NO._____

In The
Supreme Court of the United States

THOMAS WALTER GILLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Anti-Riot Act (hereinafter "Act") embodied in 18 U.S.C. § 2101 prohibits interstate travel or the use of the mechanisms of interstate commerce with intent to engage in a number of specified activities related to a riot. 18 U.S.C. § 2101. The prohibited conduct includes inciting, organizing, promoting, encouraging, participating in, urging, and the commission of any act of violence in furtherance of a riot.

The Fourth Circuit has upheld the constitutionality of the Act once certain language offensive to the First Amendment, namely promoting, encouraging, urging, is excised from the Act. The Ninth Circuit agreed though it also struck the word "organize" as offensive to the First Amendment. Therein lies the federal appellate circuit split of opinion. In petitioner's case, the Fourth Circuit inferred that petitioner knowingly and voluntarily pled guilty to the constitutional parts of the law and not to those parts rendered unconstitutional by the Fourth Circuit and the Ninth Circuit. Accordingly, the Fourth Circuit affirmed petitioner's single count felony conviction. The questions presented are:

1. Whether the difference of opinion between the Fourth Circuit and the Ninth Circuit as to the constitutionality of "organize" within the context of the Act is a matter requiring resolution by the Court.
2. Whether the constitutionally infirm provisions of the Act are severable sufficiently to sustain petitioner's conviction under the Act.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. Thomas Walter Gillen was a defendant in this case in the United States District Court for the Western District of Virginia, Charlottesville Division, and was an appellant in USA v. Thomas Walter Gillen (4th. Cir. No. 19-4553).

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fourth Circuit:

United States v. Miselis, 972 F.3d 518 (4th Cir. 2020)

U.S. Court of Appeals for the Ninth Circuit:

United States v. Rundo, No. 19-50189 (*per curiam* Opinion, March 4, 2021)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas Walter Gillen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at *United States v. Thomas Walter Gillen,* No. 19-4553 (Unpublished, September 23, 2022) and reprinted at Appendix page A1. The United States Court of appeals rendered judgment that same day and said judgment reprinted at Appendix page A6. The related opinion of the united States Court of Appeals is reported at *United States v. Miselis,* 972 F.3d 518 (4th Cir. 2020). The district court opinion rejecting a constitutional challenge to the Anti-Riot (hereinafter, "the Act") Act is reported at *United States v. Daley,* 378 F. Supp. 3d 539 (W.D. Va. 2019). The Seventh Circuit's opinion rejecting a constitutional challenge to the act is reported at *United States v. Dellinger,* 472 F.3d 340 (7th Cir. 1972). The United States District Court for the Central District of California's decision declaring the entire Act unconstitutional is reported at *United States v. Rundo,* --F. Supp. 3d--, 2019 WL 11779228 (C.D. Cal. June 3, 2019). The published opinion of the United States Court of Appeals for the 9th Circuit is reported at *United States v. Rundo,* 19-50189 (9th Cir. 2021).

JURISDICTION

The Court of Appeals entered its judgment on September 23, 2022. The jurisdiction of this Court to review this petition is conferred by 28 U.S.C. §1254(1). The

district court had jurisdiction over this federal criminal case pursuant to 18 USC § 3231. The Court of Appeals had jurisdiction pursuant to 28 USC § 1291 and 18 USC § 3742(a).

The Petition is filed within 90 days from the date of the decision of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2101 (The Anti-Riot Act) provides in 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.

18 U.S.C. § 2102 provides in part the following definition:

> (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.

PROCEDURAL HISTORY

The petitioner was indicted in the Western District of Virginia on one count of violating the Act, 18 U.S.C. § 2101, and on a second count of conspiracy to violate the Act. App. 1a. Petitioner was indicted along with three co-defendants. Four other individuals were similarly indicted in the Central District of California. *See Rundo,*

2019 WL11779228. All eight individuals were alleged to be either members or loosely associated with a group called the Rise Above Movement ("RAM").

In each court defendants challenged the constitutionality of the Act with different results. The Western District of Virginia upheld the Act in its entirety. The Central District of California discharged the Act as unconstitutional in its entirety. Petitioner pled guilty to one count of conspiring to violate the Act and preserved his right via plea agreement to challenge the constitutionality of the Act on appeal. The Fourth Circuit, after striking several parts of the Act as unconstitutional on First Amendment grounds, upheld the remainder of the Act and concluded that petitioner had pled guilty to the constitutional parts of the Act and accordingly affirmed his conviction. It should be noted that petitioner's co-appellants in the Fourth Circuit, Benjamin Daley and Michael Miselis filed a consolidated appeal. The published opinion in that appeal is reported at *United States v. Miselis,* 972 F.3d 518 (4th Cir. 2020). Petitioner, for reasons not relevant to this Petition, filed his own separate appeal (prepared and filed by undersigned counsel who was also trial counsel). The opinion in that appeal is reported at *United States v. Thomas Walter Gillen,* No. 19-4553 (Unpublished, September 23, 2022). The Ninth Circuit agreed with the Fourth Circuit on the unconstitutionality of certain sections of the Act but added the term "organize" as also constitutionally infirmed, requiring severance as offensive to the First Amendment.

STATEMENT OF THE CASE

The United States Court of Appeals for the Seventh Circuit undertook an extensive review of the Act in United States v. Dellinger. *United States v. Dellinger,* 472 F.3d 340 (7th Cir. 1972). Dellinger was taken up in light of the decision in Brandenburg. *Brandenburg v. Ohio,* 395 U.S. 444 (1969). The Seventh Circuit in Dellinger upheld the Act in its entirety. *Dellinger, Id.*

The Fourth Circuit determined the Act's criminalization of action taken to "encourage" or "promote" violated the principles of Brandenburg. The Fourth Circuit further found the Act's definition of inciting, organizing, participating in, or carrying on a riot was repugnant to the Constitution in that it criminalized "urging" a riot and thereby encompassed mere advocacy of the rightness of a position. *United States v. Miselis,* 972 F.3d 518 (4th Cir. 2020). The Ninth Circuit agreed with the Fourth Circuit in finding these provisions constitutionally infirm yet further found the prohibition of "organizing" a riot as repugnant to the Constitution. The Ninth Circuit therefore added "organize" to the list of terms it struck as constitutionally infirm. *United States v. Rundo,* 19-50189 (9th Cir. 2021). The Ninth Circuit acted after the district court for the Central District of California declared the Act unconstitutional in its entirety. *United States v. Rundo,* --F. Supp. 3d--, 2019 WL 11779228 (C.D. Cal. June 3, 2019). The result of this difference of opinion between the Fourth Circuit and the Ninth Circuit is that under the Act it is lawful to organize a riot in the Ninth Circuit but unlawful to do so in the Fourth Circuit. What other circuits may conclude on this issue is a matter of speculation. Indeed the Seventh Circuit has not addressed the issue since 1972.

In severing critical elements from the Act the Fourth and Ninth Circuits have essentially created new law. The areas of "expression" or "expressive behavior" are excised by both circuits leaving portions of the law associated with violent conduct in place. In the Ninth Circuit the concept of "organizing" is struck from the Act. The element of inter-state travel combined with the requirement of more than a single actor in light of no requirement that violence be imminent or in fact occur surely highlights the concept of "organizing" as a significant part of the Act. Urging, encouraging, and promoting are not insignificantly broad concepts in and of themselves. Both circuits have engaged in line-editing and the deleted sections of the Act are supremely significant ones. The Act is clearly intended to interdict riots *before* they happen and the Act applies even if there never is a riot. The Act was intended to criminalize the behavior of those who intentionally and deliberately engaged in organizing a riot, in encouraging others to engage in a riot, or undertaking to promote a riot. All of this can in principal amount to extremely extensive intentional conduct. Though it is unconstitutionally proscribed behavior, the Act, without this conduct, remains. The Court has noted that line-editing can be a "serious invasion of the legislative domain." *United States v. Stevens,* 559 U.S. 460, 481 (2010). Line-editing can, as here, simply disregard legislative intent. The question necessarily arises as to whether the legislature would have undertaken the valid action independently of the invalid action. *See Minn. v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999).

The Fourth Circuit in its opinion in Petitioner's case correctly notes that petitioner steadfastly maintains he committed no act of violence at the rallies in Charlottesville, Virginia on August 11 and 12, 2017. The opinion further notes that in

his guilty plea appellant admitted he did on a previous occasion "attack a protestor" in Berkeley, California. It is noteworthy the usual legal term "assault", indicating unlawful conduct, is not employed. Had the matter proceeded to trial petitioner would have contended this "attack" was justified in so far as it was in defense of another. Petitioner has admitted the act in Berkeley, California was not in self-defense. In fairness to the government, it has responded on brief that it considers defense of others to be subsumed within the concept of self-defense and petitioner has accordingly waived this issue. While the foregoing needs to be stated in the interests of fairness and candor it is petitioner's position that the fact of a circuit split on a constitutional issue and the issue of the availability of severance to save a remnant of this constitutionally infirmed statute remains and does so regardless of the characterization of petitioner's conduct in a venue where petitioner was never charged with a criminal offense and hence was never litigated in that venue. Local crimes are typically the province of the locality in which they occur and there never was a California prosecution of petitioner for the act described in California.

The district court had jurisdiction over this federal criminal case pursuant to 18 USC § 3231. The Court of Appeals had jurisdiction pursuant to 28 USC § 1291 and 18 USC § 3742(a).

REASONS FOR GRANTING THE PETITION

I. There is a conflict among the circuits.

It is indisputable that though there is agreement between the Fourth Circuit and the Ninth Circuit that certain offending portions of the Act must be stricken there is a disagreement over the element of "organizing". The Ninth Circuit finds it constitutionally infirmed and the Fourth Circuit does not. No other circuit has ruled on the issue other than the Seventh in 1972. Even without a conflict among the circuits the Court has granted certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional. *United States v. Kebodeaux,* 570 U.S. 387,391 (2013). *See also, e.g., Zivotofsky v. Kerry,* 135 S.Ct. 2076 (2015); *Ashcroft v. ACLU,* 542 U.S. 656 (2004); *United States v. Morrison,* 529 U.S. 598 (2000). It would seem intolerable that organizing a riot should be lawful in California but subject a citizen to felony prosecution and lengthy incarceration if organized in North Carolina. Recent civil unrest in various parts of the country make a resolution of this issue all the more critical. The Court has recognized that determining the constitutionality of a statute is a grave and important undertaking. *See Rostker v. Goldberg,* 453 U.S. 57 (1981). Three circuits have undertaken this task with regard to the Act in question with three different results.

II. The Fourth Circuit is in error in concluding that the offending portions of the Act can be severed while upholding petitioner's conviction under the remaining portion.

Apart from the fact that a court re-drafting a statute would seem to violate basic principles of federalism it is instructive to look at the background in Dellinger. As petitioner argued to the district court in a pre-trial motion to dismiss the indictment the federal prosecution in Dellinger focused on the conduct of the Chicago Eight at the 1968 Democratic Convention. *Dellinger, Id.* The core of the indictment in that case focused on several speeches and exhortations delivered by members of the group promoting and encouraging specific acts of violence along with more general incitement to riot and disrupt the political convention. The alleged offending conduct was the call to action, or the call to violent action, of members of the general public by members of the Chicago Eight. Trial counsel read portions of the indictment in that case into the record. The Act specifically targeted conduct prior to any riot, or any act of violence, occurring. The pre-convention conduct of the Chicago Eight met the elements of the Act and it is clear Congress intended prohibit the encouragement of acts of public violence. The Act targets pre-riot communications and pre-riot actions whether as riot occurs or not. The Act certainly targeted rioting itself. As such the Act should be viewed as a whole and it is no surprise the Fourth and Ninth Circuits had to undertake a considerable re-write in order to bring it into compliance with the Constitution. The severance embarked upon in this case yields a statute that results in "an effect altogether different from that sought by the measure viewed as a whole." *Railroad*

Retirement Bd. V. Alton R. Co., 295 U.S. 330, 362 (1935). If a statute is constitutionally infirmed to the extent the Act is, it is for Congress to address any revision thereof.

In pleading guilty to the indictment petitioner was advised of the nature of the statute he was charged with violating, the elements thereof, and that in pleading guilty he was waiving any defenses he might have. In order for a defendant to voluntarily plead guilty he must understand the nature of the allegation and what the prosecution would have to prove at trial in order to obtain a conviction. Where a defendant is not advised of the elements of the charge against him he is deprived of any meaningful capacity to "make the fundamental choices about his own defense." *McCoy v. Louisiana,* 138 S.Ct. 1500, 1511 (2018). More succinctly, a defendant not so apprised and informed will be unable to determine if he has a viable defense. In the case at bar petitioner faced a felony prosecution in Virginia where he had not engaged in any violent conduct in Virginia. The elements, though, did not exclusively go to violent conduct but included encouraging, promoting, urging, or organizing a riot, with "riot" defined in the Act. Petitioner could well have concluded that his conduct could reasonably be deemed by a trier of fact to encompass this now unconstitutional language. It is the defendant's choice as to whether to enter a plea of guilty or not guilty. Our law requires that this choice be an informed one and there is hence the right to counsel and the right to a uniform rule based plea colloquy overseen by a trial judge who makes certain findings as to whether the plea is knowingly and voluntarily made.

CONCLUSION

For the reasons given above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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