U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 18, 2021

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: *United States* v. *Miselis*, 972 F.3d 518 (4th Cir. 2020) (Nos. 19-4550 & 19-4551), rehearing denied (Oct. 5, 2020)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to notify you that the Department of Justice has decided not to file a petition for a writ of certiorari in the above-captioned case. The judgment affirmed the convictions of two defendants for conspiring to violate the Anti-Riot Act, 18 U.S.C. 2101-2102, in violation of 18 U.S.C. 371, but in doing so concluded that some of the Anti-Riot Act's applications that are not implicated in this case would violate the First Amendment. A copy of the Fourth Circuit's decision is enclosed.

1. The two defendants in this case, Michael Paul Miselis and Benjamin Drake Daley, were members of a white-supremacist group in Southern California known as the Rise Above Movement (RAM). Op. 4. RAM "[b]ill[ed] itself as a 'combat-ready, militant group of a new nationalist white identity movement,'" with the "chief purpose" of "attend[ing] 'purported "political" rallies' (typically organized by other groups) at which its members engaged in violent attacks on counter-protestors." *Ibid.* "[T]o prepare for such rallies, RAM members spent their weekends training in martial arts and other combat techniques." *Ibid.* This prosecution arises from three rallies in 2017—two in California, and the third in Charlottesville, Virginia (the "now-infamous 'Unite the Right' rally")—at which the defendants and other RAM members engaged in "numerous assaults" on counter-protesters. Op. 4-5; see Op. 4-6.

Following a federal investigation, each defendant was charged with one count of conspiring to commit an offense against the United States, in violation of 18 U.S.C. 371, with the underlying offense being a violation of the Anti-Riot Act, 18 U.S.C. 2101-2102. Each also was charged with a substantive violation of the Anti-Riot Act, but those counts were dismissed.

Enacted as part of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, the Anti-Riot Act's central provision states:

> (a) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—
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> (1) to incite a riot; or
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> (2) to organize, promote, encourage, participate in, or carry on a riot; or
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> (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;
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> 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 [Title 18], or imprisoned not more than five years, or both.

18 U.S.C. 2101(a). (As codified, the statute contains a footnote explaining that the reference to "'subparagraph (A), (B), (C), or (D)' is the result of a drafting mistake" and should refer to subparagraphs (1)-(4). Op. 9 n.3 (citing 18 U.S.C. 2101 n.1).) The Act contains a definitional provision that defines certain terms used in Section 2101(a) as follows:

> (a) As used in [the Anti-Riot Act], 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 [the Anti-Riot Act], the term "to incite a riot", or "to organize, promote, encourage, participate in, or carry on a riot", includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.

18 U.S.C. 2102.

After the district court denied the defendants' motion to dismiss the indictment, each defendant conditionally pleaded guilty to conspiring to violate the Anti-Riot Act, reserving his right to challenge the constitutionality of the Act on appeal. Op. 7. The district court sentenced Daley to 37 months of imprisonment, to be followed by two years of supervised release, and

sentenced Miselis to 27 months of imprisonment, to be followed by two years of supervised release. *Ibid.*

2. The defendants appealed, contending that the Anti-Riot Act is facially overbroad under the Free Speech Clause of the First Amendment and that it is void for vagueness under the Due Process Clause of the Fifth Amendment. Op. 3. The Fourth Circuit affirmed the defendants' convictions. Op. 3-46. The court rejected the defendants' contention that the Act is unconstitutionally vague. Op. 3, 38-43. But the court agreed with the defendants that "*some* of the [Anti-Riot Act's] applications" would violate the First Amendment; the court found, however, that those applications were severable from the remainder of the statute and were not implicated in this case. Op. 11-38, 44-46.

Specifically, the court held that while "[i]n all other respects, * * * the statute comports with the First Amendment," it

> sweeps up a substantial amount of speech that remains protected advocacy under the modern incitement test of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam), insofar as it encompasses speech tending to "encourage" or "promote' a riot under 18 U.S.C. 2101(a)(2), as well as speech "urging" others to riot or 'involving' mere advocacy of violence under 18 U.S.C. 2102(b).

Op. 3. But the court determined that "the discrete instances of overbreadth" that it perceived "are severable from the remainder of the statute" and that "the appropriate remedy [was] to invalidate the statute only to the extent that it reaches too far, while leaving the remainder intact." Op. 4; see Op. 22-23, 25-27, 31-38; see also Op. 36 (reproducing statutory text with provisions held invalid stricken). And the court found that "the factual bases for the defendants' guilty pleas conclusively establish that their own substantive offense conduct—which involve[d] *no* First Amendment activity—falls under the Anti-Riot Act's surviving applications." Op. 4; see Op. 44-46.

3. The Department of Justice does not agree with certain aspects of the Fourth Circuit's decision holding that portions of the Anti-Riot Act violate the First Amendment, and we remain committed to investigating and prosecuting individuals and groups who, like the defendants in this case, pose a threat to public safety and national security by engaging in "violent confrontations" during protests. Op. 45 (citation omitted). But in the Department's view filing a petition for a writ of certiorari in the present circumstances is unwarranted. The government ultimately prevailed in securing affirmance of the defendants' convictions. And the decision confirms the constitutionality of most of the Anti-Riot Act's operative language, including certain portions that the defendants had argued violate the First Amendment. In addition, the practical significance of the court's conclusion that certain phrases in the statute cannot validly be enforced may be limited. The government's principal argument on appeal was that the Act "can and should be construed narrowly to cover only unprotected conduct and unprotected speech." Gov't C.A. Br. 24; see *id.* at 24-37. The court's conclusion that the statute purports to cover some protected speech but cannot validly do so thus reaches a similar result by a different analytical path.

Under the Supreme Court's present order providing 150 days to file a petition for a writ of certiorari, such a petition would be due on March 4, 2021. Please let me know if we can be of further assistance in this matter.

Sincerely,

Elizabeth B. Prelogar

Elizabeth B. Prelogar
Acting Solicitor General

Enclosure