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,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This petition presents an important question involving the constitutionality of the Anti-Riot Act—a criminal statute that seriously threatens the First Amendment rights of protesters. In its opposition, the government does not dispute that there is a three-way circuit conflict. Nor does it dispute that this case squarely presents the issue.

As to the objections Respondent does raise, none is persuasive. *First*, the non-final nature of the judgment below is no basis to deny certiorari; further factual development will have no bearing on this Court's resolution of Petitioners' facial challenge. *Second*, the court of appeals' reading of "overt act" as requiring a completed act cannot be salvaged on constitutional avoidance grounds, because the plain text is not susceptible to such a reading. *Third*, the claim that there is little practical difference between the three circuits' views is premised on a reading of the Anti-Riot Act that the Ninth Circuit expressly disavowed. And *fourth*, the court of appeals' severance analysis is incompatible with congressional intent.

None of Respondent's arguments provides a sound reason to avoid review in this case. The petition should be granted.

ARGUMENT

I. The interlocutory posture of this case does not counsel against review.

Respondent argues that the non-final nature of this case counsels against granting the writ. But "there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997). Rather, this Court's practice is to

grant certiorari before final judgment if the issue would otherwise merit this Court's review and if resolution of the issue is "fundamental to the further conduct of the case." *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).

This case meets that standard. The proper construction of the Anti-Riot Act is fundamental to the case going forward: It will affect what portions of the broadly charged indictment remain intact, what evidence the parties can present at trial, and how the jury will be instructed.

The government claims that further factual development would assist this Court's review. BIO 13. But this is a facial challenge to a statute, with an indictment that charges each provision of the Anti-Riot Act. It is unclear how this Court would be in a better position to evaluate that facial challenge after trial, and the government provides no explanation.

And while the government is correct that this Court would *also* have authority to consider the question presented after trial and another appeal, delaying review until then is inefficient for the lower courts and the parties. Trial will be shaped by the Ninth Circuit's construction of the statute. If the court was wrong, either in its definition of overt act or in the portions of the statute it deemed constitutional, a trial applying that incorrect standard would be a waste of judicial and party resources.

Delaying review is also unjust. *Cf. Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 153 (1964) (deeming case sufficiently "final" to warrant review because, among other things, victims would otherwise have to wait longer to vindicate their interests). Petitioners have been at liberty since the district court dismissed the

indictment in this case. If the district court's interpretation of the statute is correct, then Petitioners should not be brought to trial at all. They should not face detention, nor should they be subject to the jeopardy of a trial and potentially years of appellate process, just to return to the same spot, seeking this Court's review of their facial challenge. *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963) (recognizing the prejudice to criminal defendant in enduring a remand for retrial under the wrong rubric).

Delaying review in this case will multiply efforts, with no corresponding benefit to this Court's review. The interlocutory nature of this case is no reason to deny certiorari.

II. The court of appeals' reading of overt act is not faithful to the Anti-Riot Act's text.

The government's analysis of the Anti-Riot Act starts with its verbs—to incite, organize, participate, or commit an act of violence. BIO 16–18. But that's the wrong framing. The lynchpin of Petitioners' claim is the interpretation of "overt act." If a violation of the statute depended on a defendant actually committing violence, then there is no First Amendment problem. But the Anti-Riot Act does not proscribe the actual commission of violence in furtherance of a riot, it proscribes overt acts for the purpose of participating in, inciting, or committing violence. And if overt act is used in its ordinary sense, then *each* of the verbs in 18 U.S.C. § 2101(a) lack the imminence required under *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

The government does not appear to dispute that the common usage of overt act is the one offered by Petitioners—conduct that is a step toward a particular

end, even if it does not achieve that end. BIO 20. Instead, it argues that Congress does not have to use language in its ordinary or plain-meaning sense.

That may be true, but it's irrelevant here. Congress did not use an explicit definitional provision to assign a non-common usage to "overt act," as it did in the examples recited by the government. BIO 20. Instead, Respondent depends on a far less clear token of congressional intent—a purported ambiguity in a separate evidentiary provision, § 2101(b).

As the petition explains, however, using § 2101(b) to find an ambiguity in the phrase overt act is strained. Pet. 30. "The overt acts described in [(a)(1), (2), (3), or (4)]" most naturally refers to the only "overt acts" "described in" § 2101(a)—that is, overt acts undertaken *for the purposes* set out in § 2101(a)(1)–(4).

But even if the Ninth Circuit's finding of ambiguity were plausible based on a reading of § 2101(b) in isolation, it is untenable in context. Reading overt act as completed act renders "for any purpose" surplusage; after all, it is unnatural to say an act must fulfill a certain end *and* be for the purpose of that same end—that it must incite a riot and be for the purpose of inciting a riot. It also renders the "other" in any *other* overt act nonsensical: If there is to be an*other* overt act, there must be a first overt act. But the only candidates in the text are the interstate commerce acts, like use of the phone or mail, and the government does not claim that a phone call or mailing that satisfies the first element must, itself, incite or promote a riot. Petitioners described these anomalies in their petition (Pet. 30–31), and Respondent did not address them.

The government's suggestion that Congress used § 2101(b) to signal its intent to assign an unusual

meaning to overt act hits another historical roadblock. The drafters of the Anti-Riot Act used the Travel Act, 18 U.S.C. § 1952, as a template,[1] and adopted its verbiage almost entirely—with one major exception. It added "overt." *Compare* 18 U.S.C. § 1952 (requiring an interstate-commerce act plus "an act described in" paragraphs (1)–(3)), with *id.* § 2101 (requiring an interstate-commerce act plus "any other overt act for any purpose" specified in paragraphs (1)–(4)). Either Congress used "overt" to lower the bar set by the Travel Act, or Congress knew that the courts had already interpreted the Travel Act to require only a (common-law) overt act and wanted to embrace that reading. *E.g.*, *Spinelli* v. *United States*, 382 F.2d 871, 893–94 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969) (finding Travel Act satisfied by "overt act" of visiting apartment where gambling occurred). Either way, reading the Anti-Riot Act to require a completed act not only strays from its plain and common-law meaning, it vitiates an intentional modification of the statute Congress used as a template.

Far from showing an intentional deviation from the common meaning of overt act, all of these clues suggest that Congress meant precisely what it said: that it intended to create criminal liability for conduct manifesting a riot plan afoot.

The doctrine of constitutional avoidance depends on the text being susceptible to the desired interpretation. Viewing the text and history of the Anti-Riot Act, as a whole, the statute is not amenable to the Ninth Circuit's construction.

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[1] *See* 113 Cong. Rec. 19,364 (1967) (statement of Rep. Cramer); 112 Cong. Rec. 18,462 (1966) (statement of Rep. Cramer).

III. The circuits' divergent interpretations of the Anti-Riot Act warrant this Court's review.

The government does not dispute that the three circuits that have examined the Anti-Riot Act have each come to a different conclusion about its reach. It does not dispute that there is a two-way conflict as to the interpretation of overt act, or that there is a three-way conflict about what portions of the statute are constitutional. Instead, it tries to downplay the conflicts, suggesting that the differences are too marginal to warrant this Court's review. Its arguments are not persuasive.

To start, the government points out that the result Petitioners urge has not been adopted by any of the circuits. But this Court does not hear cases merely to decide which of the approaches already accepted in the various circuits is correct. For example, in *Rehaif* v. *United States*, this Court granted certiorari and held that *none* of the circuits had the correct view of the *mens rea* requirement for certain firearms offenses. 139 S. Ct. 2191, 2195 (2019) (ruling for petitioner); U.S. Br. in Opp. at 6, *Rehaif*, No. 17-9560 (Oct. 24, 2018) (opposing certiorari because no court of appeals had adopted petitioner's view).

The circuit split here evidences confusion on the proper interpretation of overt act—confusion that results in disparity in the reach of a criminal statute in different circuits. What is criminal in one state is not criminal in another. And just as with any other circuit conflict this Court addresses, that disparity is intolerable, no matter how the Court would ultimately interpret the Act. Indeed, the government has previously sought, and this Court has previously granted, certiorari solely because a single circuit struck down a

criminal statute on constitutional grounds, even in the absence of a conflict. Pet. at 13–16, *United States* v. *Alvarez*, No. 11-210 (Aug. 18, 2011), *pet. granted*, 132 S. Ct. 457 (2011).

The government claims that the circuit conflict here is not significant enough to warrant this Court's review. It doesn't dispute Petitioners' statement of the three conflicts, so much as it disputes whether those conflicts have practical importance.

In particular, the government argues that there may be little practical difference between the Fourth Circuit's interpretation, which reads the Anti-Riot Act as an attempt statute, and the Ninth Circuit's interpretation, which reads overt act as an act that fulfills one of the objects set out in § 2101(a)(1)–(4). It points to the text's inclusion of "attempts to perform" overt acts as suggesting that the Ninth Circuit, too, would accept conduct that is merely a substantial step toward the ends described in the (a)(1)–(4). BIO 24–25.

But the Ninth Circuit expressly disavowed that view. It found that the statute was saved from unconstitutionality precisely because it required an act that fulfilled one of the objects in (a)(1)–(4)—one that actually incited or involved participation in a riot or violence in furtherance of a riot—and not conduct that was merely was a step in the direction of that goal. Pet. App. 8a. Indeed, it faulted the Fourth Circuit's "attempt" construction for failing to ensure that the statute would cover only conduct that satisfied *Brandenburg*'s imminence test. *Id.* at 8a n.8.

Other than this misreading of the Ninth Circuit's interpretation, Respondent offers no answer to the divergence in the Fourth Circuit's "attempt" view and

the Ninth and Seventh Circuit's "fulfillment" view. And the gap is not hypothetical.

Take *United States* v. *Peavy*, No. 4:20-mj-06092-CEH, ECF 1 at 5–7 (N.D. Ohio Jun. 5, 2020). There, the defendant tried to organize a protest in his hometown following the death of George Floyd. He posted Facebook messages telling people what time and place to come together, but he was arrested before the appointed day arrived. His conduct may well have been criminal in the Fourth Circuit, depending on whether his posts were seen as a substantial step toward organizing a riot. His conduct would be criminal in the Seventh Circuit if he had actually been able to organize a riot, but was not because he was arrested before it occurred. And he could not have been prosecuted for organizing a riot in the Ninth Circuit, because that court struck organizing from the statute.

If anything, the "attempts to perform" clause that the government relies on just creates other problems. The Fourth Circuit viewed the entire statute as creating an attempt offense, but, because "there can be no attempt to commit an attempt," Jens David Ohlin, Wharton's Criminal Law § 7.4 (16th ed. 2021), this interpretation leaves the "attempts to perform" clause without any work to do. And though the Ninth Circuit did not explicitly strike the phrase "attempts to perform," the logic of its decision would not appear to permit prosecution under an attempted overt act theory—yet another step away from the statute's text.

This Court should grant review to provide an interpretation that is faithful to the text of the statute and also consistent across the country.

IV. Severing portions of the statute goes against congressional intent.

As the government acknowledges, Petitioners cannot be prosecuted if either of two things is true: the statute as a whole is unconstitutional, or the unconstitutional portions of the statute are not severable from the Act. BIO 14. The district court found no reason to reach the question of severance, because the statute as a whole failed to satisfy the imminence standard set out in *Brandenburg*. Petitioners contend that this view is correct.

But even if the Ninth Circuit were correct that only part of the statute is unconstitutional, its decision to strike part of the statute and then rewrite the rest through the doctrine of severance would still be untenable. Under the Ninth Circuit's view, severance is appropriate even if it means converting a double-negative clause into a single negative. That maneuver violates the government's own statement of the test, which says that severance is only appropriate where it tracks Congress's basic objective in enacting the statute. BIO 26–27 (citing *United States* v. *Booker*, 543 U.S. 220, 258–59 (2005)). Turning a clause into its opposite cannot be consistent with Congress's basic objective in enacting the law.

The government argues that severance is appropriate because Congress intended "to proscribe, to the maximum permissible extent, unprotected speech and conduct that both relates to a riot and involves the use of interstate commerce." BIO 28. This is wrong, both as a historical matter and as a doctrinal point. On the historical question, the 1968 Congress that enacted the Anti-Riot Act was not trying to criminalize riots to the fullest extent of its power under the Commerce Clause. Congress recognized that the States, in the

exercise of their police powers, would have primary responsibility over assaults and property crimes that occur during a riot. And it did not intend to displace that jurisdiction. H.R. Rep. No. 90-472, at 3 (1967). Rather, it targeted those "professional agitators" who would inflamed a population and leave before the riot started. 113 Cong. Rec. 19,363–64 (1967) (statement of Rep. Cramer); *see* Pet. at 5–6, 25–26.

The Ninth Circuit's severance analysis turns the enacting Congress's intent on its head, creating federal jurisdiction over the conduct the enacting Congress wanted left to the States, and striking all the rest. That puts this case squarely within the realm of *Murphy* v. *N.C.A.A.*, 138 S. Ct. 1461 (2018). There, this Court recognized that severance is not appropriate where it would disturb the delicate balance reflected in a piece of legislation, leaving in place a minor premise of the law while striking the major one. *Id.* at 1483. The government's claim that *Murphy* is distinguishable fails to grapple with the extensive legislative record and textual signals, all of which make clear Congress's intent not to disturb the States' primary authority for on-the-ground conduct in a riot. 18 U.S.C. § 2101(c), (f).

On the doctrinal point, the inquiry into congressional intent cannot be, simply, that Congress would want this Court to salvage as much of the statute as could be deemed constitutional. Not only does that ignore the reality that this law, like most, embodied a set of careful compromises, but it also would encourage Congress to write laws in broad strokes and leave this Court the tough work of legislative line drawing. That is the very thing this Court, in *United States* v. *Stevens*, said judges had no business doing. 559 U.S. 460, 481 (2010).

At the time of the passage of the Anti-Riot Act, Congress crafted a law that made no effort to satisfy *Brandenburg*'s imminence standard, because *Brandenburg* had not yet been decided. Both the Ninth and Fourth Circuits agreed that the law, as written, cannot stand, and thus took an editor's pen to the statute, using the doctrine of constitutional avoidance to stretch the text, and the doctrine of severance to rewrite it. In a delicate area that treads close to the balance of federal and state authority over protest and implicates precious constitutional rights, this Court should not "rewrite a . . . law to confirm it to constitutional requirements." *Stevens*, 559 U.S. at 481. The entire law should be struck down.

CONCLUSION

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

Respectfully submitted,

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