No. 21-5952

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment prohibits the indictment of petitioners for conspiring to violate, and violating, the Anti-Riot Act, 18 U.S.C. 2101(a).

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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 (Pet. App. 15a-23a) is reported at 497 F. Supp. 3d 872. A subsequent order of the district court (Pet. App. 24a-25a) is not published in the Federal Supplement but is available at 2019 WL 11779227.

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). On March 19, 2020, this Court extended the time within

which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on October 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Central District of California returned an indictment charging petitioners on one count of conspiring to violate the Anti-Riot Act, 18 U.S.C. 2101(a), and petitioners Rundo, Boman, and Eason on one count of substantively violating Section 2101(a). Pet. App. 4a-5a. Those three petitioners moved to dismiss the charges against them, and the district court granted the motion. Id. at 5a. Petitioner Laube, who had initially pleaded guilty to the conspiracy charge against him, moved to withdraw his guilty plea and to dismiss the charge against him, and the court granted his motion. Ibid. The court of appeals reversed and remanded. Id. at 1a-14a.

1. As alleged in the indictment, petitioners were members of the "Rise Above Movement," or "RAM," a group that represents itself "as a combat-ready, militant group of a new nationalist white supremacy and identity movement." Pet. App. 4a; see Indictment 1. "RAM members post videos and pictures online of their hand-to-hand-combat training," along with videos and pictures of themselves assaulting people at political events. Pet.

App. 4a-5a. Between December 2016 and October 2018, petitioners conspired to engage in acts of violence at political rallies in California and Virginia. Id. at 5a; Indictment 3-12. As part of the conspiracy, petitioners recruited other individuals to join RAM, coordinated and engaged in combat training to prepare to commit violence at political rallies, travelled to political rallies where they assaulted people, and shared videos and photographs of their acts of violence to recruit members for future events. Ibid.

On March 15, 2017, petitioners Rundo, Laube, and Boman, along with other RAM members, conducted combat training. Indictment 4. Ten days later, on March 25, 2017, all four petitioners, along with other RAM members, attended a political rally in Huntington Beach, California, where petitioners Laube, Rundo, and Boman assaulted other individuals. Indictment 4-5.

On March 27, 2017, petitioners began planning for further violence at an upcoming rally in Berkeley, California. Indictment 5. Petitioners recruited others to join them at the rally, seeking to have "a group of at least 25 so [they] c[ould] form up and take down anything that c[ame] at [them]," and rented a van to transport themselves and other RAM members to the rally. Indictment 5-6. During that rally, which occurred on April 15, 2017, petitioners Rundo, Boman, and Eason assaulted multiple people, including a Berkeley police officer. Indictment 6. During the violence at the rally, petitioner Rundo reportedly broke his hand. Indictment

7. Petitioner Boman subsequently posted on Facebook a photograph of himself punching other individuals. Ibid.

On June 10, 2017, petitioner Rundo and other RAM members attended a political rally in San Bernadino, California. Indictment 8. At that rally, petitioner Rundo and others allegedly confronted and chased people, and some RAM members smashed car windows. Ibid. Petitioner Rundo subsequently sought to assist two co-conspirators in attending the "Unite the Right" rally in Charlottesville, Virginia, in August 2017, where the co-conspirators assaulted counter-protesters. Ibid.; see United States v. Miselis, 972 F.3d 518, 526-527 (4th Cir. 2020), cert. denied, 141 S. Ct. 2756 (2021).

After the Charlottesville rally, petitioners continued to train for future violence. Indictment 10-12. In the months that followed, petitioner Rundo posted videos and photographs online depicting RAM members engaging in violence or combat training -- including a promotional video showing petitioners Rundo, Boman, and Laube assaulting individuals at the Huntington Beach and Berkeley rallies. Indictment 10.

2. In October 2018, a grand jury in the Central District of California returned an indictment charging petitioners with conspiring to violate the Anti-Riot Act, 18 U.S.C. 2101(a), and charging petitioners Rundo, Boman, and Eason with a substantive violation of the Anti-Riot Act. Indictment 1-14.

a. The Anti-Riot Act was enacted as Section 104(a) of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 75-77, following the "long, hot summer of 1967," in which more than 150 cities across the United States saw rioting, and during the violence in more than 100 cities sparked by the assassination of Martin Luther King, Jr., on April 4, 1968. Miselis, 972 F.3d at 527-528 (citation omitted).

The primary provision of the Anti-Riot Act provides:

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce * * * 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.

18 U.S.C. 2101(a) (footnote omitted).*

The Anti-Riot Act contains a definitional provision, 18 U.S.C. 2102, that defines certain terms used in Section 2101(a) as follows:

> (a) As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.
>
> (b) As used in this chapter, the term "to incite a riot", or "to organize, promote, encourage, participate in, or carry on a riot", includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.

Ibid.

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* As the court of appeals observed, the reference in Section 2101(a) to "subparagraph (A), (B), (C), or (D) of this paragraph," 18 U.S.C. 2101(a), which is repeated in Section 2101(b), is the result of an apparent error made in a technical revision of the statute in 1996. Pet. App. 6a n.6. The court "read the statute's references to subparagraphs (A)-(D) as referring to subparagraphs (1)-(4) in § 2101(a)," which neither party disputed. Ibid.; see Miselis, 972 F.3d at 528 n.3.

b. Petitioner Laube pleaded guilty to the conspiracy charge pursuant to a plea agreement. C.A. E.R. 57-69; Pet. App. 5a. In that agreement, petitioner Laube admitted that he (along with others) had "assaulted protesters and other persons" at the Huntington Beach rally in March 2017. C.A. E.R. 61.

Petitioners Rundo, Boman, and Eason jointly moved to dismiss the indictment, contending that the Anti-Riot Act is facially unconstitutional under the First Amendment. C.A. E.R. 81-88, 98; Pet. App. 18a. The district court granted the motion. Pet. App. 15a-23a. The court concluded that the Anti-Riot Act is unconstitutionally overbroad, reading it to prohibit "a substantial amount of protected expressive activity in relation to the statute's legitimate sweep." Id. at 22a; see id. at 19a-23a. The court did not undertake a severability analysis to determine whether portions of the Anti-Riot Act that the court construed to prohibit protected speech were severable from the remainder of the statute.

Petitioner Laube moved to withdraw his guilty plea and to dismiss the indictment as to him. C.A. E.R. 270-274. The district court granted the motion. Pet. App. 24a-25a.

3. The court of appeals reversed and remanded in a per curiam decision. Pet. App. 1a-14a.

The court of appeals recognized its obligation to "construe the [Anti-Riot] Act as constitutional if [the court] c[ould] reasonably do so." Pet. App. 6a. The court also observed that,

"[i]f there is a constitutional infirmity" in the Anti-Riot Act, the court must "consider whether the Act is severable and, if so, invalidate only the unconstitutional provisions." Ibid.; see id. at 12a. And although the court concluded that the Anti-Riot Act "does have some constitutional defects," it found that "those defects are severable from the remainder of the Act" and that the district court had therefore erred in dismissing the indictment. Id. at 6a.

Agreeing with the Seventh Circuit's interpretation in its decision upholding the Anti-Riot Act against a similar constitutional challenge in United States v. Dellinger, 472 F.2d 340 (1972), cert. denied, 410 U.S. 970 (1973), the court of appeals construed the phrase "any other overt act for any purpose specified in subparagraph [(1), (2), (3), or (4)]" in 18 U.S.C. 2101(a) to refer to "acts that fulfill the elements themselves, and not mere steps toward, or related to, one or more of those elements." Pet. App. 8a. The court explained that, unlike the other possible reading, under which the language would refer to an act that is a "'step toward' one of the acts in subparagraphs (1)-(4)," its construction "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." Id. at 7a-8a (citation omitted). The court observed that "§ 2101(b) also supports that construction by specifically referring to 'the overt acts described in subparagraph [(1), (2),

(3), or (4)] of subsection (a).'" Ibid. (quoting Dellinger, 472 F.2d at 362, in turn quoting 18 U.S.C. 2101(b)) (brackets in original).

The court of appeals then determined that subparagraphs (1)-(4) of Section 2101(a) are "not facially overbroad" and "do not violate the First Amendment" except for certain terms in Section 2101(a)(2). Pet. App. 11a-12a; see id. at 8a-11a. The court recognized that, under this Court's precedent, "'[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.'" Id. at 5a (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)). The court of appeals then concluded that the terms "organize," "promote," and "encourage" in Section 2101(a)(2) encompass substantial amounts of protected speech that is not directed to inciting imminent lawless action. Id. at 9a. But the court found that the remaining terms in subparagraph (2) and the proscribed acts in subparagraphs (1) and (4) describe activities that fall outside the protections of the First Amendment. Id. at 8a-9a, 11a. And petitioners did not challenge subparagraph (3), which applies to the commission of "any act of violence in furtherance of a riot." 18 U.S.C. 2101(a)(3); see Pet. App. 8a.

The court of appeals additionally concluded that two portions of 2102(b) -- which addresses the meaning of "the term[s] 'to

incite a riot'" and "'to organize, promote, encourage, participate in, or carry on a riot,'" 18 U.S.C. 2102(b) -- are similarly overbroad. Pet. App. 9a-10a. The court took the view that the term "urging" in that provision encompasses protected speech. Id. at 9a. The court additionally reasoned that Section 2102(b)'s final phrase -- which states that "the term[s] 'to incite a riot'" and "'to organize, promote, encourage, participate in, or carry on a riot' * * * 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) -- violates the First Amendment. Pet. App. 10a. The court recognized that the full phrase is a limitation on the scope of Section 2101(a), but concluded that the final part affirmatively "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'" and was not limited to inciting imminent lawless action. Ibid. (citation omitted).

The court of appeals observed that, although the Fourth Circuit's decision in United States v. Miselis, supra, had not interpreted the Act in precisely the same way, see Pet. App. 8a n.8, its determination that most of the Anti-Riot Act's terms are not facially overbroad accorded with Miselis, except insofar as the Fourth Circuit found the term "organize" not to be overbroad. See Pet. App. 8a-9a; see also Miselis, 972 F.3d at 536-539. The

court of appeals acknowledged that the Seventh Circuit in Dellinger had upheld all of the Act's provisions based on a narrower reading of certain terms. Pet. App. 9a-10a.

Finally, the court of appeals explained that the portions of the Anti-Riot Act that it had deemed overbroad were severable. Pet. App. 12a. The court observed that "severing small portions of the statutory language" -- "§ 2101(a)(2)'s inclusion of 'organize,' 'promote' and 'encourage' and § 2102(b)'s inclusion of 'urging or'" and that provision's "'not involving'" phrase -- eliminated any constitutional infirmity. Ibid. (citation omitted). The court "agree[d] with the Fourth Circuit" in Miselis, which had similarly recognized that the portions of the statute that it had held overbroad were severable, and emphasized "that Congress would prefer severance over complete invalidation." Ibid.; see Miselis, 972 F.3d at 542-543.

Judge Fernandez issued an opinion concurring in part and dissenting in part. Pet. App. 13a-14a. He concurred in the panel majority's opinion, except that he "would not strike the concepts of organizing and urging from the [Anti-Riot] Act." Id. at 13a.

ARGUMENT

Petitioners renew their contention (Pet. 28-34) that the indictment against them must be dismissed, asserting that the Anti-Riot Act is facially overbroad under the First Amendment and also that the portions of the Act that the court of appeals found to be overbroad are inseverable from the remainder of the statute.

Although the government does not agree with certain aspects of the court of appeals' reasoning and conclusions, the court's decision reversing the dismissal of the indictment against petitioners does not warrant this Court's review. Petitioners would not be entitled to any greater relief under the decisions of any other court of appeals. And the interlocutory posture of this case counsels strongly against the Court's review at this time. This Court has recently denied two petitions for writs of certiorari presenting essentially the same question as this petition. See Miselis v. United States, 141 S. Ct. 2756 (2021) (No. 20-1241); Daley v. United States, 141 S. Ct. 2756 (2021) (No. 20-7377). The same result is warranted here.

1. As a threshold matter, review is unwarranted in the case's current posture because the decision below is interlocutory. See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 384 (1893); see also Stephen M. Shapiro et al., Supreme Court Practice § 4.18, at 4-54 to 4-58 (11th ed. 2019). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." Hamilton-Brown Shoe Co., 240 U.S. at 258. That ordinary practice enables the Court to examine cases on a full record, prevents unnecessary delays in the trial and appeals process, and allows the Court to

consider all of the issues raised by a single case or controversy at one time.

Those considerations apply with particular force here. Because the courts below decided the case in a motion-to-dismiss posture, the factual record has not been developed beyond the indictment, apart from petitioner Laube's admissions in his since-withdrawn plea agreement. See C.A. E.R. 61. While the court of appeals reversed the dismissal of the indictment, it subsequently stayed its mandate pending this Court's disposition of the petition for a writ of certiorari, see C.A. Order (May 26, 2021), which has halted further factual development in the district court. Those facts, and the precise grounds on which petitioners are prosecuted for violating the Anti-Riot Act, would substantially aid any further consideration of how the First Amendment might bear on this case.

If petitioners are convicted at trial or enter guilty pleas, and their convictions are affirmed on appeal, they will then be able to raise the claim raised in their petition -- together with any other questions that may arise on remand -- in a single petition for a writ of certiorari seeking review of the final judgment against them. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). The Court should not depart from its usual

practice of declining to grant a petition for certiorari before entry of a final judgment.

2. Petitioners cannot, and do not appear to, dispute that the indictment alleges conduct by petitioners that is unprotected by the First Amendment. For example, the indictment alleges that all four petitioners engaged in acts of violence at one or more political rallies. Indictment 5-6; see, e.g., Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("The First Amendment does not protect violence." (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982))). Petitioners accordingly could prevail in their effort to have the indictment dismissed on First Amendment grounds only by demonstrating either (1) that the Anti-Riot Act must be invalidated in its entirety under the overbreadth doctrine, or (2) that the particular portions of the Act that are clearly constitutional and that petitioners are alleged to have violated are inseverable from other portions of the Act that the court of appeals found to be overbroad. The court of appeals correctly determined that petitioners failed to make either showing.

a. "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." United States v. Williams, 553 U.S. 285, 293 (2008). In construing the statute, a court will seek to avoid any "constitutional problems" by asking whether it may be "subject to * * * a limiting construction." New York v. Ferber, 458 U.S.

747, 769 n.24 (1982). After construing the statute, the court must then ask whether the statute "criminalizes a substantial amount of protected expressive activity." Williams, 553 U.S. at 297.

This Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." Williams, 553 U.S. at 292 (emphasis omitted). That requirement serves "to maintain an appropriate balance" between the concern that "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas," and the "obvious harmful effects" that flow from "invalidating a law that in some of its applications is perfectly constitutional -- particularly a law directed at conduct so antisocial that it has been made criminal." Ibid. If a provision of the statute is "impermissibly overbroad," a court must then consider whether "the unconstitutional portion" is "severable" from the remainder. Ferber, 458 U.S. at 769 n.24.

b. The Anti-Riot Act makes it unlawful for a person to "travel[] in interstate or foreign commerce" or to "use[] any facility of interstate or foreign commerce" for one of four listed purposes, provided that the person performs or attempts at least one overt act in furtherance of those purposes during or after such travel in, or use of, a facility of interstate or foreign commerce. 18 U.S.C. 2101(a). The listed purposes are:

> (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.

Ibid. Section 2102(a) defines a "riot" as "a public disturbance" involving either "acts of violence" that "constitute a clear and present danger of, or [that] result in, damage or injury to" another person or property, or certain threats of such acts by persons having "the ability of immediate execution" of them. 18 U.S.C. 2102(a). And Section 2102(b) states that the phrases "'to incite a riot'" and "'to organize, promote, encourage, participate in, or carry on a riot'"

> include[], but [are] 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).

The court of appeals correctly recognized that only a handful of terms in these provisions could even potentially be read to implicate protected speech: the verbs "organize," "promote," and "encourage" under Subsection 2101(a)(2), and the definition of the phrases "to incite a riot" and "to organize, promote, encourage, participate in, or carry on a riot" in Section 2102(b). Pet. App.

8a-10a. Other listed purposes that consist of violent acts -- "participat[ing] in" or "carry[ing] on a riot," as defined in the Act to entail actual or imminently threatened violence, and "commit[ting] any act of violence in furtherance of a riot," 18 U.S.C. 2102(a)(2)-(4) -- do not constitute protected advocacy. See, e.g., Mitchell, 508 U.S. at 484.

Although "'incit[ing]'" a riot under Subsection 2101(a)(1) entails speech, the court of appeals correctly determined that that term encompassed only "advocacy that is likely to cause an imminent riot," speech that is unprotected under this Court's holding in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). Pet. App. 9a. Similarly, the court of appeals correctly held 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'" and thus "satisfies Brandenburg's imminence requirement" for the same reason. Id. at 11a.

The court of appeals identified only three terms in Subsection 2101(a)(2), and one term and one phrase in Subsection 2102(b), that, in its view, sweep too broadly with respect to the category of constitutionally protected speech: "§ 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.'" Pet. App. 12a (citation omitted). The

government does not intend to pursue charges against petitioners based on those portions of the statute.

c. In this Court, petitioners do not appear to challenge the court of appeals' determination that the remainder of the acts identified in Section 2101(a)(1)-(4) and Section 2102(b) comport with the First Amendment. Instead, petitioners contend (Pet. 28-32) that the court of appeals erred in construing the "other overt act" element of the offense set forth in 18 U.S.C. 2101(a) to include only the acts enumerated in subparagraphs (1)-(4) of Section 2101(a). Petitioners contend that the court should have construed Section 2101(a)'s reference to "any other overt act for any purpose specified in subparagraph [(1), (2), (3), or (4)]," 18 U.S.C. 2101(a), to require "nothing more than an outward manifestation of the riot plan in motion," Pet. 28. So construed, petitioners argue (ibid.), the other "'overt act'" phrase would encompass a range of acts that would not satisfy "Brandenburg's imminence requirement." No court of appeals has adopted that interpretation, and the court of appeals here correctly rejected it, see Pet. App. 7a-8a.

The court of appeals acknowledged that, in isolation, the phrase "any other overt act for any purpose specified in subparagraph [(1), (2), (3), or (4)]," 18 U.S.C. 2101(a), could refer "to one of the specific acts contemplated in" those subparagraphs, or more broadly to an act that is "'a step toward'" one of those objectives. Pet. App. 7a-8a (citation omitted). The

court observed, however, that both the Anti-Riot Act's text and principles of constitutional avoidance supported the former, narrower interpretation. Id. at 8a. The court observed that the text of Section 2101(b) "specifically refer[s] to 'the overt acts described in subparagraph [(1), (2), (3), or (4)] of subsection(a),'" ibid. (quoting Dellinger, 472 F.2d at 362, in turn quoting 18 U.S.C. 2101(b)) (emphasis added; brackets in original), and found that reference supported construing Section 2101(a) to encompass only the acts actually described through the specifications in subparagraphs (1)-(4) -- not to a different, broader category of conduct undertaken with the ultimate goal of achieving one of the acts described in those subparagraphs. Cf. United States Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1845 (2020) (emphasizing that courts "do 'not lightly assume that Congress silently attaches different meanings to the same term in the same . . . statute'" (citation omitted)). In addition, that narrower reading of "other overt act" avoids the additional constitutional question that petitioners' interpretation would raise of whether, if Section 2101(a) prohibited all conduct taken as "a step toward" one of the acts stated in subparagraphs (1)-(4), many of the provision's applications would violate the First Amendment. Pet. App. 7a (citation omitted); see id. at 8a; Pet. 31-32. For similar reasons, the Seventh Circuit adopted the same construction nearly

50 years ago in United States v. Dellinger, 472 F.2d 340, 361-362 (1972), cert. denied, 410 U.S. 970 (1973).

Petitioners contend that such a construction is impossible, asserting that the term "'overt act'" had a "settled meaning" when the Anti-Riot Act was enacted, referring to "'an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.'" Pet. 28 (quoting Chavez v. United States, 275 F.2d 813, 817 (9th Cir. 1960)). But even assuming arguendo that petitioners' premise is correct, Congress is not beholden to use the term in that way. See, e.g., Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1658 (2017) (observing that Congress sometimes defines terms in ways that differ from ordinary usage, such as when "Congress says something like 'a State "includes" Puerto Rico and the District of Columbia,'" (citation omitted)); see also Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 776 (2018) (explaining that, where Congress accords a statute-specific meaning to a term, courts "'must follow that definition,' even if it varies from [the] term's ordinary meaning" (citation omitted)). And here, Section 2101(b) provides a textual indication that Congress used the term "overt act" in relation to subparagraphs (1)-(4) of Section 2101(a) to refer to the acts described in those provisions. At a minimum, that is a permissible reading that should be adopted to avoid potential constitutional infirmities. See Ferber, 458 U.S. at 769. And petitioners urge a contrary

interpretation in order to create, rather than to avoid, what they portray (Pet. 31) as "serious constitutional problems" with the statute. This Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question" counsels strongly against that approach. Gomez v. United States, 490 U.S. 858, 864 (1989).

d. Contrary to petitioners' contention (Pet. 15-21), review is not warranted to resolve a lower-court conflict concerning the scope and validity the Anti-Riot Act's provisions. The court of appeals' decision rejecting petitioners' facial-overbreadth challenge accords with the results reached by every court of appeals that has addressed a similar challenge. To the extent that other circuits view the application of constitutional principles to the Act differently than the court of appeals did, this case does not implicate the tension because no court of appeals' decision would grant petitioners more relief than they have already received.

All three courts of appeals that have considered the constitutionality of the Anti-Riot Act have reached similar conclusions as to what the Act permissibly covers. See Pet. App. 5a-13a; United States v. Miselis, 972 F.3d 518, 530-544 (4th Cir. 2020) (deeming certain portions of the Act overbroad but upholding the remainder as valid and severable), cert. denied, 141 S. Ct. 2756 (2021); Dellinger, 472 F.2d at 354-364 (upholding the Act, as

interpreted by the court, as constitutional). In particular, all three courts agree that the Act validly proscribes certain courses of conduct that involve participating in, carrying on, or committing an act of violence in furtherance of a riot. See Pet. App. 11a; Miselis, 972 F.3d at 540 ("[A] 'riot' entails at bottom an act or a threat of violence presenting 'grave danger' to others"); Dellinger, 472 F.2d at 361-363. All three circuits also agree that the Act permissibly covers inciting a riot, because incitement of violence is unprotected speech under Brandenburg. See Pet. App. 8a-9a ("Like the Fourth Circuit and the Seventh Circuit, we conclude that speech that 'incites' or 'instigates' a riot satisfies Brandenburg's imminence requirement"); Miselis, 972 F.3d at 536 ("With respect to 'incite' under § 2101(a)(1), we have little difficulty concluding that this verb encompasses no more than unprotected speech under Brandenburg."); Dellinger, 472 F.2d at 360. And all three recognize that abstract advocacy of violence -- speech that falls short of the Brandenburg standard -- may not be punished. See Pet. App. 9a; Miselis, 972 F.3d at 533 ("[A]dvocacy of lawlessness retains the guarantees of free speech unless it's directed and likely to produce imminent lawlessness."); Dellinger, 472 F.2d at 360.

Petitioners err in contending (Pet. 18-20) that further review is warranted because the courts of appeals' decisions differ at the margins regarding which if any particular portions of Sections 2101(a) and 2102(b) they deem overbroad. No other court

of appeals decision casts doubt on the court of appeals' decision here that petitioners may, consistent with the First Amendment, be prosecuted for their alleged conduct in this case, which includes the use of violence in furtherance of a riot. As petitioners acknowledge (Pet. 18-19), the Seventh Circuit in Dellinger did not invalidate the Anti-Riot Act in any respect, and petitioners' alleged conduct would plainly be punishable under that court's construction of the statute. The Fourth Circuit's decision in Miselis did not strike down any provision upheld by the court of appeals in this case. To the contrary, the Ninth Circuit gave defendants every benefit that they would have received in the Fourth Circuit. See generally Miselis, 972 F.3d at 535-544.

Although the Ninth Circuit additionally held the term "organize" in Section 2101(a)(2) to be overbroad, Pet. App. 9a, that slight divergence does not warrant this Court's review. Petitioners do not ask this Court to review the court of appeals' determinations regarding which particular portions of subparagraphs (1)-(4) of Section 2101(a) or of Section 2101(b) it found to be overbroad. See p. 18, supra. And, in any event, the Ninth Circuit's conclusion that the term "organizing" is overbroad favors petitioners, by narrowing the statutory terminology on which a conviction under Section 2101(a) may be based. Granting review to address whether the court of appeals erred in deeming that term overbroad could not provide petitioners with any benefit.

Petitioners observe (Pet. 16-17) that the Fourth Circuit in Miselis declined to construe the "other overt act" phrase in Section 2101(a) to refer to one of the specific acts described in subparagraphs (1)-(4), as the Ninth Circuit here and the Seventh Circuit in Dellinger did, and instead interpreted Section 2101(a) as creating "an attempt offense." 972 F.3d at 534. The Fourth Circuit observed that, so interpreted, the Anti-Riot Act's "overt-act elements don't implicate Brandenburg[] because, as with inchoate offenses generally, the overt acts themselves -- 'which may be entirely innocent when considered alone' -- 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 (citations omitted). As reasoned by the Fourth Circuit, "to obtain a conviction under the Anti-Riot Act, the government must at a minimum prove that, notwithstanding any failure of consummation, the defendant acted with specific intent to engage in unprotected speech or conduct under § 2101(a)(1)-(4)." Ibid. Under the Fourth Circuit's approach, it is "therefore 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 for purposes of the Anti-Riot Act." Ibid.

As petitioners note (Pet. 17), the Ninth Circuit here "disagree[d] with" the Fourth Circuit's attempt-focused approach in rejecting petitioners' facial overbreadth challenge. Pet. App. 8a n.8. It is unclear, however, what practical difference those

alternative framings of the statute would make with respect to the statute's scope. Section 2101(a) expressly makes it an offense to "perform[] or attempt[] to perform" the prohibited acts. 18 U.S.C. 2101(a) (emphasis added). Under both circuits' approaches, the statute encompasses some attempted but uncompleted violations. Even if the application of the Anti-Riot Act to any particular inchoate offense might raise First Amendment concerns, that is a matter for an individual, as-applied challenge -- not a basis to hold the statute facially invalid in all of its applications.

No circuit would permit a conviction based on protected First Amendment activity to stand. And the Seventh Circuit's decision upholding the Anti-Riot Act has been in place for nearly 50 years without any evident chilling effect on such legitimate activities. No sound basis exists to review petitioners' abstract assertion that the Ninth Circuit -- which will review any convictions entered against them -- has adopted a narrower reading of the statute than other circuits have.

3. Petitioners alternatively contend (Pet. 32-34) that the indictment should be dismissed on the theory that, in light of the court of appeals' determination that certain portions of the Anti-Riot Act are overbroad, the entire Act must be invalidated as well. The court of appeals correctly rejected that contention.

a. It is a court's "duty * * * to maintain [an] act in so far as it is valid." Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion) (quoting El Paso & Ne. Ry. Co. v. Gutierrez,

215 U.S. 87, 96 (1909)); see Ferber, 458 U.S. at 769 n.24 ("[I]f [a] federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated."). This Court accordingly applies "a strong presumption of severability," under which it "presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute." Barr v. American Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2350 (2020) (AAPC) (plurality opinion); see id. at 2357 (Sotomayor, J., concurring in the judgment); id. at 2363 (Breyer, J., joined by Ginsburg and Kagan, JJ., concurring in the judgment with respect to severability and dissenting in part); see also Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 508 (2010) ("'Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" (citation omitted)). The Court's precedents "reflect a decisive preference for surgical severance rather than wholesale destruction, even in the absence of a severability clause." AAPC, 140 S. Ct. at 2350-2351 (plurality opinion). Under those precedents, a court should "retain those portions of the [a]ct that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives

in enacting the statute." United States v. Booker, 543 U.S. 220, 258-259 (2005) (citations omitted).

The court of appeals here properly applied those principles and determined that the portions of the Act that it deemed overbroad are severable. Pet. App. 12a. The court agreed with the reasoning and conclusion of the Fourth Circuit in Miselis, which explained that provisions covering activities such as "committing any act of violence in furtherance of a riot" and "participating in" and "carrying on a riot" -- all acts that petitioners themselves are alleged to have engaged in -- are both "'perfectly valid'" and entirely "capable of functioning independently." Miselis, 972 F.3d at 543, 547 (citation omitted); see Pet. App. 12a. And the language that the court of appeals considered infirm -- a small number of discrete terms and one definitional phrase -- "lends itself to being cleanly excised." Miselis, 972 F.3d at 543.

Petitioners are mistaken in contending (Pet. 34) that this Court's decisions in Murphy v. National Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018), and United States v. Stevens, 559 U.S. 460 (2010), compel a different result. In Murphy, the Court held unconstitutional the central provision in a statutory scheme to prevent sports betting -- a prohibition on States' authorizing or licensing private entities to engage in such activity. See 138 S. Ct. at 1478. The Court concluded that, with that central provision unenforceable, Congress would not have intended the

provision that prevented the States themselves from operating sports betting to remain in effect. Id. at 1483 ("To the Congress that adopted [the statute], legalizing sports gambling in privately owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards."). Similarly, the Court found that leaving in place a provision that punished private entities for operating sports betting in accordance with state law would "implement[] a perverse policy that undermines whatever policy is favored by the people of a State." Ibid.

In contrast, severing the few portions of the Anti-Riot Act that the court of appeals found to be overbroad, while allowing the remaining provisions of the Act to remain in force, comports with "Congress's basic objective," namely, "to proscribe, to the maximum permissible extent, unprotected speech and conduct that both relates to a riot and involves the use of interstate commerce." Miselis, 972 F.3d at 543. As the court of appeals recognized, "Congress would prefer severance to complete invalidation" of the Anti-Riot Act. Pet. App. 12a.

In Stevens, the Court held invalid a statute that "regulate[d] expression based on content," where the regulated expression fell outside the "'well-defined and narrowly limited classes of speech'" that the Court has found to be unprotected. 559 U.S. at 468-469 (2010) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942)). Although the Court highlighted two words in the definition of the term "'depiction of animal cruelty'" that

exemplified its "alarming breadth," id. at 469, 474, nowhere did Stevens suggest that the statute's constitutional flaw might have been ameliorated by striking just those two words. See id. at 474-477.

b. Petitioners do not contend that the court of appeals' severability determination conflicts with any decision of another court of appeals. To the contrary, the decision below accords with the Fourth Circuit's severability determination in Miselis, supra, the only other appellate decision to address the issue. See pp. 27-28, supra. As in Miselis, further review is not warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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