scope "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).

The circuits are divided on the Act's constitutionality. In this case, the Ninth Circuit read "overt act" as requiring an act that completed one of the riot-related purposes, and even under that interpretation, found significant portions of the statute unconstitutional for failure to satisfy the imminence test this Court set forth in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Elsewhere, the Fourth Circuit construed the Act as an attempt statute, and, applying that construction, concluded that an overlapping (but not identical) portion of the statute was unconstitutional. And the Seventh Circuit read overt act as the Ninth Circuit did, but upheld the entire statute as constitutional. All three courts acknowledged significant doubt about the constitutionality of the Act if "overt act" was read in its well-settled and ordinary sense as requiring only manifestation of a riot plan.

The question presented is:

Whether the Anti-Riot Act is facially unconstitutional, because it cannot be interpreted, faithful to its plain text and consistent with congressional intent, in a manner that comports with the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners are Robert Paul Rundo, Robert Boman, Tyler Laube, and Aaron Eason. Respondent is the United States of America.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. *Rundo*, No. 18-cr-00759 (June 3, 2019)

United States Court of Appeals (9th Cir.):

United States v. *Rundo*, No. 19-50189 (Mar. 4, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Robert Rundo, Robert Boman, Tyler Laube, and Aaron Eason respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–14a) is reported at 990 F.3d 709. The order of the district court granting Rundo, Boman, and Eason's motion to dismiss the indictment (Pet. App. 15a–23a) is reported at 497 F. Supp. 3d 872. The order of the district court granting Laube's motion to withdraw his guilty plea and dismiss the indictment (Pet. App. 24a–25a) is not published.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2021. A petition for rehearing was denied on May 13, 2021. Pet. App. 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

18 U.S.C. § 2101 provides in relevant part:

(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)[1] of this paragraph—

Shall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. § 2102 provides:

(a) As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such

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[1] So in original. Probably should be "paragraph (1), (2), (3), or (4) of this subsection".

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.

INTRODUCTION

The Anti-Riot Act was passed in a moment of civil unrest not unlike the present day. And the constitutional limits of the government's ability to prosecute protesters is as timely a question as this Court confronts.

While three different circuits have taken three different tacks when it comes to assessing the Act's constitutionality, they all agree on the problem: The statute has the potential to chill peaceful protest. And protest lies at the heart of what the First Amendment protects—the right to speak, alone and with others, and to condemn the government, even in vehement, caustic language. To pass constitutional muster, the Act has to strike a difficult balance. It must, as the Ninth Circuit put it, keep the government from acting too soon, while leaving it room to act before it is too late.

The Ninth Circuit thought it could construe its way out of this quagmire. In the name of constitutional

avoidance, and barely constrained by the statute's plain text, the court read "overt act" as an act that fulfills one of the statute's riot-related purposes. And even after that significant step away from the text, the court still deemed it necessary to redline nearly half of the statute's enumerated purposes, and to convert a double-negative clause into a single negative. The re-written Act was, in its view, constitutional—even if it looked little like the statute Congress passed.

The Ninth Circuit was the third appellate court to address the constitutionality of the Act, and it adopted the view of neither of the courts that went before it. As it stands, encouraging a riot is criminal in Illinois but protected speech in Virginia. And attempted organizing is criminal in North Carolina, but *actually* organizing a riot is protected speech in California. Outside the three circuits that have weighed in, would-be protesters are left to wonder whether they will be judged for their overt acts, in its plain-meaning sense, or by some other measuring stick, and what riot-related conduct remains criminal in their jurisdiction. This unevenness and uncertainty in the law cannot help but chill legitimate protest.

The problem, as demonstrated by these three circuit opinions, is that once interpretation of the Act is unmoored from its text in the name of constitutional avoidance, it's difficult to predict exactly where the statute's meaning will land. Not one of the circuits has been faithful to the text Congress wrote. Congress took aim at the person who committed preliminary acts that could precipitate a riot. It felt no constraint from *Brandenburg*, because *Brandenburg* hadn't been decided yet. And any attempt to rewrite the Act to fit that subsequently created standard will necessarily fail to account for the statute's plain text.

Rather than tinker with a statute that doesn't pass muster as written, the Ninth Circuit should have simply found the statute facially unconstitutionally and sent Congress back to the drawing board. Given the significant chilling effect inherent in the current landscape, the Court should grant certiorari to ensure a uniform standard for where lawful protest ends and lawlessness begins.

STATEMENT

A. Legal Background

1. The Anti-Riot Act, Pub. L. No. 90-284, § 104(a), 82 Stat. 75–77, was passed in April 1968—one week after the assassination of Dr. Martin Luther King, Jr. It was a time of considerable social unrest: between 1965 and 1967, more than 100 major riots occurred in cities across the country. *Congress & Federal Anti-Riot Proposals, Pro-Con*, 47 Cong. Dig. 99, 100 (1968). For some, the root cause of this unrest was longstanding racial injustice. Report of the Nat'l Advisory Comm'n on Civ. Disorders 1 (1968) ("Our Nation is moving toward two societies, one black, one white—separate and unequal"). For others, the blame rested with "outside agitators" who allegedly traveled the nation inciting violence. Marvin Zalman, *The Federal Anti-Riot Act & Political Crime: The Need for Criminal Law Theory*, 20 Vill. L. Rev. 897, 916 (1975) (describing a "legislative faction" focused on "what was believed to be a close-knit group of outside agitators fomenting disorder").

The Act's proponents were in this latter group. They took aim at "professional agitators" who "come into a jurisdiction, inflame the people therein to violence, and then leave the jurisdiction before the riot begins." 113 Cong. Rec. 19,363–64 (1967) (statement of Rep.

Cramer). Some of these "agitators" were Black civil rights activists. *Id.* at 19,364 (specifically identifying Stokely Carmichael and H. Rap Brown, both leaders of the Student Nonviolent Coordinating Committee). As one of the Act's original architects lamented, Black activists were telling people that "they are downtrodden, that 'black power' is their salvation, that the Negroes must take the law into their own hands, that they must 'kill Whitey,' and that they must 'burn, baby, burn.'" *Ibid.* In response, the Act would give federal authorities the ability to "cleanse our streams of commerce of moral, criminal and hatemongering pollution." *Id.* at 19,365; see also Zalman, *supra*, at 900 (explaining that "the Anti-Riot Act was designed to stifle internal political dissent").

Congress also made clear that "the most immediate and effective means of riot control, riot prevention, and the punishment of rioters rest with State and local police." H.R. Rep. No. 90-472, at 3 (1967). The House Judiciary Committee Report expressly disclaimed any intent to "*supplant*" local law enforcement; rather, the Act was designed to provide federal jurisdiction against those "who travel from State to State . . . with intent to incite street violence and rioting." *Ibid.*

2. As passed, the Anti-Riot Act criminalizes interstate travel or use of interstate facilities with intent to "incite a riot." 18 U.S.C. § 2101(a)(1). But it also sweeps in anyone who intends to "organize, promote, encourage, participate in, or carry on a riot," *id.* § 2101(a)(2), people who intend to "commit any act of violence in furtherance of a riot," *id.* § 2101(a)(3), and those who intend 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," *id.*

§ 2101(a)(4). The Act additionally requires, either during or after such interstate travel or use, performance or attempted performance of "any other overt act" for any of the above-specified purposes. *Id.* § 2101(a). A violation of the Act is punishable by up to five years' imprisonment. *Ibid.*

The Act contains a definitional section. A "riot" is "a public disturbance" involving certain violent acts or threats by one or more persons in a group of at least three. 18 U.S.C. § 2102(a). Any such act or threat must ultimately constitute "a clear and present danger" of, or result in, damage to the property or injury to the person of another. *Ibid.* Further, the Act places a gloss on the terms "incite," "organize," "promote," "encourage," "participate in," and "carry on." *Id.* § 2102(b). They include "urging or instigating" others 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." *Ibid.* (emphases added). In simpler terms, the statute criminalizes advocacy of violence or assertions of the right to engage in violent conduct.

Finally, the Anti-Riot Act explicitly disclaims any intent to displace the States' primary jurisdiction over riotous conduct, 18 U.S.C. § 2101(f), and bars federal prosecution if one has been acquitted of the same conduct in the State. *Id.* § 2101(c).

3. About a year after the Anti-Riot Act's passage, this Court decided *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam). That case involved the conviction of a Ku Klux Klan leader for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." *Id.* at

444–45. The defendant had appeared in a film threatening "revengeance" on behalf of the "white, Caucasian race." *Id.* at 446.

This Court reversed. It held that the First Amendment does not permit a State to "forbid or proscribe advocacy of the use of force or of law violation," unless it is "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. As such, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id.* at 448 (citation omitted). A statute that "fails to draw this distinction . . . sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Ibid.*

4. The Anti-Riot Act was a "dead letter" under President Lyndon Johnson and Attorney General Ramsey Clark. Zalman, *supra*, at 915 n. 96. But it was "activated" by the Nixon Administration (*ibid.*) in an infamous prosecution involving anti-Vietnam war demonstrations during the 1968 Democratic Convention. *United States* v. *Dellinger*, 472 F.2d 340, 350–52 (7th Cir. 1972). The so-called "Chicago Seven" were charged with making speeches for the purposes of "inciting, organizing, promoting, and encouraging a riot." *Id.* at 348. Although a split panel of the Seventh Circuit sustained the Act's constitutionality, it recognized the "[F]irst [A]mendment problems presented on the face of th[e] statute" and said the case was a "close" one. *Id.* at 362. The convictions were ultimately reversed on other grounds (*id.* at 409), and the government dropped the charges on remand.

Prosecutions under the Anti-Riot Act were relatively infrequent for decades after *Dellinger*. Free Expression Found. Amicus Br. 16–19 (collecting cases). Indeed, the few cases in which courts have considered the Act's constitutionality involved political dissenters of the same era. *E.g.*, *United States* v. *Hoffman*, 334 F. Supp. 504, 509 (D.D.C. 1971) (case involving Abbie Hoffman, co-founder of the Youth International Party and one of the Chicago Seven); *In re Shead*, 302 F. Supp. 560, 565–67 (N.D. Cal. 1969) (case involving grand jury subpoena of Black Panther Party members).

Recently, however, there has been a resurgence in prosecutions under the Act. For example, in *United States* v. *Miselis*, 972 F.3d 518 (4th Cir. 2020), the defendants were indicted for, among other things, "engag[ing] in several skirmishes" during the "Unite the Right" rally in Charlottesville, Virginia. *Id.* at 527. Thereafter, the government began filing Anti-Riot Act charges stemming from the protests following George Floyd's murder. *E.g.*, *United States* v. *Betts*, 509 F. Supp. 3d 1053, 1056 (C.D. Ill. 2020) (defendant posted on Facebook about the need to "fight for our black rights" and "Justice for George," and also called for looting of a local mall). The defendants in both *Miselis* and *Betts* challenged the Act as contrary to the First Amendment, but were unsuccessful.[2]

For its part, the Department of Justice has stated that it "remain[s] committed to investigating and prosecuting individuals and groups who . . . pose a

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[2] This Court denied certiorari in *Miselis*, No. 20-1241 (U.S. June 14, 2021). In that case, the defendants entered conditional guilty pleas admitting that their offense conduct involved violent acts not protected under the First Amendment. 972 F.3d at 547. The same is not true here.

threat to public safety and national security by engaging in 'violent confrontations' during protests." Letter from Elizabeth B. Prelogar to Hon. Nancy Pelosi (Feb. 18, 2021), https://www.justice.gov/oip/foia-library/osg-530d-letters/us_v_miselis_530d/download.

B. Facts and Proceedings Below

1. Petitioners are alleged members of an organization called RAM (the "Rise Above Movement"). Indictment 1. RAM bills itself as "a combat-ready, militant group of a new nationalist white supremacy and identity movement." *Ibid.* Members allegedly post images and videos online of themselves "conducting training in hand-to-hand combat" and "assaulting people at political events," along with messages advocating white supremacy. *Id.* at 1–2. RAM then uses those materials to "recruit" new members and train them "to prepare to engage in violence at political rallies." *Id.* at 3.

Petitioners allegedly attended three events in California in 2017. Indictment 4–9. The goal was "apparently to provide 'security' at right-wing political rallies, where there were often left-wing counterprotestors." Pet. App. 18a. The first event was in Huntington Beach, where Rundo, Boman, and Laube allegedly "assaulted" people. Indictment 5. The second event was in Berkeley. *Ibid.* Eason allegedly sent text messages to recruits about combat training and rally attendance. *Id.* at 5–6. He also allegedly used a credit card to rent a van and drove Rundo and Boman to the Bay Area. *Id.* at 6, 13. At the rally, the three men allegedly "assaulted" people again. *Id.* at 6. The final event was in San Bernardino. *Id.* at 8. Rundo carried a sign and allegedly "confronted and pursued" people. *Ibid.* After each rally, RAM members would "boast[]" in "text messages and on social media." Pet. App. 18a.

2. In 2018, a grand jury in the Central District of California returned a two-count indictment against Petitioners. Count One charged each of them with conspiring to violate the Anti-Riot Act, 18 U.S.C. § 371, while Count Two charged Rundo, Boman, and Eason with aiding and abetting each other in violation of the Act, 18 U.S.C. §§ 2101, 2(a). The indictment alleged nearly 50 "overt acts," and charged the full range of speech and conduct made unlawful under § 2101(a)(1)–(4). Indictment 3–13.

Laube pleaded guilty to the conspiracy count, while Rundo, Boman, and Eason moved to dismiss the indictment as facially overbroad under the First Amendment. Pet. App. 5a.

3. The district court dismissed the indictment against Rundo, Boman, and Eason. Pet. App. 15a–23a. It found that the Act "regulates a substantial amount of protected speech and assembly" on its face and is "unconstitutionally overbroad." *Id.* at 18a.

The court first recognized that "[t]he vitality of our democratic and public institutions depends on free and vigorous discussion." Pet. App. 17a. Civil rights protesters once "took to the streets to contest segregation and Jim Crow," and today people continue that tradition by protesting about issues like "abortion, Black Lives Matter, climate change, [and] healthcare." *Ibid.* As the court put it, "[o]ne person's protest might be another person's riot." *Ibid.*

The Anti-Riot Act "threatens these important freedoms," the court said. Pet. App. 17a. The statute indisputably "reaches speech and expressive conduct," criminalizing activities that far "precede any violence, so long as the individual acts with the required pur-

pose or intent." *Id.* at 19a. And criminal liability extends to those who "advocate acts of violence or assert the rightness of, or the right to commit, any such acts." *Id.* at 20a.

As the district court found, the core problem is that the Act lacks an "imminence requirement." Pet. App. 20a. The statute "does not require that advocacy be directed toward inciting or producing imminent lawless action," as required under *Brandenburg*. *Ibid.* It instead targets "*pre*-riot communications and actions," while sweeping in "a wide swath of protected expressive activity." *Id.* at 22a. The district court refused to "engage in grammatical gymnastics—and some degree of hand waving—to read an imminence requirement into the Anti-Riot Act." Pet. App. 22a. While it did not "condone RAM's hateful and toxic ideology," the court noted that state and federal law enforcement have "sufficient means at [their] disposal to prevent and punish such behavior without sacrificing the First Amendment." *Id.* at 23a. Upholding the Act, in contrast, would "substantially infringe[] on the rights to free speech and freedom of assembly." *Ibid.*[3]

The district court later permitted Laube to withdraw his guilty plea and dismissed the indictment against him on the same grounds. Pet. App. 24a–25a.

4. The court of appeals reversed. Pet. App. 1a–14a. Despite recognizing that First Amendment rights "are of the utmost importance in maintaining a truly free

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[3] The government asked the district court to consider severing portions of the statute. Because that would not have solved the "imminen[ce]" problem the court identified, it declined to do so. *E.g.*, 6/3/19 Tr. 10:16–11:3.

society," it concluded that the Anti-Riot Act is "not facially overbroad except for severable portions." *Id.* at 4a, 13a.

The court began by attempting to "construe" the Act's provisions as constitutional. Pet. App. 5a–6a. First, it read the statute's reference to "any other overt act for any purpose specified" in § 2101(a)(1)–(4) to mean that the purposes listed in subparagraphs (1)–(4) are "themselves the required overt acts." *Id.* at 8a. Put differently, the provision "refers to acts that fulfill the elements themselves, and not mere steps toward . . . one or more of those elements." *Ibid.* The court viewed this construction as "closely connect[ing] speech and action," such that the overt act provision itself would not raise constitutional concerns. *Ibid.*

Next, the court of appeals considered the terms set forth in the Act. Pet. App. 8a–11a. It found the Act constitutional except to the extent that "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." *Id.* at 11a. The court also sanctioned the Act's definition of "riot" because "[a]cts of violence are not protected under the First Amendment." *Ibid.* Finally, the court concluded that the Act did not implicate the "heckler's veto" doctrine because "intent to engage in one of the prohibited overt acts is a personal prerequisite to punishment." *Ibid.*

So construed, the court of appeals determined that the Anti-Riot Act "criminalizes a substantial amount of protected speech." Pet. App. 12a. Nevertheless, the court found it could be "salvaged" by severing "small portions of the statutory language—even words or phrases." *Ibid.* It redlined the words "organize," "promote," and "encourage" from § 2101(a)(2), along with

"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" from § 2102(b). *Id.* at 12a–13a. Although it did not offer any indicia of congressional intent, the court stated that "Congress would prefer severance over complete invalidation." *Id.* at 12a. Indeed, the court believed that its "elisions" struck the right "balance"—preventing the government from "act[ing] to avert a perceived danger too soon," while permitting it to "act before it is too late." *Id.* at 13a.

Judge Fernandez concurred in part and dissented in part. Pet. App. 13a–14a. He largely agreed with the majority, but would not have stricken the terms "organize" and "urging." *Ibid.*

The court denied Petitioners' request for rehearing and rehearing en banc. Pet. App. 26a.

REASONS FOR GRANTING THE PETITION

The Anti-Riot Act presents obvious First Amendment problems on its face, criminalizing wide swaths of protected speech and conduct far removed from actual riots. The statute has vexed federal courts since its inception and still does today: the Fourth, Ninth, and Seventh Circuits are hopelessly divided over whether, or to what extent, the Act is unconstitutionally overbroad. This case provides an excellent opportunity to resolve that division of authority, while also providing clarity and uniformity in an area of extreme importance.

I. The courts of appeals are divided over the construction and constitutionality of the Anti-Riot Act.

This case involves a multifaceted split among the circuits. In struggling to determine whether the Anti-Riot Act runs afoul of the First Amendment, the courts have fractured: the Seventh Circuit construed the Act as constitutional and upheld the entire statute; the Ninth Circuit construed the statute similarly, but still struck down various terms as overbroad; and the Fourth Circuit concluded that the Act is really an "attempt" statute, and struck down a non-coextensive set of terms. The result is a patchwork of criminal liability, where someone can be indicted for exercising speech and assembly rights in some jurisdictions, but not in others.

These incongruous interpretations of the Anti-Riot Act—a criminal statute that carries the potential for five years' imprisonment—are untenable, particularly in the First Amendment context. Indeed, the ensuing uncertainty has a significant chilling effect on the exercise of speech and assembly rights: a person who tries to demonstrate in New York or Florida, for example, will be left to guess whether her conduct crosses the line from protected protest to federal felony. Will the federal government prosecute her for merely attempting to "organize" a riot, as in Virginia? Or can she be prosecuted only for a completed act of "organiz[ation]," as in Illinois? Or can no charges be filed related to "organiz[ing]" conduct, as in California? These differences are open and acknowledged in the lower courts, and only this Court's intervention can resolve them.

A. The Seventh and Ninth Circuits require "fulfillment" of the Act's purposes, while the Fourth Circuit holds that "attempt" suffices.

The Anti-Riot Act criminalizes interstate travel or use of interstate facilities with a specific intent, provided that the person "performs or attempts to perform any other overt act for any purpose" specified in 18 U.S.C. § 2101(a)(1)–(4). The courts of appeals have struggled to construe this "overt act" provision, splitting into two camps: (1) the Seventh and Ninth Circuits require a completed act, (2) while the Fourth Circuit just requires an attempt.

1. The Seventh Circuit reads overt act as requiring "fulfillment" of one of the purposes listed in § 2101(a)(1)–(4), not just a "step toward one such element." *Dellinger*, 472 F.2d at 361. In *Dellinger*, the court recognized that the "overt act" provision would be constitutionally problematic if satisfied by a speech that was only a step toward inciting a riot. *Id.* at 362. It therefore read the statute with an eye toward forging an "adequate relation between expression and action," and took the purposes listed in § 2101(a)(1)–(4) as the actual "overt acts" required for criminal liability, not as mere "goals." *Ibid.* To support its construction, the court relied upon § 2101(b), which purportedly describes the purposes listed in § 2101(a)(1)–(4) as "overt acts." *Ibid.*

The Ninth Circuit has "adopt[ed]" the same approach. Pet. App. 7a. In *Rundo*, the court found that the statute can "reasonably be read to limit the meaning of 'overt act' to one of the specific acts contemplated in subparagraphs (1)–(4)." *Id.* at 8a. Like the Seventh Circuit, the court viewed its construction as "closely connect[ing] 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." *Ibid.* And it, too, found purported textual support for this reading in § 2101(b). *Ibid.*

2. The Fourth Circuit has an entirely different view of the provision. It believes that "the Anti-Riot Act was drafted as an *attempt* offense, . . . rather than a commission offense." *Miselis*, 972 F.3d at 534 (explaining that the statute "bears all the classic hallmarks" of an inchoate crime). The "overt act" provision does not implicate *Brandenburg* at all, then, because such acts "serve only to establish that a defendant specifically intended to carry out (and went far enough toward carrying out) an unlawful 'purpose.'" *Id.* at 535. In the court's view, it is "with respect to the defendant's *intended* speech, as opposed to *actual* speech (if any), that *Brandenburg* mandates the adequate relation between words and lawless action." *Ibid.* Accordingly, to sustain a conviction under the Act, the government must (at a minimum) prove that "the defendant acted with specific intent to engage in unprotected speech or conduct under § 2101(a)(1)–(4)." *Ibid.*

The Ninth Circuit disagreed with the Fourth Circuit's reading of the "overt act" provision. Pet. App. 8a n.8. According to the Ninth Circuit, "[b]y analogizing to an attempt statute, the Fourth Circuit sidesteps—and ultimately fails to address—the need to construe the 'overt act' provision in such a way that satisfies *Brandenburg*'s imminence requirement." *Ibid.*

B. The Seventh Circuit upholds the entire statute, the Fourth Circuit finds certain terms overbroad, and the Ninth Circuit strikes down yet another term.

The Anti-Riot Act criminalizes conduct undertaken with the specific intent, among other things, to "organize, promote, encourage, participate in, or carry on a riot." 18 U.S.C. § 2101(a)(2). It further defines these terms to cover "urging . . . other persons to riot." *Id.* § 2102(b). In interpreting these terms, three factions have emerged: (1) the Seventh Circuit holds that all the terms are constitutional, (2) the Fourth Circuit has found that three of these statutory alternatives are unconstitutionally overbroad, and (3) the Ninth Circuit has found still another term overbroad.

1. The Seventh Circuit has held that all of the purposes in § 2101(a)(1)–(4) bear a sufficient connection between speech and action to satisfy *Brandenburg*. And in the court's view, "all the terms are on an equal footing with respect to the degree of causal relationship required." *Dellinger*, 472 F.2d at 361.

In *Dellinger*, the court found that most of the terms "embody a relation to action in that they logically appear to require that the riot occur" or "require the element of propelling the action." 472 F.2d at 361. That is not readily apparent for terms like "organize," "promote," and "encourage," but the court found they are nonetheless "treated alike in § 2102(b)" and "include[] . . . urging . . . other persons to riot." *Ibid.* The court believed that the term "urge" itself "embod[ies] the required relation of expression to action" because it "suggest[s] an impelling beyond mere persuasion," and has been used in other statutes "to embody a relation to action." *Id.* at 361–62; see also *id.* at 362 (ex-

plaining that § 2101(b) "puts a sufficient gloss of propulsion on the expression described that it can be carved away from the . . . guarantee of freedom of speech").

2. The Fourth Circuit disagrees. It has held that the Act "sweeps up a substantial amount of speech that retains the status of protected advocacy," to the extent that it criminalizes "speech tending to 'encourage' or 'promote' a riot under § 2101(a)(2)" and "speech 'urging' others to riot . . . under § 2102(b)." *Miselis*, 972 F.3d at 530. In the court's view, these terms "fail to bear the requisite relation between speech and lawlessness" required under *Brandenburg*. *Id.* at 536. Encouraging is "quintessential protected advocacy" that can be read to "encompass[] *all* hypothetical efforts to advocate for a riot, including the vast majority that aren't *likely* to produce an *imminent* riot." *Ibid.* Promoting is similarly overinclusive, given that it "subsum[es] an abundance of hypothetical efforts to persuade that aren't likely to produce an imminent riot." *Ibid.* And urging "suffers from a similarly inadequate relation between speech and lawless action" because it can simply mean recommending or advising with "earnestness and persistence." *Id.* at 539.

3. The Ninth Circuit likewise holds these same terms—"promote," "encourage," and "urging"—run afoul of the First Amendment. Pet. App. 11a. But it has gone a step further, disagreeing with both the Fourth and Seventh Circuits to conclude that "organize" is "similarly overbroad" and "not susceptible to a limiting construction." *Id.* at 9a. To reach this conclusion, the court considered the particular facts of *Brandenburg*: a speech at a Ku Klux Klan rally, where the defendant stated "[t]his is an organizers' meeting" and threatened to take "revenge[]" on behalf of the "white

. . . race." *Ibid.* Because the defendant's speech was protected in *Brandenburg*, the Ninth Circuit believed that "the use of the verb 'organize' in [§] 2101(a)(2) [also] punishes protected speech." *Ibid.*

C. The Seventh Circuit upholds a provision that criminalizes mere advocacy of violence, while the Fourth and Ninth Circuits revise it to say the opposite.

The Anti-Riot Act puts a definitional gloss on the phrases "to incite a riot" and "to organize, promote, encourage, participate in, or carry on a riot." 18 U.S.C. § 2102(b). They "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." *Ibid.* (emphases added). Translating this "double negative" into a positive: the Act criminalizes speech involving mere advocacy of violence or assertion of the right to engage in violent conduct. The courts have divided over this provision, too: (1) the Seventh Circuit holds that the "double-negative" provision is constitutional, (2) while the Fourth and Ninth Circuits have struck it out.

1. The Seventh Circuit has strained to uphold the "double-negative" provision. Despite its obvious tension with *Brandenburg*, the court indulged the following assumption: Congress knew that "a truly inciting, action-propelling speech" would often include advocacy of violence or assertions of the right to commit violent acts, and thus included this provision to "forestall any claim by such speaker" that her conduct is excluded under § 2102(b). *Dellinger*, 472 F.2d at 363. The court acknowledged its reading was "awkward[]" and "assum[ed] that unnecessary language was em-

ployed," but still "deem[ed] it the most reasonable construction." *Ibid.* The court also downplayed any constitutional concerns, suggesting it "unreal . . . to suppose that the existence of this obtuse and obscure provision will deter expression." *Id.* at 364.

2. The Fourth and Ninth Circuits disagreed with *Dellinger*, and found § 2102(b) was not readily susceptible to a limiting construction. *Miselis*, 972 F.3d at 539; Pet. App. 10a. Because a "double negative cancels itself out," the phrase had to be read as punishing "the 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." *Miselis*, 972 F.3d at 539. In addition, since "*Brandenburg*'s imminence requirement was not adopted until after Congress passed the Act," the Ninth Circuit saw "no reason to [assume] that use of the double negative was a drafting error." Pet. App. 10a. Both courts ultimately severed the offending portion of § 2102(b), making the remainder say the opposite of what Congress intended.

II. This case presents an important question concerning the Anti-Riot Act's constitutionality and is an ideal vehicle for resolving it.

A. The question presented is extremely important.

1. Assessing the constitutionality of federal legislation is among "the gravest and most delicate dut[ies] that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). A decision striking down a congressional enactment is inherently worthy of this Court's review, and the "usual" practice is to grant certiorari in such cases. *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019); see also *Maricopa Cnty.* v. *Lopez-Valenzuela*, 574 U.S.

1006 (2014) (statement of Thomas, J.) (describing "a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional"); *United States* v. *Morrison*, 529 U.S. 598, 605 (2000) (granting certiorari "[b]ecause the Court of Appeals invalidated a federal statute on constitutional grounds").

This case involves the partial invalidation of a federal criminal statute on First Amendment grounds, elevating its importance further still. Among other things, the Anti-Riot Act has the potential to punish people who come together and express their views on public issues. See *Dellinger*, 472 F.2d at 348–49 (prosecution based on anti-war demonstrations). As this Court has held, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011) (citation omitted). That is because the right was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484 (1957). It is "the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964).

These First Amendment protections extend to impassioned speech, even words that advocate violence. This country has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times, Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Accordingly, "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft* v. *Free Speech Coal.*,

535 U.S. 234, 253 (2002); see also *N.A.A.C.P.* v. *Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.").

In light of these principles, there is a heightened need for this Court's review. Protest is at the crossroads of free speech and assembly, which was "considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry." *Bates* v. *City of Little Rock*, 361 U.S. 516, 522–23 (1960). For this reason, the Court has carefully guarded the rights of protesters against government intrusion. *E.g.*, *Snyder*, 562 U.S. at 459 (shielding from tort liability religious protesters outside a military funeral); *Texas* v. *Johnson*, 491 U.S. 397, 408–10 (1989) (vacating protester's state conviction for flag burning); *Boos* v. *Barry*, 485 U.S. 312, 329 (1988) (striking down statute that criminalized picketing critical of a foreign government near its embassy); *Claiborne*, 458 U.S. at 913–15 (shielding organizers of civil rights boycotts from tort liability); *Cox* v. *Louisiana*, 379 U.S. 536, 551–53 (1965) (vacating disturbing the peace convictions for students protesting segregation).

Here, too, the Court's intervention is crucial to ensure breathing space around the right to protest. On its face, the Anti-Riot Act chills protected speech by criminalizing acts undertaken for the purpose of organizing, promoting, encouraging, or urging others to riot. 18 U.S.C. § 2101(a)(2). The breadth of the statute, particularly as applied to online social media content, cannot be overstated. *E.g.*, *United States* v. *Peavy*, No. 4:20-mj-06092-CEH, ECF 1 at 5–7 (N.D. Ohio Jun. 5, 2020) (charges based on Facebook posts, which called

out "racist bias[ed] police department" and encouraged people to "hit the streets to [e]ndure on [d]estruction" at a protest several days in the future; defendant was arrested before date of alleged riot).

The common law of riot limited liability to the individual who personally committed a violent or destructive act. *United States* v. *Matthews*, 419 F.2d 1177, 1191 (D.C. Cir. 1969) (Wright, J., dissenting). But the Anti-Riot Act provides no such shield. Under the Act, whether an event is a criminal riot or a protected protest can depend on the conduct of others; that is, any property damage or injury, or the threat of such, by any "assemblage" within a "public disturbance" can transform a lawful assembly into a riot. 18 U.S.C. § 2102(a). But if involvement in a riot is criminal, and a riot depends on the violent or destructive intent of others, then "a rowdy group of Proud Boys or anarchists [might] have veto power over peaceful protests." *Dream Defenders* v. *DeSantis*, No. 4:21-cv-191-MW/MAF, 2021 WL 4099437, at *21 (N.D. Fla. Sept. 9, 2021) (striking down similar Florida statute). The Act has a significant chilling effect on those who would attend or promote a protest that they know, or fear, might "involve" such elements. Hayley Smith, *Police Declare Unlawful Assembly as Tensions Increase Among Rival Demonstrators at Huntington Beach Rally*, L.A. Times (Apr. 11, 2021) (Black Lives Matter leader "consider[ed] shutting down the counterprotest [at "White Lives Matter" rally] to make it clear the group was not there to incite a riot"), https://bit.ly/3uXyztr.

2. While the threat to the First Amendment alone warrants review, the decision below also merits consideration for its invasion of federal legislative au-

thority. Rather than invalidate the statute in its entirety, the Fourth and Ninth Circuits took an editor's pen to the Act, redlining its language until the statute bore little resemblance to the one Congress passed. So significant were these alterations, that each court felt it necessary to close its opinion by setting out the new statute as modified. Pet. App. 12a–13a (clean version of statute, constitutional "after the elisions"); *Miselis*, 972 F.3d at 542–43 (redlined version of statute, "severed accordingly"). In doing so, the courts strayed beyond the judicial function, i.e., "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great N. Ry. Co.*, 343 U.S. 562, 575 (1952).

Not only does the decision below usurp federal legislative power, but it also sharply alters the line that Congress drew between federal and state responsibility for riots. Congress recognized the primacy of state law in the control of riot conduct. And it manifested that intent by including an express (and exceedingly rare in the criminal code) anti-preemption clause, as well as a provision (again, rare in the criminal code) barring charges under the Act after acquittal in the state. 18 U.S.C. § 2101(c), (f). Nevertheless, by reading "overt act" as requiring a completed act of incitement or violence, the Ninth Circuit has shifted coverage of the statute to crimes at the core of state police powers—making choices that Congress surely would not have made.[4] Bradford R. Clark, *Separation of Powers*

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[4] Recent prosecutions reflect how the Act can be used to transform minor state-law property crimes into federal charges, with serious penalties. *See, e.g.*, *Betts*, No. 2:20-cr-20047-MMM, ECF 15 at 1–2 (C.D. Ill. Jul. 7, 2020) (three-year custody sentence for theft offense turned federal based on Facebook posts encouraging

(continued . . .)

as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1324 (2001) (explaining how federal lawmaking power protects the States' interests "by assigning lawmaking power solely to actors subject to the political safeguards of federalism").

3. The question presented here takes on greater importance because the States have started passing riot statutes that similarly threaten First Amendment rights. In the past year, nine States amended their criminal codes relating to protest or riot, and another 21 States have protest-related legislation pending. Int'l Ctr. for Not-For-Profit Law, U.S. Protest Law Tracker (last visited Oct. 8, 2021), https://www.icnl.org/usprotestlawtracker. Two of the recently amended statutes have language mirroring the Anti-Riot Act. Tenn. Code Ann. § 39-17-303(a)(2)(A) (criminalizing the knowing participation in a riot where the individual, *inter alia*, "[t]raveled from outside the state with the intent to commit a criminal offense"); Fla. Stat. Ann. § 870.01(2) (criminalizing "willfully participat[ing] in a violent public disturbance," defined in line with the Anti-Riot Act).

All of these considerations counsel in favor of this Court's review of the issue.

B. This case is an excellent vehicle for reviewing the Anti-Riot Act's constitutionality.

This case provides a clear lens through which to examine the Anti-Riot Act. The underlying indictment charges conduct allegedly fulfilling each subsection of

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"rioting" post-George Floyd); *United States* v. *King*, No. 2:20-cr-00543-RMG, ECF 39 at 2 (D.S.C. Aug. 23, 2021) (two-year custody sentence for livestreaming looting and stealing a six-pack of hard cider).

the statute, 18 U.S.C. § 2101(a)(1)–(4), meaning that the Court's facial review will invariably impact any further proceedings.

The constitutional question is also outcome determinative. If this Court holds that the Act is unconstitutional in its entirety, the charges against Petitioners will be dismissed outright. But if this Court holds that the Act is unconstitutional in part, the decision will still affect: (1) which of the nearly 50 charged overt acts are relevant to guilt, (2) which of the eight charged purposes can go to the jury, and (3) how the jury will be instructed as to "overt act." Indeed, the meaning of "overt act" is not a hypothetical question here: the only overt act named in Count Two—"traveling together" to Berkeley to participate in a riot (Indictment 14)—would likely be an "overt act" in the common-law sense, but is not a "completed act" of participation as the Seventh and Ninth Circuits require, and may or may not be a "substantial step" toward participation, as the Fourth Circuit seems to require.

In addition, given that Petitioners mounted a facial challenge under the First Amendment's overbreadth doctrine, there is no factual development necessary for this Court's review. The constitutionality of the Anti-Riot Act is a pure legal question, which was fully litigated and preserved at each step, and elicited reported decisions from the district court and court of appeals. In short, there are no obstacles to full consideration of the Act's constitutionality in this case.

III. The decision below is wrong.

Finally, the Ninth Circuit's reading of the Anti-Riot is textually unsound, and its severance analysis is contrary to congressional intent.

A. The Ninth Circuit's reading of "overt act" is untenable.

The Ninth Circuit's opinion depends on its threshold decision to read "overt act" as completed act. Like the Seventh Circuit, the court recognized that substantial swaths of the statute would be in peril if "overt act" meant something less than fulfillment of one of the purposes listed in 18 U.S.C. § 2101(a)(1)–(4). Pet. App. 8a; see also *Dellinger*, 472 F.2d at 362. If "overt act" requires nothing more than an outward manifestation of the riot plan in motion, then *Brandenburg*'s imminence requirement is not met as to any of the provisions. Merely crossing state lines with the intent to protest, and posting on Facebook encouraging friends to join would likely be a felony.

Although the Ninth Circuit's construction might sidestep some constitutional issues, it runs aground on the Act's plain text.

1. "Overt act" has a settled meaning: "an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime," even if "perfectly innocent . . . standing by itself." *Chavez* v. *United States*, 275 F.2d 813, 817 (9th Cir. 1960). Overt act had this meaning at common law—where the will is to be taken for the deed (*voluntas reputabatur pro facto*), so long as the will was manifested outwardly. Sir Edward Coke, Third Part of the Inst. of the Laws of England 5 (1644) ("But if a man had imagined to murder, or rob another, and to that intent had become *[i]nfidiator 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.").

This common-law meaning came to be assigned to "overt act" in the conspiracy context. Today, as it was when the Anti-Riot Act was drafted, conspiracy is where the term "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 whether at common law, or in the modern conspiracy context, the meaning is the same: an overt act need not fulfill the aspirations of the plan, so long as it is an outward manifestation of the plan.

Absent contrary instructions, "if a word is obviously transplanted from another legal source, . . . it brings its soil with it." *Moskal* v. *United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (citation omitted); accord *Morissette*, 342 U.S. at 263. And in this case, that "soil" is the long-standing definition of "overt act" as requiring something *less* than a completed act.

There is no contrary direction from Congress here—in fact, it's clear Congress wanted to capture distant conduct that propelled a riot. It targeted those who "train malcontents in the art of destruction," "hide weapons in their homes," and "write training tracts on the manufacture and use of bombs and Molotov cocktails." 113 Cong. Rec. 19,356 (1967) (statement of Rep. Broyhill). All overt acts in the common-law sense. And far from providing a contrary indication, the plain text and legislative history shows that Congress wanted to capture such preparatory conduct.

2. The Ninth Circuit rested its contrary reading of the statute on a nonsensical evidentiary provision, 18 U.S.C. § 2101(b), which uses the phrase "the overt acts described in [subsections (a)(1)–(4)]." Pet. App. 8a. This provision, the court said, was ambiguous, and could mean that the purposes listed in subsections

(a)(1)–(4) must be completed to establish criminal liability. *Ibid.* But the court found an ambiguity where none existed. It is far more natural to read § 2101(b) as a cross-reference to the "overt acts" "described in" subsection 2101(a)—i.e., those undertaken *for the purposes* set out in subsections (a)(1)–(4).

In any event, even if there were some ambiguity when § 2101(b) is viewed in isolation, there is none in the term "overt act" or the statutory structure. As just explained, "overt act" had a settled meaning at common law and still does today. The canon that favors a construction avoiding constitutional issues depends, first, on the text being "readily susceptible" to such a construction. *United States* v. *Stevens*, 559 U.S. 460, 481 (2010). The Ninth Circuit's reading, in contrast, does what this Court has long forbidden: "substitut[ing] words of another and different import." *Lambert* v. *Yellowley*, 272 U.S. 581, 598 (1926).

Nor can the Ninth Circuit's reading be harmonized with the remaining text. For instance, reading "overt act" as completed act renders superfluous "for any purpose specified" in § 2101(a). The phrase generally is used to describe an end—e.g., mail fraud requires a mailing "for the purpose of" furthering a fraudulent scheme, but the scheme need not have succeeded as long as the mailing was a step toward that goal. *United States* v. *Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989). The "for any purpose specified" plays the same role here if "overt act" has its usual, common-law meaning. But if "overt act" refers to a completed act, then the phrase is redundant. The statute becomes: any completed act that fulfills one of the purposes described in § 2101(a)(1)–(4), for any purpose specified in subparagraph § 2101(a)(1)–(4).

Similarly, to give meaning to "other" in "any *other* overt act," the interstate-commerce element must be considered an initial overt act; there cannot be an "other" without an initial. *Another*, New Oxford Dictionary (3d ed. 2010) ("another" is "an additional . . . thing of the same type as one already mentioned"). Congress's textual choice makes sense under Petitioners' reading, given that traveling or texting could be a manifestation of a plan to incite or organize or participate in a riot. But traveling itself does not *fulfill* any purpose listed in § 2101(a)(1)–(4).

The Ninth Circuit was wrong to find that the statute was readily susceptible to its construction of overt act.[5]

3. The reason that the Ninth Circuit, like the Fourth and Seventh Circuits, fought the most natural reading of the statute is apparent: If the Act means what it says, it creates serious constitutional problems. Criminalizing a common-law overt act undertaken for a riot-related purpose would not come close to satisfying the First Amendment test set out in *Brandenburg*, i.e., prohibited speech must be directed

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[5] The Fourth Circuit's reading fares no better. *Miselis*, 972 F.3d at 534. First, there is no textual hook for reading the Anti-Riot as an attempt statute. Since long before the Act was drafted, attempt has required more than an "overt act"; it requires a substantial step toward completion of the offense. *Hyde* v. *United States*, 225 U.S. 347, 387 (1912) (Holmes, J., dissenting) (distinguishing conspiracy from attempt based on gravity of act required: "[C]ombination, intention, and overt act may all be present without amounting to a criminal attempt"). Congress knows how to draft an attempt statute when it wants to (*e.g.*, 8 U.S.C. § 1324(a)(1)(A); 18 U.S.C. § 1512(a)(2)), and there is no reason to think it intended to do so here. Second, as the Ninth Circuit recognized, requiring a substantial step does not ensure the necessary degree of imminence under *Brandenburg*. Pet. App. 8a n.8.

at producing imminent lawlessness *and* likely to do so. 395 U.S. at 447.

Consider the charges in *Peavy*, which appear to have been drawn up with the common-law definition of "overt act" in mind. The defendant used Facebook to call his local police department racist, and to rally others to take to the streets at least *five days* in the future. No. 4:20-mj-06092-CEH, ECF 1 at 5 (N.D. Ohio Jun. 5, 2020). But he was arrested before the planned rally ever occurred. *Id.* at 7. Although the Facebook posts may have been intended to incite a riot, they came nowhere close to meeting *Brandenburg*'s imminence requirement.

The problem is evident here, too. Count Two of the indictment alleges an interstate-commerce element (using a credit card to rent a van), plus one identified overt act ("traveling together . . . to Berkeley, California, to engage in a riot"). Indictment 14. Renting and driving a van might be overt acts toward participating in a protest one believes may turn violent. But if the offense is complete once Petitioners hit the freeway, *Brandenburg*'s requirements of imminence and likelihood are not satisfied.

At bottom, the Anti-Riot Act's text—as Congress wrote it—runs headlong into the First Amendment.

B. The Ninth Circuit's severability analysis is contrary to congressional intent.

Petitioners' view is that severability does not come into play because, under a proper reading of "overt act," the statute as a whole lacks the imminence required under *Brandenburg*. But even if some portion of the Act were constitutional, the Ninth Circuit was still wrong to redline the offending portions and leave the rest intact. In doing so, the court transformed the

statute into one that Congress would not have passed because it fails to address the perceived harms Congress intended to remedy.

The Ninth Circuit treated severability as a grammar test: Would the statute be grammatically proper if the offending provision is excised? But that is not how severance works. *Alaska Airlines* v. *Brock*, 480 U.S. 678, 684–85 (1987). Rather, the core question is "whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 685; *Regan* v. *Time, Inc.*, 468 U.S. 641, 655 (1984) (whether "Congress' intent can in large measure be fulfilled without the [offending] requirement"); *R.R. Ret. Bd.* v. *Alton R. Co.*, 295 U.S. 330, 362 (1935) (whether severance gives the statute "an effect altogether different from that sought by the measure viewed as a whole").

Here, the Ninth Circuit's redlining gave the statute an entirely different effect than the one Congress intended. First, after finding the double-negative clause unconstitutional, the court concluded the offending portion could be severed. Pet. App. 12a. The statute, as revised, reads as though the panel deleted "not" from the phrase "not involving advocacy of any act . . . of violence." *Id.* at 13a. Reading a statute to say the opposite of what Congress intended is improper. *R.R. Ret. Bd.*, 295 U.S. at 362. And all the more so, since the Act was passed before *Brandenburg* and Congress could not have contemplated trimming the statute's coverage to meet that test. Pet. App. 10a. Because the double-negative provision infects each of its terms, § 2101(a)(1)–(2) should have been struck altogether.

Second, by striking the terms "organize," "promote," "encourage," and "urging" from the statute (Pet. App. 12a), the Ninth Circuit converted it into something far

afield from what Congress wrote. In the Anti-Riot Act, Congress made textual choices—the use of "overt act," the inclusion of the preparatory acts like organizing, promoting, and encouraging, and the anti-preemption clauses—manifesting a clear intent to reach individuals far removed from the riot itself who could not be reached by state laws. But after the Ninth Circuit's redlining and reinterpretation, all that is left are completed violent acts and actual riotous conduct—wholly intrastate crimes that should be left to state and local authorities.

Whatever value severance has in modern jurisprudence, it cannot be used as a tool for judicial legislation. *Murphy* v. *N.C.A.A.*, 138 S. Ct. 1461, 1482–83 (2018) (refusing to sever where effect would be to strike major premise of legislation, and leave in place only minor target). To criminalize only mid-riot conduct that state law-enforcement authorities were expected to handle "would have seemed exactly backwards" to Congress. *Ibid.*

Rewriting a statute is a "serious invasion of the legislative domain" and "sharply diminish[es] Congress's 'incentive to draft a narrowly tailored law in the first place.'" *Stevens*, 559 U.S. at 481 (citations omitted). The appropriate, and textually faithful, decision here is to strike the statute entirely, and let Congress "address the conditions that pertained when the statute was considered at the outset." *N.F.I.B.* v. *Sebelius*, 567 U.S. 519, 692 (2012) (Scalia, J., dissenting) (severance can be "a more extreme exercise of the judicial power than striking the whole statute").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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

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

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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*Counsel of Record