Nos. 20-1241 and 20-7377

In the Supreme Court of the United States

MICHAEL PAUL MISELIS, PETITIONER

v.

UNITED STATES OF AMERICA

BENJAMIN DRAKE DALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' convictions for conspiring to engage in violent assaults on protesters in violation of the Anti-Riot Act, 18 U.S.C. 2101 *et seq.*, are consistent with the First Amendment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Va.):

United States v. *Daley*,
No. 18-cr-25-NKM-JCH-1 (July 26, 2019)

United States v. *Miselis*,
No. 18-cr-25-NKM-JCH-2 (July 26, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a)[1] is reported at 972 F.3d 518. The opinion of the district court is reported at 378 F. Supp. 3d 539.

JURISDICTION

The judgment of the court of appeals (Pet. App. 53a-54a) was entered on August 24, 2020. A petition for rehearing was denied on October 5, 2020 (Pet. App.

[1] Unless otherwise indicated, "Pet. App." in this brief refers to the appendix to the petition for a writ of certiorari in No. 20-1241.

68a-69a). 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 petitions for writs of certiorari were filed on March 4, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following conditional guilty pleas in the United States District Court for the Western District of Virginia, petitioners were convicted of conspiring to violate the Anti-Riot Act, 18 U.S.C. 2101 *et seq.*, in violation of 18 U.S.C. 371. Pet. App. 3a. The district court sentenced petitioner Miselis to 27 months of imprisonment, to be followed by two years of supervised release. *Id.* at 8a. The court sentenced Petitioner Daley to 37 months of imprisonment, to be followed by two years of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 1a-52a.

1. Petitioners were members of a California-based white-supremacist group called the "Rise Above Movement," or "RAM." Pet. App. 4a-5a. RAM "[b]ill[ed] itself as a 'combat-ready, militant group of a new nationalist white identity movement.'" *Id.* at 5a (citation omitted). "[T]he group's chief purpose was to attend 'purported "political" rallies' (typically organized by other groups) at which its members engaged in violent attacks on counter-protestors." *Ibid.* (citation omitted). To prepare for those attacks, petitioners and other RAM members engaged in "training in martial arts and other combat techniques." *Ibid.*

Petitioners and other RAM members attended three such rallies in 2017 at which they engaged in "numerous assaults against counter-protesters." Pet. App. 5a; see

id. at 5a-7a. The first two rallies occurred in California, in Huntington Beach and Berkeley, respectively. *Id.* at 5a. Following those rallies, in August 2017, petitioners traveled to Charlottesville, Virginia, to attend the "Unite the Right" rally, where they expected to engage in violent confrontations. *Id.* at 6a.

On August 11, 2017, the night before the scheduled event, petitioners "joined hundreds of other white nationalists for a torch-lit march on the campus of the University of Virginia," culminating near a statue of Thomas Jefferson. Pet. App. 6a. The marchers chanted various racist and anti-Semitic slogans. *Ibid.* When the marchers arrived at the statue, they confronted a smaller group of protesters who had gathered holding a banner that read: "VA Students Act Against White Supremacy." *Ibid.* (citation omitted). Violence erupted between the marchers and the protesters; petitioners and other RAM members punched and struck multiple protesters with torches. *Ibid.* After the protesters left, petitioner Miselis yelled "total victory" and "we beat you tonight, we'll beat you tomorrow too!" C.A. App. 236. Petitioner Daley subsequently boasted that he "hit like 5 people" at "the fight at the torch march." *Id.* at 230.

The following morning, many groups and individuals espousing racist and anti-Semitic views, including petitioners and other RAM members, arrived at Emancipation Park in Charlottesville for the planned rally. Pet. App. 6a-7a; C.A. App. 230, 236. Petitioners and other RAM members had wrapped their hands in white athletic tape in advance in preparation for violence. C.A. App. 230, 236. Before entering the park, they became embroiled in a violent confrontation with protesters.

Pet. App. 6a-7a; C.A. App. 231, 236. During the altercation, petitioner Miselis punched a protester who had already been thrown to the ground and kicked a protester who was falling to the ground. C.A. App. 236. During the same altercation, petitioner Daley punched a protester at least twice and kicked him once; grabbed another protester and threw her off the sidewalk; and grabbed a third protester by the throat and threw her to the ground. *Id.* at 231.

2. A federal grand jury in the Western District of Virginia returned an indictment charging petitioners and two other codefendants each with one count of conspiring to violate the Anti-Riot Act, in violation of 18 U.S.C. 371, and one count of traveling in interstate commerce with intent to riot, in violation of the Anti-Riot Act. Indictment 3-7.

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 Dr. Martin Luther King, Jr. on April 4, 1968. Pet. App. 8a-9a.

The primary provision of the Anti-Riot Act states:

> 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[2]—
>
> Shall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. 2101(a).

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

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[2] As the court of appeals observed, "[a]s codified, the statute contains a footnote in this location explaining that the reference to 'subparagraph (A), (B), (C), or (D)' is the result of a drafting mistake, and should read '[sub]paragraph (1), (2), (3), or (4).'" Pet. App. 10a n.3 (citing 18 U.S.C. 2101 n.1) (brackets in original); see 18 U.S.C. 2101 n.1 ("So in original. Probably should be 'paragraph (1), (2), (3), or (4) of this subsection—'.").

> 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.

b. Petitioners moved to dismiss the indictment, contending (as relevant) that the Anti-Riot Act is facially overbroad under the First Amendment. D. Ct. Doc. 104, at 13-22 (May 2, 2019). The district court denied the motion, rejecting petitioners' facial challenge to the Act. *Ibid.* Petitioners each subsequently pleaded guilty to the conspiracy count in exchange for the dismissal of the substantive Anti-Riot Act count, reserving the right to appeal based on their challenges to the Act. Pet. App. 8a. The district court sentenced petitioner Miselis to 27 months of imprisonment and petitioner Daley to 37 months of imprisonment. *Ibid.*

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-52a.

a. The court of appeals observed that "the category of speech that lies at the core of the Anti-Riot Act's prohibition, called 'incitement,' has never enjoyed First Amendment protection." Pet. App. 4a (citing *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam)). The court concluded, however, that certain portions of the Act are overbroad because they "sweep[] up a substantial amount of

speech that remains protected advocacy"—specifically, the portions of Sections 2101(a)(2) and 2102(b) that proscribe "speech tending to 'encourage' or 'promote' a riot," and the portions of Section 2102(b) that proscribe "speech 'urging' others to riot or 'involving' mere advocacy of violence." *Ibid.* (citations omitted); see *id.* at 13a-37a.

The court of appeals further determined that, "[i]n all other respects, * * * the statute comports with the First Amendment." Pet. App. 4a; see *id.* at 42a. And the court found that "the discrete instances of overbreadth" that it had identified "are severable from the remainder of the statute." *Id.* at 4a; see *id.* at 37a-43a. The court observed that "the remainder of the Anti-Riot Act 'is perfectly valid'" and "'fully operative without the offending' language." *Id.* at 42a (citations omitted). The court further observed that the statutory language the court deemed overbroad "lends itself to being cleanly excised." *Ibid.* And it explained that "such minimal severance is consistent with Congress's basic objective." *Id.* at 43a. The court accordingly concluded that "the appropriate remedy [wa]s to invalidate the statute only to the extent that" the court found it to "reach[] too far, while leaving the remainder intact." *Id.* at 4a; see 20-7377 Pet. App. 36a.

b. The court of appeals then affirmed petitioners' convictions, finding that "the record * * * establishes conclusively that [petitioners'] substantive offense conduct falls under the statute's surviving" provisions. Pet. App. 51a; see *id.* at 50a-52a. The court noted that petitioners had "stipulated that the substantive offense conduct underlying their respective conspiracy convictions consist[ed] (beyond such overt acts as traveling to rallies

through interstate commerce, conducting combat training, and buying supplies) of engaging 'in violent confrontations,' which is to say 'physical conflict,' with counter-protestors at each of the three rallies." *Id.* at 51a (citations omitted). In particular, the court observed that petitioners had "admitted to having each (as part of an assemblage of three or more) 'personally committed multiple violent acts'—including but not limited to pushing, punching, kicking, choking, head-butting, and otherwise assaulting numerous individuals, and none of which 'were in self-defense.'" *Ibid.* (citation omitted).

The court of appeals determined that "[s]uch substantive offense conduct qualifies manifestly as 'committing any act of violence in furtherance of a riot' within the ordinary meaning of § 2101(a)(3), as well [as] 'participating in' and 'carrying on a riot' within the ordinary meaning of § 2101(a)(2)." Pet. App. 51a (brackets omitted). The court explained that those portions of the statute had been "left unscathed by [the court's] partial invalidation of the statute" and that petitioners' "offenses have manifestly nothing to do with * * * First Amendment activity." *Id.* at 52a. And it reasoned that petitioners "ha[d] necessarily conceded * * * that the Anti-Riot Act poses no constitutional concern as applied to their own conduct." *Ibid.* (citations omitted).

c. Finally, the court of appeals rejected petitioners' contention that, even if the statute validly applied to their conduct, their guilty pleas were nevertheless invalid on the theory that "the indictment and, by extension, their guilty pleas * * * are premised on a conspiracy to violate the statute as a whole, without specifying which of its alternative purposes they conspired to (and in fact did) carry out." Pet. App. 50a. The court observed that it is "well-established that a conviction under a statute

that 'specifies several alternative ways' to commit an offense 'will stand' as long as the record evidence suffices to prove 'one or more of the means of commission,' even if the indictment alleged 'the several ways' in conjunction." *Ibid.* (citation omitted). The court noted that, although it had deemed certain other provisions of the Anti-Riot Act overbroad, the record showed "conclusively" that petitioners' convictions were based on provisions of the Act that the court had recognized as constitutional. *Id.* at 51a.

ARGUMENT

Petitioners contend that their convictions for conspiring to violate the Anti-Riot Act are infirm based on their assertion that the Act is facially overbroad under the First Amendment and, alternatively, that the portions of the Act on which petitioners' convictions were based are inseverable from portions the court of appeals deemed overbroad. 20-1241 Pet. 22-25; 20-7377 Pet. 19-22. Although the government does not agree with certain aspects of the court of appeals' decision holding that portions of the Anti-Riot Act violate the First Amendment, the court's decision affirming petitioners' convictions does not conflict with any decision of this Court or of another court of appeals. Petitioners' challenges to their convictions would fail in every court of appeals that has considered the Anti-Riot Act's constitutionality.

Petitioners alternatively contend that the court of appeals' decision deeming invalid certain portions of the Anti-Riot Act other than the portions on which their own convictions rest retroactively rendered petitioners' guilty pleas unknowing and involuntary. 20-1241 Pet. 25-27; 20-7377 Pet. 22-24. The court correctly rejected that contention, and its decision does not conflict with

any decision of this Court or of another court of appeals. Further review is not warranted.

1. As these cases come to this Court, it is undisputed that the Anti-Riot Act does not violate the First Amendment as applied to petitioners' offense conduct. As the court of appeals observed, petitioners "have necessarily conceded—consistent with the 'usual judicial practice' in overbreadth cases—that the Anti-Riot Act poses no constitutional concern as applied to their own conduct." Pet. App. 52a (quoting *Board of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 484 (1989); other citation omitted). In entering their conditional guilty pleas, petitioners "stipulated that," in addition to such inherently nonexpressive "overt acts as traveling to rallies through interstate commerce, conducting combat training, and buying supplies," "the substantive offense conduct underlying their respective conspiracy convictions consist[ed] * * * of engaging 'in violent confrontations'"—namely, "'physical conflict' with counter-protestors at each of the three rallies." *Id.* at 51a (citations omitted). As both courts below recognized, petitioners' offense conduct thus "ha[s] manifestly nothing to do with speech tending to encourage, promote, or urge others to riot; mere advocacy of violence; or any other First Amendment activity." *Id.* at 52a; see D. Ct. Doc. 104, at 24-25. Petitioners accordingly could prevail in challenging their convictions on First Amendment grounds only by demonstrating either that the Anti-Riot Act must be invalidated in its entirety under the overbreadth doctrine, or at a minimum that the particular portions of the Act under which they were convicted are inseverable from other portions of the Act that are themselves unconstitutional. The court correctly determined that petitioners have not made 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 text, a court will seek to avoid any "constitutional problems" by asking whether the statute 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. 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 such 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).

As the court of appeals explained, "at the core of the statute's prohibition" is a "category of unprotected speech" that "lies at the origin of First Amendment jurisprudence: 'incitement,'" which generally "refers to 'the act of persuading'—that is, of inducing—'another

person to commit a crime.'" Pet. App. 18a (citation omitted). The court framed "the central overbreadth question" as "whether any of the purposes included in the statute's specific-intent element" in Section 2101(a), which the definitions in Section 2102 inform, are properly construed to "implicate protected advocacy." *Id.* at 25a.

The court of appeals properly recognized, in agreement with the parties, that only a handful of terms in those provisions could be read to "implicat[e] speech": "the verbs 'incite,' 'organize,' 'promote,' and 'encourage,' under § 2101(a)(1)-(2)," Pet. App. 26a (citation omitted), 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), *id.* at 30a (citation omitted). 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. 2101(a)(2) and (3)—do not constitute protected advocacy. 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))).

In addition, while "incit[ing]" a riot entails speech, the court of appeals "ha[d] little difficulty concluding that," in the context of the Anti-Riot Act, "th[at] verb encompasses no more than unprotected speech under *Brandenburg* [v. *Ohio*, 395 U.S. 444 (1969) (per curiam)]," and it "most sensibly refers to speech that is directed and likely to produce an imminent lawlessness." Pet. App. 26a. Similarly, as the court noted, although "aid[ing] or abet[ting] 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.

2101(a)(4), might involve speech, "any such speech would constitute 'aiding and abetting of criminal conduct,'" which does not implicate the First Amendment. Pet. App. 26a n.9 (citation omitted).

c. The court of appeals identified only three terms and one phrase in Sections 2101 and 2102 that, in its view, sweep too broadly with respect to the category of constitutionally unprotected incitement: "the words 'encourage,' 'promote,' and 'urging' under §§ 2101(a)(2) and 2102(b), as well as the final phrase of § 2102(b), beginning with the words 'not involving' and continuing through the end of that provision." Pet. App. 40a; see *id.* at 26a-36a. And although it deemed those particular terms and phrase overbroad notwithstanding the Anti-Riot Act's overall "plainly legitimate sweep," *id.* at 37a, the court correctly recognized that, even if unconstitutional, those portions "are severable from the constitutionally valid remainder," which includes the portions under which petitioners were convicted, *ibid.*; see *id.* at 37a-43a.

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); *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 that precedent, a court should "retain those portions of the act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." Pet. App. 39a (quoting *United States* v. *Booker*, 543 U.S. 220, 258-259 (2005)) (brackets omitted).

Petitioners err in suggesting (20-1241 Pet. 23-25; 20-7377 Pet. 20-22) that the court of appeals was required to invalidate the whole Anti-Riot Act. The court correctly recognized that the portions that cover petitioners' offense conduct—which "qualifies manifestly as 'committing any act of violence in furtherance of a riot'" under Section 2101(a)(3) and "'participating in' and 'carrying on a riot'" under Section 2101(a)(2)," Pet. App. 51a (brackets omitted)—are both "'perfectly valid'" and entirely "capable of functioning independently." *Id.* at 42a (citation omitted). As the court observed, the language it deemed overbroad "makes up only a fraction of the statute's specific-intent element" in Section 2101(a)(2), "plus two additional purposes glossed onto

these by way of § 2102(b)." *Ibid.* In addition, the language "lends itself to being cleanly excised": the terms "'encourage,' 'promote,' and 'urging' are each set off from their adjoining purposes by the disjunctive 'or' (in addition to commas where appropriate)," and the final phrase of Section 2102(b) "is easily dropped off from the rest of the clause in which it appears." *Ibid.* And permitting the undisputedly constitutional application of the statute to petitioners' own unprotected activities 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." *Id.* at 43a.

Petitioners err in contending that the entire Anti-Riot Act is overbroad on the theory that *none* of the purposes listed in the Act's specific-intent provision requires a "sufficient threat of imminent violence." 20-1241 Pet. 22; 20-7377 Pet. 19. The Act "has a plainly legitimate sweep," Pet. App. 37a, that encompasses, for example, those who, like petitioners, travel in or use an instrumentality of interstate commerce with the intent to "commit an[] act of violence in furtherance of a riot," 18 U.S.C. 2101(a)(3), where such violence is imminent. Petitioners also err in contending that *United States* v. *Stevens*, 559 U.S. 460 (2010), mandates facial invalidity. In *Stevens*, the Court invalidated 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. *Id.* at 468-469 (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 474, nowhere

did *Stevens* suggest that the statute's constitutional flaw might be ameliorated by striking just those two words—let alone suggest anything about a context-specific severability analysis of a distinct statute like the one at issue here. See *id.* at 474-477.

d. Contrary to petitioners' assertions (20-1241 Pet. 14-22; 20-7377 Pet. 12-19), review is not warranted to resolve a lower-court conflict regarding which portions, if any, of the Anti-Riot Act violate the First Amendment. The court of appeals' decision rejecting petitioners' overbreadth challenges does not conflict with any decision of another court of appeals. To the extent other circuits view the application of constitutional principles to the Act differently, petitioners' convictions do not implicate that tension because no court of appeals' decision would require their invalidation.

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. 22a-43a; *United States* v. *Rundo*, 990 F.3d 709, 713-721 (9th Cir. 2021) (per curiam) (deeming certain portions of the Act overbroad but upholding the remainder as valid and severable), petition for reh'g pending, No. 19-50189 (9th Cir. filed Apr. 19, 2021); *United States* v. *Dellinger*, 472 F.2d 340, 354-364 (7th Cir. 1972) (holding Act constitutional as interpreted by the court), cert. denied, 410 U.S. 970 (1973). 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. 35a ("[A] 'riot' entails at bottom an act or a threat of violence presenting 'grave danger' to others."); *Rundo*, 990 F.3d at 719; *Dellinger*, 472 F.2d at 361-363. And all

three circuits agree that the Act permissibly covers inciting a riot, because incitement of violence is unprotected speech under *Brandenburg*. See Pet. App. 26a ("With respect to 'incite' under § 2101(a)(1), we have little difficulty concluding that this verb encompasses no more than unprotected speech under *Brandenburg*."); *Rundo*, 990 F.3d at 716-717 ("Like the Fourth Circuit and the Seventh Circuit, we conclude that speech that 'incites' or 'instigates' a riot satisfies *Brandenburg*'s imminence requirement."); *Dellinger*, 472 F.2d at 360. Conversely, all agree that abstract advocacy of violence—speech that falls short of the *Brandenburg* standard—may not be punished. See Pet. App. 20a ("[A]dvocacy of lawlessness retains the guarantees of free speech unless it's directed and likely to produce imminent lawlessness."); *Rundo*, 990 F.3d at 717; *Dellinger*, 472 F.2d at 360.

The Seventh Circuit did not invalidate the Anti-Riot Act in any respect, and petitioners' conduct would plainly be punishable under its construction of the statute. And the Ninth Circuit's decision in *United States* v. *Rundo*, which reversed the district-court decision on which petitioners rely (20-1241 Pet. 18-20; 20-7377 Pet. 15-17), did not invalidate any portion of the Act at issue here. The Ninth Circuit went further than the court of appeals here in concluding that, in addition to the terms the Fourth Circuit held overbroad, the term "organizing" in Section 2101(a)(2) is also overbroad. *Rundo*, 990 F.3d at 717; but see *id.* at 721-722 (Fernandez, J., concurring in part and dissenting in part). But its decision casts no doubt on the court of appeals' conclusion with respect to petitioners' offenses, which were premised on "pushing, punching, kicking, choking, head-butting, and otherwise assaulting numerous individuals." Pet. App. 51a;

see *Rundo*, 990 F.3d at 713-721. Petitioners' convictions thus fall within the valid scope of the Anti-Riot Act under each circuit's precedent.

2. Petitioners alternatively contend that their convictions should be set aside on the theory that, in light of the court of appeals' determination that certain portions of the Anti-Riot Act are overbroad, their guilty pleas should now be deemed unknowing and involuntary. 20-1241 Pet. 25-27; 20-7377 Pet. 22-24. That contention lacks merit and does not warrant review.

As the court of appeals explained, "the record * * * establishes conclusively that [petitioners'] substantive offense conduct falls under" the provisions that the court upheld, and accordingly "their convictions must stand." Pet. App. 51a. In particular, the court noted that petitioners had stipulated that their offense conducted consisted of "engaging 'in violent confrontations,' which is to say 'physical conflict,' with counter-protestors at each of the three rallies." *Ibid.* (citations omitted). That conduct fits squarely within the portions of Section 2101(a)(2) and (3) that the court of appeals sustained as constitutionally sound. *Ibid.*; see *id.* at 22a-43a. And that conduct "ha[s] manifestly nothing to do with * * * First Amendment activity." *Id.* at 52a.

Petitioners contend that their guilty pleas were not knowing and voluntary because they were made before the court of appeals determined that "a significant portion of the law to which [they were] pleading" was held unconstitutional by that court. 20-1241 Pet. 26; 20-7377 Pet. 22. To the extent petitioners presented that contention to the court of appeals, the court properly rejected it. As the court of appeals explained, "a conviction under a statute that 'specifies several alternative ways' to commit an offense 'will stand' as long as the

record evidence suffices to prove 'one or more of the means of commission,' even if the indictment alleged 'the several ways' in conjunction." Pet. App. 50a (citation omitted); see *ibid.* (citing, *inter alia*, *Turner* v. *United States*, 396 U.S. 398, 420 (1970) ("The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged.")).

As the court of appeals recognized, its invalidation of Anti-Riot Act provisions that had no bearing on petitioners' convictions does not render their conditional guilty pleas, following rejection of their overbreadth claim, unknowing or unintelligent. Pet. App. 51a. Indeed, as the court found, and as petitioners acknowledged, "the record * * * establishes conclusively that [their] substantive offense conduct falls under the statute's surviving" provisions. *Ibid.* Petitioners identify no decision of this Court or of another court of appeals that reaches a contrary conclusion. Further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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