U.S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, D.C. 20530*

September 22, 2021

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

Re: *United States* v. *Rundo*, 990 F.3d 709 (9th Cir. 2021) (No. 19-50189) (per curiam), rehearing denied (May 13, 2021)

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 reversed the dismissal of the indictment against three defendants for violating and conspiring to violate the Anti-Riot Act, 18 U.S.C. 2101-2102, and against a fourth defendant for conspiring to violate the Act. In doing so, the court of appeals concluded that some of the Anti-Riot Act's applications that are not squarely implicated by the government's allegations in this case violate the First Amendment. A copy of the Ninth Circuit's decision is enclosed.

1. The indictment alleges that the four defendants in this case—Robert Paul Rundo, Robert Boman, Tyler Laube, and Aaron Eason—were members of a white-supremacist group in Southern California known as the Rise Above Movement (RAM). Op. 5. RAM "represents itself 'as a combat-ready, militant group of a new nationalist white supremacy and identity movement.'" *Ibid.* RAM members carried out "assaults on people at political events," and RAM "conducted combat training to prepare [its members] to commit violent acts at political rallies." *Ibid.* RAM members also "post[ed] videos and pictures online of their hand-to-hand-combat training, often interspersed with videos and pictures of their assaults * * * and messages supporting their white supremacist ideology." *Ibid.*; see *United States* v. *Miselis*, 972 F.3d 518, 526 (4th Cir. 2020), cert. denied, Nos. 20-1241 and 20-7377 (June 14, 2021). This prosecution arises from three rallies in in 2017 in California at which the defendants and other RAM members "attacked people." Op. 5.

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. Three of the defendants—Rundo, Boman, and Eason—were additionally charged with a substantive violation of the Anti-Riot Act, namely, aiding and abetting one another in using facilities of interstate commerce with intent to riot.

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
>
> (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 [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). *Miselis*, 972 F.3d at 528 n.3 (citing 18 U.S.C. 2101 n.1). The court of appeals here "read the statute's references to subparagraphs (A)-(D) as referring to subparagraphs (1)-(4) in § 2101(a)." Op. 9 n.6.)

The Anti-Riot 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.
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> (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.

The defendants moved to dismiss the indictment. Op. 6. The district court granted the motions and dismissed the indictment, concluding that the Anti-Riot Act is facially overbroad under the Free Speech Clause of the First Amendment. Op. 4, 6.

2. The government appealed, and the court of appeals reversed the district court's dismissal of the indictment and remanded for further proceedings in a per curiam opinion. Op. 4-24. Although it viewed the Anti-Riot Act to "have some constitutional defects," the court of appeals determined that the perceived defects were "severable from the remainder of the Act" and that the district court accordingly "erred when it dismissed the indictment." Op. 7; see Op. 7-24.

Specifically, the court of appeals explained that the Anti-Riot Act "is not facially overbroad except" for "§ 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.'" Op. 21-22 (quoting 18 U.S.C. 2101(a)(2) and 2102(b)). The court concluded that those terms in the statute are overbroad under *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam), but determined that "the remainder of the Act," as construed by the court, can "be salvaged * * * by severing" those "small portions of the statutory language." Op. 21; see Op. 15-19, 21-22. "With [the court's] construction and severance, the Act is not facially overbroad," and continues to "prohibit[] unprotected speech that instigates (incites, participates in, or carries on) an imminent riot, unprotected conduct such as committing acts of violence in furtherance of a riot, and aiding and abetting of that speech or conduct." Op. 24. The court observed that its determinations as to overbreadth and severability generally accorded with the Fourth Circuit's decision in *United States* v. *Miselis*. See Op. 15-17, 22 (citing *Miselis*, 972 F.3d at 536-539, 542-544). The court in *Miselis* had similarly taken the view that those same portions of the Anti-Riot Act were overbroad—except for the term "organize," which the Fourth Circuit upheld, 972 F.3d at 537—but that those portions are severable, see *id.* at 535-544.

Judge Fernandez "concur[red] in the per curiam opinion with two exceptions." Op. 25. He dissented from the panel's conclusions that the terms "urg[e]" and "organize" in the statute are overbroad and stated that he "would not strike" those portions. *Ibid.*; see Op. 25-27.

3. The Department of Justice does not agree with certain aspects of the Ninth 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. 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 reversal of the dismissal of the indictment in this case. 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 "is readily susceptible" to "a narrowing construction that would make it constitutional"; that the Act accordingly "need not, and therefore should not, be read so expansively as to violate *Brandenburg*"; and that "[t]he district court erred by rejecting a reasonable limiting construction of the statute." Gov't C.A. Br. 24-26 (emphasis omitted); see *id.* at 24-34. The court of appeals' 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. Finally, apart from its holding that the term "organize" is overbroad, the Ninth Circuit's decision largely accords with the Fourth Circuit's decision in *Miselis*. As indicated in our letter of February 18, 2021, the Department of Justice decided not to file a petition for a writ of certiorari to review the Fourth Circuit's judgment in *Miselis*, and the Supreme Court subsequently denied petitions for writs of certiorari filed by the two defendants in that case. See *Miselis* v. *United States*, No. 20-1241 (June 14, 2021); *Daley* v. *United States*, No. 20-7377 (June 14, 2021).

Under the Supreme Court's orders of March 19, 2020, and July 19, 2021, providing 150 days to file a petition for a writ of certiorari in any case in which the relevant lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued before July 19, 2021, a petition for a writ of certiorari in this case would be due on October 10, 2021. Please let me know if we can be of further assistance in this matter.

Sincerely,

Brian H. Fletcher
Acting Solicitor General

Enclosure