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APPLYING THE ANTI-RIOT ACT: FROM ANTIFA TO INSURRECTIONISTS

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I. INTRODUCTION

Nicole Armbruster lives a nomadic lifestyle, off the grid, in her pull behind camper with a simple message hanging from her rear-view mirror, "come back with a warrant."[1] She preaches to her "comrades" about revolution, and she is a staunch supporter of the Second Amendment.[2] Her arrest record spans five different states: Washington, Arizona, Virginia, Minnesota, and Florida, as well as Washington D.C.[3] Her charges range from unlawful assembly and failure to disperse to violation of the federal Anti-Riot Act and assault; of both opposing protestors and a police officer.[4]

Robert Rundo posts on social media, "[w]hen the squads not out smashing commies… #nationalist #lifestyle."[5] In the modern era of civil unrest, he uses social media to spread his misplaced views by posting photographs and videos of him and his fellow combatants engaging in physical training and "mixed martial arts street-fighting techniques."[6] He travels to right-wing political rallies, with the apparent goal of providing "security" against counter-protesters.[7]

The brief stories of Armbruster and Rundo illustrate the vast divide in American society.[8] Armbruster is a self-proclaimed member of the anti-fascist movement ("Antifa"),[9] whereas Rundo is an outspoken white supremacist and leader in the Rise Above Movement ("RAM").[10] Prior to the Ninth Circuit's ruling in the *United States v. Rundo* ("*Rundo II*"), the Central District of California noted that, "[i]t is easy to champion free

1. *See* Aram Roston, *American Antifa*, REUTERS INVESTIGATES (Aug. 25, 2021, 11:00 AM), www.reuters.com/investigates/special-report/usa-antifa-profile [perma.cc/8CD6-C63F] (detailing the nomadic and isolated life of a member of the Anti-Fascist organization Antifa and giving a background into what a member of the far-left group's life entails).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* United States v. Rundo (*Rundo I*), 497 F. Supp. 3d 872, 878 (C.D. Cal., June 11, 2019) (referring to Defendant Rundo's social media posts to illustrate his use of both Facebook and Twitter, which enables extreme groups such as the Rise Above Movement to influence and recruit members).

6. *See* Press Release, U.S. Attorney's Office of the Western District of Virginia, Federal Grand Jury Indicts Four from California for Conspiracy to Violate Riots Statute (Oct. 10, 2018), www.justice.gov/usao-wdva/pr/federal-grand-jury-indicts-four-california-conspiracy-violate-riots-statute [perma.cc/URX4-GJNU] (providing background into the Rise Above Movement, that Defendant Rundo was affiliated with, while also detailing the type of tactics or training used by members when preparing for a political rally).

7. *See Rundo I*, 497 F. Supp. 3d at 874 (noting that defendants affiliated with RAM would frequently travel to political rallies to provide, what the group called "security" for right-wing protestors and would purposefully cause altercations with any opposing citizens who also attended the rally).

8. Roston, *supra* note 1.

9. *Id.*

10. United States v. Rundo (*Rundo II*), 990 F.3d 709, 712-13 (9th Cir. 2021).

speech when it advocates a viewpoint with which we agree."[11] Armbruster and Rundo come from different ends of the political spectrum, where their respective viewpoints stand in stark contrast of one another. [12] Yet, the First Amendment of the Constitution treats both Armbruster and Rundo equally.[13] In recent years, United States prosecutors have turned to a familiar piece of legislation, known as the Anti-Riot Act of 1968 ("the Act").[14] However, the Act, controversial at its conception, is now fifty-three years old.[15] The Act was drafted and signed into law thirty-six years before the founding of Facebook[16] and thirty-nine years prior to the inception of Twitter.[17] As social media continues to provide a forum for the free exchange of ideas, the federal government may begin to use the Anti-Riot Act to prosecute individuals who use social media to merely advocate for social unrest.

In *Rundo II*, the Ninth Circuit grapples with how to save this piece of legislation. The federal Anti-Riot Act of 1968 is inadequate to fight the current battles with big technology firms, such as Facebook and Twitter, and their algorithms that consistently push hate and violence. [18] The viewpoints of individuals, like Armbruster and Rundo, are amplified by social media. [19]Undoubtedly, social media has also been used to drive

11. *See Rundo I*, 497 F. Supp. 3d at 874 (illustrating the district court's view that an individual's freedom of speech cannot be abridged because it promotes a viewpoint that is different).

12. *See* Roston, *supra* note 1 (stating that Amanda Armbruster is a self-proclaimed member of left-wing group Antifa); *Rundo II*, 990 F.3d at 712 (detailing Robert Rundo and members of RAM as a right-wing, nationalist organization).

13. *See Rundo II*, 990 F.3d at 876 (documenting that Defendants had attended three political rallies in California with the purpose of aiding and providing security for right-wing extremists).

14. 18 U.S.C.S. §§ 2101-2102 (1968).

15. *See* Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 VILL. L. REV. 897, 911 (1975) (establishing an in-depth background to the inception of the Anti-Riot Act, specifically alluding to the political climate of the United States after the Acts inception in the mid-1970's).

16. *See* Mark Hall, *Facebook*, BRITANNICA, www.britannica.com/topic/Facebook [perma.cc/LX28-FV85] (last visited Sept. 15, 2021), (providing an informational article that gives a brief introduction to the founding of Facebook, while also demonstrating that the Anti-Riot Act was drafted decades before the social media site, now considered one of the most influential inventions in human history).

17. *See Twitter*, BRITANNICA, (Aug. 12, 2021), www.britannica.com/topic/Twitter [perma.cc/9S6A-NXJT] (providing a brief introduction to the founding of Twitter, decades after the introduction of the federal Anti-Riot Act provides perspective to the potentially waning relevancy of the statute).

18. *See* Sounman Hong, *Political Polarization on Twitter: Implications for the Use of Social Media in Digital Governments*, 33 GOV'T INFO. Q. 777, 777-78 (2016) (discussing the term "echo chambers" as "highly fragmented, customized, and niche-oriented" characteristics of social media that enhances political polarization).

19. *See* Brett Milano, *The Algorithm Has Primacy Over Media…Over Each of Us, and it Controls What We Do*, HARVARD L. TODAY (Nov. 18, 2021), today.law.harvard.edu/the-algorithm-has-primacy-over-media-over-each-of-us-and-it-controls-what-we-do [perma.cc/2KDV-ZGY8] (summarizing a Harvard Law panel discussion on social media's "foster[ing] a more toxic political dialogue that has infected politics at large, accelerating polarization and the decline of legacy media.").

violence and protests; but it is also a tool that can be used for greater organization and freedom of information.[20]

Part II of this Case Note will establish the background of the federal Anti-Riot Act and the prior case law relied upon by the Ninth Circuit in *Rundo II*.[21] This section will also serve as an overview of *Brandenburg v. Ohio*, the seminal 1969 Supreme Court case on freedom of expression.[22] *Brandenburg* is important because it still serves as a guide to the freedom of speech debate today.[23]

Part III of this Case Note will analyze the Ninth Circuit's opinion in *Rundo II*.[24] Specifically, this section will establish the jurisprudence that the Ninth Circuit utilized to find that the Act was not unconstitutional on its face.[25] In the analysis of the case, this section will illustrate the Ninth Circuit's opinion on the Act as a useful piece of legislation to protect American citizens from future rioting.[26]

Part IV of this Case Note, while building upon the analysis of the Ninth Circuit, will discuss my personal analysis of the policies surrounding the Anti-Riot Act. This discussion will focus on the Act's applicability to individuals accused of using the facilities of interstate commerce, but not to incite a riot. Particularly, the Act should not be used by the government to prosecute citizens based on mere social media posts that do not meet the *Brandenburg* imminence requirement.[27] This section will also discuss potential solutions such as relying on states to be more influential in how to protect non-violent protests and prevent riots.

Part V of this Case Note will briefly summarize the analysis utilized by the Ninth Circuit's *Rundo II* opinion, as well as creating a call to action

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20. *See* Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 3 (2012) (commenting on Americans' use of social media to organize themselves unlike any other time in history and how the government may narrowly regulate speech brought through technology).

21. *Id.*

22. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (establishing the Supreme Court's differentiation between speech that is "the mere abstract teaching" of the need for violence and using speech to "prepar[e] a group for violent action," which is relied upon by the District Court in *Rundo I* and the Ninth Circuit in *Rundo II*); Noto v. United States, 367 U.S. 290, 297-98 (1961) (ruling that a member of a communist activist party's speech was protected because the individual was merely teaching the tenants of Communism and was not preparing its followers to incite imminent unlawful action).

23. *Brandenburg*, 395 U.S. at 444.

24. *Rundo II*, 990 F.3d at 709.

25. *See id.* at 721 (holding that the Act can be made constitutional by severing the overly broad language that does not comport with the First Amendment).

26. *See id.* (stating that "[o]nce the offending language is elided from the Act by means of severance the Act is not unconstitutional on its face," and "it would be cavalier to assert that the government and its citizens cannot act but must sit quietly and wait until they are actually physically injured.").

27. *See Brandenburg*, 395 U.S. at 450 (Douglas, J., concurring) (describing that "[t]he questions in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.") (internal citations omitted).

to continue to bolster the First Amendment's protection of the freedom of expression.

II. BACKGROUND

The Framers of the United States, through a new form of government, were steadfast in ensuring that no law would inhibit the freedom of expression, or the right to peacefully assemble.[28] In the 1960's, over a century and a half later, Americans exercised their First Amendment rights as the United States underwent monumental changes in civil rights, but unfortunately at a price.[29] In 1963, Dr. Martin Luther King Jr. stood in front of the Lincoln Memorial to give his "I Have a Dream" speech.[30] Only three months later, President John F. Kennedy was assassinated in Dallas, Texas.[31] A year after that, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.[32] Four years later, in 1968, as the war in Vietnam raged on, Dr. Martin Luther King Jr., the voice of the Civil Rights Movement, was assassinated by James Earl Ray.[33] Near the end of the decade, intended as an expansion of the Civil Rights Act of 1964, President Johnson signed the Civil Rights Act of 1968 into law.[34] The Civil Rights Act is often revered for its focus on fair housing, however, perhaps less often, it is cited for the introduction of the Anti-Riot Act.[35]

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28. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 252-53 (2018) (providing that the Framers were concerned with protecting "natural rights," or acts that occur "naturally" and did not "depend on the existence of a government" and therefore should be free of strict government control); U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

29. *See The Sixties: Moments in Time*, PBS (2005), www.pbs.org/opb/thesixties/timeline/timeline_text.html [perma.cc/AFR4-QMMT] (providing an in-depth, comprehensive timeline of the major events of the 1960's) [hereinafter *The Sixties: Moments in Time*].

30. *See* Martin Luther King, Jr., NAT'L ARCHIVES (July 20, 2020), www.archives.gov/nyc/exhibit/mlk [perma.cc/X4BL-SGZL] (detailing the events surrounding Martin Luther King Jr.'s assassination, resulting in the tragic death of a national icon of the 1960's Civil Right Movement, but also the event that spurred many lawmakers into action to create the Anti-Riot Act statute).

31. *The Sixties: Moments in Time*, *supra* note 29.

32. *See Civil Rights Acts (1964, 1968)*, GEORGETOWN L. LIBR. (Aug. 26, 2021), guides.ll.georgetown.edu/c.php?g=592919&p=4172702 [perma.cc/E849-3JRE] (providing a guide that offers a quick synopsis of the Civil Rights Act of 1964 as well as 1968, along with a brief overview of the topics and particular civil rights protected under both bills).

33. *Assassination of Martin Luther King, Jr.*, STANFORD U. MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (last visited Oct. 6, 2021), kinginstitute.stanford.edu/encyclopedia/assassination-martin-luther-king-jr [perma.cc/CV7N-R7HQ].

34. *See Civil Rights Acts (1964, 1968)*, *supra* note 32 (establishing the Civil Rights Act of 1968 as an extension of the Civil Rights Act of 1964, where the Civil Rights Act of 1968 is most often credited with the Fair Housing Act).

35. *See id.* (referring to the Civil Rights Act of 1968 as legislation meant to ease the unequal housing in the United States in the 1960's, mostly driven by racial

The 1960's has been defined by tragedy, anger, and yet progress. [36] With this backdrop in mind, as one of the most turbulent decades in American history ended, the Anti-Riot Act was established. [37]

A. The Background to the Anti-Riot Act

Setting the stage and providing a look into the major events of the time captures where the United States was culturally and politically in the 1960s.[38] Congress could not agree on the best approach to solve the numerous incidents of violent riots that gripped the Nation.[39] The Anti-Riot Act of 1968 was the federal government's solution.[40] Where states criminalized the conduct of inciting a riot, the Act was created to criminalize any person who incited a riot through the use of interstate commerce.[41] The Act has also been criticized for having racial underpinnings, specifically geared towards criminalizing many African Americans during the protests of the late 1960's.[42]

Today, the Act has reemerged into the legal lexicon as prosecutors have begun to use the law against "white supremacists, demonstrators advocating for racial justice, and insurrectionists at the U.S. Capitol."[43] The revival of the Act, however, does not come without controversy.[44] As a potential split in the United States Circuit Courts emerges over whether or not the Act is facially overbroad, and as such unconstitutional, the language of the Act remains under siege.[45] The Ninth Circuit opinion in

discrimination in African Americans' ability to procure quality housing).

36. *See* Leland Ware, *Civil Rights and the 1960s: A Decade of Unparalleled Progress*, 72 MD. L. REV. 1087, 1087 (2013) (comparing the Civil Rights Movement of the 1960s to previous decades and providing a summary of events that "propelled African Americans from segregation to full citizenship.").

37. *Id.*; *see also* 18 U.S.C.S. §§ 2101-2102 (1968).

38. *The Sixties: Moments in Time*, *supra* note 29.

39. *See* Zalman, *supra* note 15, at 912 (detailing the increase in violence and rioting, the United States Congress was tasked with creating a federal law that would allow the government to punish citizens that traveled and used interstate commerce as a means to facilitate a riot).

40. *See id.* at 911 (establishing that Congress created the Act and was credited as a "more conservative approach of criminalizing riotous conduct was adopted to solve the problem.").

41. *See* Kaminski, *supra* note 20, at 3 (analyzing the definitions of riots and incitement to riot under the common law and federal statutes, while creating a "taxonomy" of constitutional problems that arise).

42. *See Recent Case: First Amendment – Federal Anti-Riot Act – Fourth Circuit Finds the Anti-Riot Act Partially Unconstitutional.* – United States v. Miselis, 972 F.3d 518 (4th Cir. 2020), 134 HARV. L. REV. 2614, 2614 (2021) (pointing to the racial and historical criticisms of the Act and where the Fourth Circuit opinion missed the opportunity to discuss the Acts initial purpose was to quell citizens' ability to travel to other areas of the United States in order to march or join a protest) [hereinafter *Recent Case*].

43. *See id.* (analyzing the Fourth Circuit opinion that found the Act partially unconstitutional as a crucial precedent and demonstrating that a potential circuit split may result).

44. *Id.*

45. *Id.*

Rundo II broke down its analysis and scrutiny of the Act into three main areas: (1) the "overt act provisions," (2) the definition of a "[r]iot," and (3) the definition of "incit[ing] a riot."[46]

1. The Overt Act Provisions of the Anti-Riot Act

Fundamentally, the Act describes four "overt acts" that if a citizen were to commit through the use of interstate commerce would result in a fine or imprisonment "not more than five years."[47] The interstate commerce requirement is violated under the Act when an individual either travels interstate or uses a "facility of interstate commerce."[48] Therefore, through either the act of traveling across state lines or in the use of a "facility of interstate commerce," a person violates the Act when acting with:

> [I]ntent – (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 . . .[49]

Courts, like the Seventh Circuit, have held that the "overt acts" are to be considered "goals" or are themselves the required acts, meaning an individual with the goal to incite a riot or to aid someone in creating a riot, through the use of interstate commerce, can be punished under the Act.[50]

2. The Anti-Riot Act's Definition of a "Riot" and "Inciting a Riot"

Concerned with the Act being "overbroad" and encroaching on protected speech, both the Ninth and Fourth Circuits determined that the Act's unconstitutional provisions could be severed.[51] The Act's definition

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46. *Rundo II*, 990 F.3d at 714-15.

47. *Id.* at 714.

48. *See id.* (providing that the Anti-Riot Act does not specifically list the internet or social media as a "facility of interstate commerce," but it was implied by the district court in *Rundo I* that the Act does not consider its list of "facilities" to be exhaustive); 18 U.S.C.S. § 2101(a) (1968) (establishing a non-exhaustive list of the facilities of interstate commerce as "[w]hoever 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…").

49. 18 U.S.C.S. § 2101(a)(1)-(4) (1968).

50. *See* Zalman, *supra* note 15, at 920 (illustrating concern that the Act is vague on the intent an alleged perpetrator must have when it is considered to have committed an overt act under the statute); Apprendi v. New Jersey, 530 U.S. 466, 492 n.17 (2000) (citing BLACK'S LAW DICTIONARY 1137, 1400 (4th ed. 1968)) (defining "mens rea" as "criminal intent" or the purposefully state of mind necessary to commit a crime); United States v. Dellinger, 472 F.2d 340, 361-62 (7th Cir. 1972) (holding from the Seventh Circuit where the defendants were referred to as the "Chicago Seven," were charged under the Anti-Riot Act for the direct promotion of violence over multiple days, at multiple protests, during the Democratic Party Convention that was held in Chicago, Illinois).

51. *See generally* United States v. Miselis, 972 F.3d 518, 526 (4th Cir. 2020) (holding

of a riot is considered "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."[52] The term "clear and present danger" has also been interpreted to mean that violent speech is used or will promote an "imminent" or strong possibility of leading to violence.[53] Under the Act, a riot is essentially considered a "public disturbance" where the acts or credible threats by one or more persons have a strong chance of causing actual injuries to other citizens or their property.[54]

The Act also defines the phrase "to incite a riot."[55] Initially concerned with assisting state and local governments in curbing the increase of "riotous conduct," Congress needed to clearly define how exactly a person incites a riot.[56] Under the Act, the phrase "to incite a riot" defines a person who wishes "to organize, promote, encourage, participate in, or carry on a riot, includes, but is not limited to, urging or instigating other persons to riot."[57] The Act, however, limits the definition to allow for "the mere oral or written (1) advocacy of ideas or (2) expression of belief," so long as it does not advocate for violence or the "rightfulness" of committing violent acts.[58] The Ninth Circuit, in analyzing the Act's language and overt act provisions, found multiple instances in which the Act infringed on an individual's freedom of expression under the First Amendment.[59]

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that where defendants were a part of a violent right-wing protest in Charleston, South Carolina, the Act was not overbroad and severing the statute to make it comport with the First Amendment).

52. *Assemblage*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/assemblage [perma.cc/T54Q-6WQ4] (last visited Oct. 7, 2021) (defining assemblage as "a collection of persons or things", or "the act of assembling"); *See also* 18 U.S.C.S § 2102(a) (stating "an assemblage of three or more persons. . .").

53. *See Brandenburg*, 395 U.S. at 444 (1969) (per curiam) (providing the seminal Supreme Court opinion that established an imminency test that has been used by courts to differentiate between whether speech has been used to "merely teach" or essentially advocate for violence, or whether the speech used is meant to "prepare a group" to take violent actions that are highly likely to occur).

54. *See* 18 U.S.C.S. § 2102(a)(1) (1968) (defining the term "riot" as "a public disturbance involving acts or threats of violence by one or more persons part of an assemblage of three or more people, which acts or acts constitute a clear and present dangers of, or shall result in, damage or injury to the property of any other person. . .").

55. *See* 18 U.S.C.S. § 2102(b) (1968) (defining "to incite a riot" but also placing a limitation clause to the end of the definition that states any advocacy of ideas or expression of beliefs are protected, except those that involve the advocacy of violence, assertions of the rightness of, or the right to commit violence that the Ninth Circuit found violates the *Brandenburg* imminence requirement).

56. *See* Zalman, *supra* note 15, at 911 (demonstrating that at the time the Act was signed into law, Congress had made slowing the trend of violent protests a top priority and drafted the Act to ensure, that on top of any state or local riot laws, the federal government would be able to criminalize any person who traveled through interstate commerce to incite or take part in a riot).

57. 18 U.S.C.S. § 2102 (1968).

58. *Id.*

59. *Rundo II*, 990 F.3d at 721.

B. The History and Establishment of the Brandenburg Imminence Requirement

In *Rundo II*,[60] the Ninth Circuit comports its constitutional review of the Act to *Brandenburg*.[61] The *Brandenburg* imminence requirement was shaped and developed from over a century of Supreme Court jurisprudence.[62] The Court, starting with *Schenck v. United States*,[63] began its search for the proper test to demonstrate when mere speech transcends into the imminent danger of unlawful action.[64] Far before the *Brandenburg* Court defined the current imminence requirement, the "clear and present danger" test was born.[65]

1. Prior to Brandenburg: The Clear and Present Danger Test

Though the First Amendment protects a vast amount of expression, it is not absolute.[66] As early as 1919, the Supreme Court began deliberating on how to balance an individual's freedom of expression with how to criminalize types of speech that tended to create detrimental results to society.[67] Speech that is detrimental to society "can pose such an immediate danger of harm that we can no longer afford as a society to tolerate it." [68] To promote order and peace, certain types of speech have always been considered "unprotected."[69] One of the prominent categories

60. *Id.*

61. *See id.* at 709 (expressing its attempt to comport the Anti-Riot Act to the Supreme Court's *Brandenburg* imminence requirement, the Ninth Circuit severs the overly broad language from the Act).

62. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (establishing the Supreme Court's "clear and present danger test" in its attempt to determine which expression can still be criminalized, while not infringing upon First Amendment rights).

63. *Id.*

64. *Id.*; *see generally* Frohwerk v. United States, 249 U.S. 204, 210 (1919) (upholding a conviction of a publisher that distributed twelve articles that were critical of the United States involvement in World War I); Debs v. United States, 249 U.S. 211, 217 (1919) (upholding a conviction of a speaker who directly attacked United States involvement in World War I); Abrams v. United States, 250 U.S 616, 624 (1919) (affirming the conviction of defendants who published critical articles about the United States in a predominantly German newspaper that was circulated in the United States during World War I).

65. *Schenck*, 249 U.S. at 52.

66. *See Frohwerk*, 249 U.S. at 206 (1919) (providing that "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language"); Dennis v. United States, 341 U.S. 494, 507 (1951) (stating that "speech is not absolute.").

67. *See Dennis*, 341 U.S. at 507 (demonstrating the need for the legislature to prevent the types of speech that are "so undesirable as to warrant criminal sanction.").

68. *See generally* Daniel T. Kobil, *Advocacy Online: Brandenburg v. Ohio and Speech in the Internet Era*, 31 TOL. L. REV. 227, 230 (2000) (discussing the use of the *Brandenburg* imminence test, and its application to online expression of extremist websites).

69. *See* Brown v. Ent. Merch. Ass'n., 564 U.S. 786, 790-91 (2011) (providing a list of unprotected forms of speech, outside the protection of the First Amendment are

of unprotected speech is speech intended to incite illegal activity.[70]

In *Schenck v. United States*, the Supreme Court found that an individual that spoke out against the United States involvement in World War I rose to the level of a "clear and present danger."[71] The Court stated that any words used in circumstances that are of "such a nature to create a clear and present danger that they will bring about the substantive evils Congress has a right to prevent" are punishable and outside the protection of the First Amendment.[72] However, the Supreme Court struggled to clearly define what was considered a "clear and present danger."[73] Throughout most of the Twentieth Century, the Supreme Court was unable to create a consistent test that would delineate between expression that was merely *advocating* a viewpoint with expression that was directed at *causing* violent and unlawful action.[74]

Finally, Supreme Court Justice Oliver Wendell Holmes, though credited with establishing the clear and present danger test, realized that the test did not require the expression to be directed at carrying out illegal activity.[75] Under the clear and present danger test, a defendant that was advocating for political reform, or even violence, but lacked the intent

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"obscenity, incitement, and fighting words.").

70. *See Schenck*, 249 U.S. at 52 (establishing that Congress, through its legislation, has a right to criminalize speech that will bring about "substantive evils" or illegal activities).

71. *See id*. at 49 (affirming the punishment of Defendant Schenck who had sent 15,000 leaflets that were critical to America's war effort and the conscription of citizens into the Armed Forces).

72. *Id.*; *see also* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911) (explaining that the First Amendment does not protect speech that poses a clear and present danger similar to an individual "shouting fire in a theatre and causing a panic.").

73. *See* Richard Parker, *Clear and Present Danger Test*, FIRST AMEND. ENCYCL. (2009), www.mtsu.edu/first-amendment/article/898/clear-and-present-danger-test [perma.cc/7CJ9-EHWD] (providing a brief overview to the evolution of the Supreme Court's jurisprudence that became known as the "imminence requirement" established in *Brandenburg v. Ohio*, 397 U.S. 444 (1969)); *see* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 749 (1975) (discussing the shortcomings of the "clear and present danger" approach because the line between protected and unprotected expression was open to the subjective discretion of the judges).

74. *See* Gitlow v. New York, 268 U.S. 652, 672 (1925) (affirming conviction of defendant who had distributed pamphlets that merely "advocated" for social change and overthrowing the government); John R. Vile, *Incitement to Imminent Lawless Action*, FIRST AMEND. ENCYCL. (2009), www.mtsu.edu/first-amendment/article/970/incitement-to-imminent-lawless-action [perma.cc/5ATE-RKJB] (describing the majority in *Gitlow v. New York*, 268 U.S. 652 (1925) which created the precedent that states have the right to punish "utterances" that, though being small and passive, may be the "revolutionary spark" that leads to violence); Whitney v. California, 274 U.S. 357, 371 (1927) (upholding precedent set in *Gitlow*, by affirming conviction of member of the Communist Labor Party of California who traveled the state advocating for revolutionary social change).

75. *See Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting) (criticizing the conviction of a defendant who was distributing pamphlets, Justice Holmes tried in many opinions to narrow the scope of the clear and present danger test to facilitate a more "pro-speech" approach).

to incite or act upon its message could still be punished.[76] Justice Holmes realized that the clear and present danger test infringed on individuals' First Amendment rights because it did not require any demonstration of incitement.[77] Holmes stated:

> every idea is an incitement . . . [t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result . . . [b]ut whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. [78]

Subsequently, the Supreme Court slowly began to add the requirement that for an expression to fall outside the protection of the First Amendment, there must also be a likelihood the expression will incite illegal activity.[79] Finally, in 1969, the Supreme Court articulated its most recent test in *Brandenburg v. Ohio*,[80] laying the foundation for the Ninth Circuit's analysis of the Act in *Rundo II*.[81]

2. Today's Standard: The Brandenburg Imminence Requirement

The Ninth Circuit applied the current test, the *Brandenburg* imminence requirement, to determine whether the language in the Act complied with the First Amendment; which only permits the punishment of unprotected speech.[82] *Brandenburg v. Ohio*[83] is a seminal United States Supreme Court case.[84] *Brandenburg* reached national prominence when a leader of the white supremacist group, the Ku Klux Klan ("KKK"), was convicted under Ohio's Criminal Syndicalism statute.[85] During a KKK rally, the appellant made disparaging statements about African Americans and Jewish citizens, while promoting upcoming political marches in Washington D.C., Florida, and Mississippi.[86] The Ohio Criminal

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76. *Id.*

77. *Id.*

78. *See id.* (reasoning that merely because someone has an idea does not necessarily mean that idea will lead to an incitement of violence, rather, it could instead be an incitement to reason).

79. *See Dennis*, 341 U.S. at 510 (adopting the "gravity of evil" refinement of the clear and present danger test as, "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."); Yates v. United States, 354 U.S. 298, 321 (1957) (demonstrating the need for an imminence requirement where "language of incitement is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.").

80. *Brandenburg*, 395 U.S. at 447.

81. *Rundo II*, 990 F.3d at 713.

82. *Id.*

83. *See Brandenburg*, 395 U.S. at 444 (providing a distinction between a statute that is only able to punish conduct, and subsequent speech, that has a more than likely chance to incite a riot; a standard that is still used today).

84. *Id.*

85. OHIO REV. CODE ANN. § 2923.13 (2015).

86. *See Brandenburg*, 395 U.S. at 446 (detailing an appellant that was recognized

Syndicalism statute, punished individuals for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing . . . political reform."[87]

The *Brandenburg* Court made the distinction between "the mere abstract teaching," or advocating, for violence versus "preparing a group for violent action."[88] The Court decided that appellant's First Amendment rights were violated by the Ohio law and reversed the state's ruling.[89] In doing so, it noted that if a law is unable to distinguish between a person's speech that is merely "teaching" with speech used to "prepare" a group of people to commit violence, the law is unconstitutional; insisting that such a law would violate the guarantees of the First and Fourteenth Amendments.[90]

The distinction between speech that merely advocates violence with speech intended to produce violence ultimately evolved into the *Brandenburg* imminence requirement.[91] Under this test, speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," is not protected under the First Amendment.[92] The *Brandenburg* test, in other words, requires that an individual's expression, either oral or written, be of the nature that is intended to instigate or provoke others into unlawful conduct.[93] The second part of the test, however, requires that after the expression has been established, there must be a likelihood that unlawful conduct will take place.[94] The Supreme Court determined that because the KKK leader's speech merely advocated for violence, the speech carried a

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on a video recording while giving a speech to other members of the Ku Klux Klan claiming to organize thousands of Klan members to march in protest, the Court ultimately stated the speech on the video was protected and did not meet the imminence requirement).

87. *Id.*

88. *See id.* at 448 (overruling a previous decision in Whitney v. California, 274 U.S. 357 (1927), the Supreme Court established that a state statute that punishes mere advocacy of violence is unconstitutional).

89. *Id.* at 449.

90. *See id.* at 448 (establishing the Supreme Court's own test based on an individual's speech that revolves around "teaching" of a particular view, in contrast to "preparing a group for violent actions" must be differentiated in state or local statutes dealing with rioting).

91. *See* Hess v. Indiana, 414 U.S. 105, 107-08 (1973) (establishing the *Brandenburg* imminence requirement protected the speaker who stated to the police, "we'll take the f**king street again" because the speaker did not specify when they meant to return, the Court reasoned the speaker could have meant an indefinite amount of time and could not be punished); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933-34 (establishing the *Brandenburg* imminence requirement protected a speaker that made the indirect threat of violence to any African American protestors that failed to boycott a hardware store).

92. *Brandenburg*, 395 U.S. at 447.

93. *Id.*; *see* 18 U.S.C.S. § 2102(b) (1968) (using the terms instigating or provoking to define the conduct necessary to find an individual's expression is punishable for inciting a riot).

94. *Id.*

minimal likelihood of leading to an imminent threat of unlawful action.[95]

In his concurrence, Justice Hugo Black thought that even though the majority did not touch upon the "clear and present danger" requirement, it should no longer be used because of the difficulty in distinguishing between "teaching" and "preparing a group" even when the speaker is advocating for violence.[96] *Brandenburg* remained the standard at the time the Ninth Circuit issued its opinion on the Act in *Rundo II.*[97]

C. The Background Facts of Rundo II

Robert Rundo, Robert Boman, Tyler Laube, and Aaron Eason (collectively "Defendants") were leading members of RAM, which was formed to promote a white supremacist ideology.[98] Defendants and other RAM members traveled to political rallies and "boasted" about their actions at the rallies in text messages and on social media.[99] Social media platforms Facebook and Twitter were common means of communication amongst RAM members.[100] Members used Facebook to share photographs of their activity at political rallies.[101] Initially, the Central District of California did not find that Defendants violated the Anti-Riot Act. [102] The district court did, however, charge Defendants with "conspiring and agreeing to riot" as well as "aiding and abetting one another in using facilities of interstate commerce."[103] The government argued that Defendants used the internet, a telephone, and a credit card to perpetrate their conspiracy to cause violence.[104] However, the district court noted, this conduct fell within their constitutional right to the

95. *Id.*

96. *See id.* at 450 (Black, J., concurring) (preferring that "clear and present danger" doctrine be struck by the Court).

97. *Rundo II*, 990 F.3d at 709.

98. *See id.* (detailing that the defendants were present at political rallies in Huntington Beach and Berkely California to promote and protect nationalists and white supremacy ideology).

99. *See Rundo I*, 497 F. Supp. 3d at 876 (introducing evidence that Defendant Eason had "used a credit card to rent a passenger van to travel from Southern California to [a] rally in Berkely.").

100. *See id.* at 878 (detailing that Defendant Rundo had used Twitter to promote and recruit new members to RAM, he had posted a message on his account which stated, "[w]hen the squads not out smashing commies . . . #nationalist #lifestyle" after he had attended a political rally a month previous to his post).

101. Press Release, U.S. Attorney's Office of the Western District of Virginia, Federal Grand Jury Indicts Four from California for Conspiracy to Violate Riots Statute (Oct. 10, 2018).

102. *See Rundo I*, 497 F. Supp. 3d at 874 (providing that Defendant Laube pled guilty to the only charge against him, while the remaining defendants moved to have the charges under the Anti-Riot Act dismissed; however, once the district court granted their motion and dismissed their indictments, Laube moved to withdraw his guilty plea which was also granted by the district court).

103. *Id.*

104. *See id.* (stating that the district court did not approve of the government's argument that a credit card used to rent a van was strong enough to demonstrate that the defendants had engaged in interstate commerce).

freedom of expression.[105]

The district court determined the Act broadly defined the term "riot" as some event in the future.[106] The court was concerned that the RAM members' social media posts that advocated for attendance at political rallies, in some instances up to six months in advance, lacked the imminence requirement under *Brandenburg*.[107] Many of Defendants' messages were posted after they attended a political rally and consequently, would not fall under the Act's definition of a "riot" or "inciting a riot."[108] The court was further concerned when the government charged Defendants for using a credit card to rent a van weeks before a political rally, as the court found this conduct too far removed to comport with the Act's "imminent threat of violence or lawless conduct."[109] The district court ultimately dismissed the charges against Defendants because the Act infringed on "pre-riot" communications that were protected under the First Amendment.[110] The government appealed.[111]

D. Procedural Overview of the Ninth Circuit's Opinion in Rundo II

After reviewing the case *de novo*, the Ninth Circuit ultimately reversed and remanded the district court's decision, finding that the Act was able to be severed of its unconstitutional language.[112] On appeal, Defendants maintained their argument that the Act was facially overbroad.[113] Defendants noted four points of emphasis to promote their argument: (1) the overt act provisions, as a whole, violated the *Brandenburg* imminence requirement; (2) the provisions in subparagraphs (1), (2), and (4) of 18 U.S.C. § 2101(a) were overly broad; (3) the Act's definition of "riot" was unconstitutional; and (4) the Defendant's conduct was further protected by the heckler veto's doctrine.[114]

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105. *See Rundo I*, 497 F. Supp. 3d at 877 (stating that the district court judge was concerned that the Act was being used by the government to punish protected speech on social media accounts that were either months or a year after Rundo had attended the particular event resulting in the speech not meeting *Brandenburg's* imminence requirement).

106. *Id.*

107. *See id.* at 880 (stating the speech exhibited by the RAM members was protected because the posts on social media and text messages, sent between members, did not cause imminent disorder).

108. *Id.* at 878

109. *See id.* (establishing that the district court also did not agree with the government's evidence that Defendant Eason's use of a credit card and the renting of a van was enough of decisive action to constitute him using the "facilities of interstate commerce" in order to incite a riot).

110. *Rundo II*, 990 F.3d at 709.

111. *Id.* at 721.

112. *Id.* at 709.

113. *Id.* at 715.

114. *Id*.

Demonstrating a split among the Circuit Courts, the Fourth and Seventh Circuits took different approaches in applying the Act's overt act provisions.[115] Ultimately, the Ninth Circuit decided to adopt the Seventh Circuit's approach.[116] The Seventh Circuit determined that an individual's conduct does not violate the Act when its actions are merely steps to incite, to promote, or aid in the furtherance of a riot.[117] Instead, the actions of the individual must be closely connected to its speech.[118] Next, the Ninth Circuit's opinion discussed 18 U.S.C. § 2101(a)(1)-(2) and (4).[119] Defendants argued that the language of the subparagraphs (1), (2), and (4) were also overly broad and unconstitutional.[120] In the subparagraphs, the Ninth Circuit focused on the words "urging," "organizing," and "encourage[ing] and promot[ing]," to find that it preferred, unlike the district court in *Rundo I*, to sever the unconstitutional language from the Act.[121] In this instance, the Ninth Circuit determined that the words "urging" and "organizing" did not meet the *Brandenburg* imminence requirement because the definitions of those words fell short of contemplating an immediate action.[122] The Ninth Circuit adopted the Fourth Circuit's approach where terms such as "urging" and "organizing" did not lead to speech that was likely to cause imminent lawless action.[123] The Fourth Circuit found that the Act's use of "urging," "organizing," "encourage[ing] and promot[ing]" were too broad and infringed upon protected speech.[124]

The Ninth Circuit disagreed with Defendants' assertion that the Act's definition of the term "riot" was unconstitutional.[125] Instead, the court decided Congress had expressed its version of the term "riot" to be synonymous with "true threats."[126] It concluded that the term's definition did not encroach on any protected speech under the First Amendment.[127]

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115. *See Rundo II*, 990 F.3d at 716 n.8 (choosing to adopt the analysis of the Seventh Circuit regarding the Act's overt act provisions, while disagreeing with the Fourth Circuit's analysis that the overt act provisions equate to an "attempt statute. . .").

116. *See id.* at 715-16 (providing that though the Ninth Circuit had adopted the same approach as the Seventh Circuit, the court also stated that it disagreed with the Fourth Circuit's ruling in *Miselis*, that the Act is an "attempt statute" where the defendants had to merely attempt to commit any of the over acts in § 2101(a) which does not comply with the *Brandenburg* imminence requirement; showing a potential split among the circuit courts).

117. *Dellinger*, 472 F.2d at 361-62.

118. *Id.*

119. *Rundo II*, 990 F.3d at 716.

120. *Id.*

121. *See Miselis*, 972 F.3d at 542-43 (demonstrating that the Ninth Circuit agrees with the Fourth Circuit's conclusion that the Act was "severable" and severing the statute would be preferred by Congress over complete invalidation).

122. *Rundo II*, 990 F.3d at 720.

123. *Miselis*, 972 F.3d at 538.

124. *Id.*

125. *See Rundo II*, 990 F.3d at 721 (holding that the Ninth Circuit reversed the ruling of the district court based on the principle of severing the Act rather than invalidating it completely).

126. *Id.* at 720.

127. *Id.*

Finally, the court did not find that the Act violated the "heckler's veto doctrine."[128] The heckler's veto doctrine is an unconstitutional, content-based speech restriction that silences the speaker to prevent an anticipated, violent reaction from the audience.[129] The Ninth Circuit determined that the heckler's veto doctrine was not applicable because the Act was violated by an individual's conduct and was not based on the hostile behavior of a listening audience.[130]

III. COURT'S ANALYSIS

This section provides an in-depth analysis of the Ninth Circuit's opinion in *Rundo II*.[131] In its unanimous decision, the court found that the Act was not unconstitutional on its face and decided to apply the severability doctrine.[132] The Ninth Circuit determined that the majority of the Act's language complied with the First Amendment's right to freedom of expression.[133] The court demonstrated its deference to Congress in finding that a majority of the Act's language was not overly broad and merely severed the unconstitutional language.[134] Second, applying the *Brandenburg* imminence requirement, the court identified and removed the specific language that did not meet the constitutional threshold.[135] Finally, once the unconstitutional language was removed, the Ninth Circuit reversed and remanded the case.[136]

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128. *See* Rosenbaum v. City & Cnty. of San Francisco, 484 F.3d 1142, 1158 (9th Cir. 2007) (similar to fighting words and unprotected speech, the heckler's veto doctrine is determinative based on the reaction of an audience, where, in contrast, the Act is determinative of an individual's conduct while using interstate commerce).

129. *Rundo II*, 990 F.3d at 721.

130. *Id.*

131. *Id.* at 709.

132. *See* New York v. Ferber, 458 U.S. 747, 769 n.24 (1982) (explaining that the severability doctrine applies when a court is unable to narrow its interpretation of a statute to meet constitutional requirements, and it may sever only the unconstitutional portion that is considered invalid); United States v. Thirty-seven Photographs, 402 U.S. 363, 376 (1971) (addressing the unconstitutionality of a Congressional statute, a court may construe the meaning of the statute to meet constitutional requirements to avoid it from being invalidated).

133. *Rundo II,* 990 F.3d at 714.

134. *Id.* at 718; *see also* Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1311 (9th Cir. 1992) (quoting a previous case, the Ninth Circuit, in *Rundo II*, stated, "[w]e must examine the meaning of the words to see whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress," an example of the Ninth Circuit's rational basis of review).

135. *See Brandenburg*, 395 U.S at 448 (explaining that a statute that does not make a clear distinction between expression that is merely advocating for violence with expression that is directed at creating an actual and imminent threat of violence is overly broad and infringes on the rights under the First Amendment).

136. *See Rundo II*, 990 F.3d at 721 (reversing the Central California District Court's ruling in *Rundo I*, 497 F. Supp. 3d. 872 (2019), that found that the Act was invalid on its face and as a result dismissed both Count 1 and Count 2 against Defendants).

A. General Overview of Operative Jurisprudence Employed by the Ninth Circuit

Defendants maintained that the Act was unconstitutionally overbroad on its face.[137] Attacking the Act, Defendants relied mostly upon *Brandenburg's* imminence requirement; which was also the standard used by the Ninth Circuit.[138] The Ninth Circuit, however, reasoned that Congress did not intentionally write an unconstitutional law and decided to sever any unconstitutional language, as opposed to the district court which invalidated the Act entirely.[139] Relying on the United States Supreme Court's jurisprudence, the Ninth Circuit stated that "invalidation for overbreadth is strong medicine that is not to be casually employed."[140] Only upon finding language that violates the First Amendment would the Ninth Circuit then decide to remove the specific language, while attempting to keep the Act in its original form.[141]

1. The Ninth Circuit's Deference to Congress

In the beginning of its opinion, the Ninth Circuit made clear it would give greater deference to Congress when construing the Act's language.[142] Courts, however, typically use strict scrutiny when interpreting a law that seeks to regulate a fundamental constitutional right, like the right to freedom of expression under the First Amendment.[143] To survive strict scrutiny, a law must serve a compelling governmental interest while

137. *Rundo I*, 497 F. Supp. 3d at 876.

138. *Rundo II*, 990 F.3d at 715.

139. *See* U.S. v. Williams, 553 U.S. 285, 293 (2008) (explaining that a court, when construing a statute for overly broad language, must appreciate that lawmakers do not intentionally write legislation to be overbroad or vague, and a court should attempt to preserve the original intention of the law); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989) (applying a narrower construction to a New York City's time, manner, and place restriction on concert noise can save it from being found unconstitutional on its face by stating, "[a]ny inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction.").

140. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (establishing a cautious standard for ruling an Oklahoma statute invalid due to overbreadth and vagueness, coining the seminal phrase that applying the overbreadth doctrine in order to invalidate a law was "manifestly, strong medicine. . .").

141. *Rundo II*, 990 F. 3d at 714.

142. *Id.*

143. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (adhering to the Court's standard of using strict scrutiny when governments or administrations attempt to create regulations that are based on a "suspect classification," namely an individual's race); Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995) (striking down a piece of affirmative action legislation that used race as a factor in prioritizing governmental spending on contractors to any "minority business" because the government did not seek to use race-neutral alternatives); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299-300 (calling for a stricter scrutiny of judicial review, especially when race is involved as a factor used by the government because of the history of governmental racial discrimination, the Court elected to carefully review legislation that concerns fundamental rights or unchangeable characteristics of an individual like race).

employing the least restrictive means possible.[144] Laws that are reviewed under strict scrutiny rarely survive and are typically invalidated.[145] However, when courts decide that a law is not attempting to regulate a fundamental constitutional right, they will often allow for a greater deference to legislators during judicial review.[146] A rational basis standard of review is often employed when reviewing legislation that seeks to regulate unprotected speech.[147] Examples of unprotected speech range from: inciting imminent unlawful actions, fighting words, obscenities, as well as defamation.[148] Under a rational basis standard of review, the court seeks to determine whether the government has a rational reason for its regulation and whether it is employing a reasonable or rational means to meet its objective.[149] Inherently, the First Amendment is not absolute.[150] Even in a democratic society, where the free exchange of ideas is crucial to a community's development, the government still maintains a narrow ability to regulate speech and the conduct that emanates from that speech.[151]

The Anti-Riot Act was created to punish individuals that utilize facilities of interstate commerce to perpetrate or incite a riot.[152] From the

144. *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (applying strict scrutiny to "smoke out" illegitimate governmental actions that may impede a person's ability to enjoy a fundamental right); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (demonstrating that strict scrutiny is necessary due to the United States history of democratic majorities establishing laws that are inherently discriminatory against insular minorities that are not equally represented in the political system); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (applying strict scrutiny, "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right. . .").

145. *See* United States v. Playboy Ent. Grp., 529 U.S. 803, 818 (2000) (applying the strict scrutiny test because the statute was considered a content-based restriction where the Court had stated, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible.").

146. *See Murgia*, 427 U.S. at 314 (1976) (explaining that rational-basis standard of review is a "relatively relaxed" standard and useful in situations where "perfection in making the [correct statute] is neither possible nor necessary.").

147. *See id.* (establishing that under rational-basis standard of review "legislation is presumed to be valid. . ."); *see also* Ripplinger v. Collins, 868 F.2d 1043, 1051 (9th Cir. 1989) (providing legislative history in the Ninth Circuit that when a statute "does not involve a fundamental right or suspect criterion, we apply a rational basis test.").

148. *See Brown v. Ent. Merch. Ass'n.,* 564 U.S. at 790-91 (providing a list of historically unprotected forms of speech, outside the protection of the First Amendment are "obscenity, incitement, and fighting words"); New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964) (ruling that "defamation" is unprotected speech); Watts v. United States, 394 U.S. 705, 708 (1969) (ruling that "true threats" are unprotected speech).

149. *Murgia*, 427 U.S. at 307.

150. *See* Baird v. State Bar of Ariz., 401 U.S. 1, 5 (1971) (explaining that the First Amendment is the "freedom to believe and freedom to act" and that the government is permitted to regulate the conduct of an individual).

151. *See id.* (establishing that the government has a rational interest in regulating conduct because "[c]onduct remains subject to regulation for the protection of society.").

152. *See* Fern L. Kletter, *Federal Anti-Riot Act of 1968 (18 U.S.C.A. §§ 2101, 2102)*, 50 A.L.R. Fed. 3d. art. 4 (2020) (detailing the enactment of the Anti-Riot Act was created to temper and regulate protests and demonstrations in the 1960's).

onset, the Act was intended to regulate a person's conduct, rather than speech.[153] Violations of the Act are determined based on the violating party committing an overt act. [154] This could include traveling out of state to take part in a riot or calling another person and telling them to immediately go commit unlawful violence.[155] Unlike the district court that invalidated the Act in its entirety, the Ninth Circuit construed its language in a light most favorable to Congress to find majority of the Act constitutional.[156] This deference to Congress is an important initial step which led to the Ninth Circuit's reversal of the district court's ruling.[157] The Ninth Circuit, however, determined that the Act did incorporate some overly broad terms.[158] Applying the overbreadth doctrine, the Ninth Circuit needed to demonstrate the proper reasoning to invalidate language in the Act.[159]

2. The Constitutional Overbreadth Doctrine

The *Rundo II* court found the Act was not facially overbroad, but determined the unconstitutional language must be removed for the Act to comply with the First Amendment.[160] The United States Supreme Court referred toand applied its "overbreadth doctrine" in *Board of Airport Commissioners v. Jews for Jesus* in 1987.[161] The Supreme Court clarified that the overbreadth doctrine applies to a statute that is facially invalid because it prohibits a substantial amount of speech.[162] To demonstrate that a law is substantially overbroad, there must be a "realistic danger" that the statute will infringe on the First Amendment rights of parties not

153. *See id.* (describing the Act as a means to criminalize the use of interstate commerce with the intent to complete an overt act such as: (1) inciting a riot, (2) organizing, promoting, or encouraging participation in a riot, (3) committing any act of violence in the furtherance of a riot, (4) aiding or abetting any person in inciting or participating in a riot or committing any act of violence in the furtherance of a riot).

154. 18 U.S.C.S. § 2101(a) (1968).

155. *Rundo I*, 497 F. Supp. 3d at 876.

156. *Rundo II*, 990 F. 3d at 716; *see also* United States v. Stevens, 559 U.S. 460, 481 (2010) (emphasizing a court's duty "is to seek a reasonable construction of the [federal Anti-Riot Act] that comports with constitutional requirements.").

157. *Rundo II*, 990 F.3d at 716.

158. *See id*. at 719 (finding that terms "urge," "promote," and "encourage" a riot were overbroad but severable from the Act).

159. *See Stevens*, 559 U.S. at 473 (stating that the overbreadth doctrine provides that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.") (internal citations omitted).

160. *Rundo II*, 990 F.3d at 714.

161. *See generally* Bd. of Airport Comm'r v. Jews for Jesus, 482 U.S. 569, 574 (1987) (providing an example of an overbroad regulation where the Los Angeles Airport (LAX) prohibited the use of the airport's public areas for any type of First Amendment activity to stop people from handing out pamphlets; the Court ruled that the statute was overly broad because it would technically punish people for merely having a conversation).

162. *Id.*

before the court to challenge the law as overly broad.[163] In other words, the overbreadth doctrine applies to statutes where a litigating party's speech may be constitutionally prohibited by the statute at issue, but the party is still "permitted to challenge a statute on its face because it also threatens others not before the court."[164] This policy was deemed essential because individuals, whose expression is constitutionally protected, "may well refrain from exercising their rights for fear of criminal sanctions."[165] The ability for litigants to challenge the law as overly broad on behalf of third parties not present at trial is crucial to promoting the exchange of ideas in a democratic society.[166]

In *Rundo II*, Defendants had the burden of demonstrating that the law was overly broad, and thus could not pass constitutional muster.[167] Defendants' main argument was that the Act was facially overbroad and unconstitutionally infringed on their ability to express their political views.[168] The district court in *Rundo I* agreed with Defendants' argument and found the Act invalid on its face.[169] The district court concluded that the Act did not criminalize conduct "of those in the heat of a riot."[170] Insisting that the Act was overly broad, the district court agreed with Defendants' analysis that the Act punished conduct that was outside the scope of either "inciting a riot" or "riot[ing]," in general.[171] The out-of-scope conduct, as noted in *Rundo I*, were activities such as using a credit card, posting on social media, and sending text messages to other RAM members.[172] This conduct, Defendants argued, was exhibited by every law-abiding citizen, and demonstrates that the Act was overly broad because it would have the potential to punish those who were not in violation of the Act.[173]

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163. *See generally* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (expressing the overbreadth doctrine as a crucial means to allow parties whose speech is unprotected to still challenge a statute for being overly broad in order to protect citizens who either do not know their First Amendment rights are being infringed upon or have already elected not to exercise their rights out of fear of being prosecuted).

164. *See* Broadwich v. Okla., 413 U.S. 601, 615 (1973) (establishing that when a statute is overly broad, a court should attempt to narrow its interpretation in order to comply with constitutional standards, the Court explained that this remedy was out of concern that the threat of enforcing an overly broad statute would chill constitutionally protected speech).

165. *Id.*

166. *See generally* Gooding v. Wilson, 405 U.S. 518, 524 (1972) (ruling a Georgia statute overly broad when it purported to punish lawful and protected speech by punishing, "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.").

167. *Hicks*, 539 U.S. at 124.

168. *Rundo II*, 990 F.3d at 713.

169. *Rundo I*, 497 F. Supp. 3d at 880.

170. *Id.* at 877.

171. *Id.*

172. *Id.*

173. *Id.*

The Ninth Circuit disagreed.[174] However, the court did establish that provisions of the Act could still be considered overly broad if they did not comply with the imminence requirement laid out in *Brandenburg*.[175] To protect lawful expression, *Brandenburg* established that if a statute did not make a distinction between speech that "merely advocated" for violence, or speech used to "prepare a group" to incite imminent unlawful action, it would infringe on protected speech and be rendered unconstitutional.[176]

The idea of imminence permeates from speech that is intended to "prepare" or compel a group to violence.[177] The *Brandenburg* Court was attempting to strike a proper balance between an individual simply teaching others and advocating for violence versus actually preparing a group to commit violent acts.[178] Defendants argued that the Act's overbreadth essentially punished speech and conduct that would not result in "incitement to imminent unlawful actions," like renting a car with a credit card or posting on social media.[179] Consistent with the *Brandenburg* imminence requirement, the Ninth Circuit determined, though the Act was not facially overbroad, it did include provisions that violated *Brandenburg*.[180] The court found that some provisions could be considered overbroad because they would effectively punish lawful speech and actions.[181] By construing the contested provisions in the Act, the Ninth Circuit severed the unconstitutional language.[182]

3. The Severability Doctrine

The Ninth Circuit decided to sever the unconstitutional language

174. *Rundo II*, 990 F.3d at 721 (citing the overbreadth doctrine, the Ninth Circuit viewed the Act in a light most favorable to Congress, ultimately disagreeing with the district court's invalidation of the entire statute and elected to use the doctrine of severability).

175. *Id.* at 713; *see also Brandenburg*, 395 U.S. at 447-48 (employing the *Brandenburg* imminence requirement which stated in two parts: (1) advocating for violence must be directed to inciting or producing imminent lawless action, and (2) is likely to incite or produce such action).

176. *Brandenburg*, 395 U.S. at 447.

177. *Id.* at 444; *see generally Hess*, 414 U.S. at 108 (ruling that an individual yelling at a police officer during a protest that they would comeback at a later time clearly did not rise to the level of imminence necessary to comply with the *Brandenburg* imminence requirement); *Claiborne Hardware Co*., 458 U.S. at 990 (following *Brandenburg v. Ohio*, the Court upholds the use of the *Brandenburg* imminence requirement by reversing a decision that claimed that punishing an individual who did not "boycott" a hardware store was merely speculative and speculation on whether or not violence will actually occur does not meet the Court's imminence requirement).

178. *Brandenburg*, 395 U.S. at 447.

179. *See Rundo I*, 497 F. Supp. 3d at 877 (using the activities of Defendants that brought them into violation of the Act, the district court interprets the statute as overly broad because every American citizen can engage in these activities).

180. *Rundo II*, 990 F. 3d at 719.

181. *Id.*

182. *Id.* at 720.

from the Act after denying that it was overly broad on its face.[183] Severability of legislation is a powerful tool granted to a court under its inherent powers of judicial review.[184] However, it is not without limits.[185] Specifically, a court cannot "rewrite a statute and give it an effect altogether different [than it was originally intended]" and after severing the unconstitutional provisions from a law, the court must ensure it remains operative.[186] To correctly "sever" a law, a court will first declare the provision unconstitutional, using substantive constitutional doctrine.[187] Next, and only after deciding that a provision in a statute is unconstitutional, the court determines whether the remainder of the statute can stand.[188]

As explained above, the Ninth Circuit's substantive constitutional standard in determining the validity of the Act was determined in *Brandenburg*.[189] The *Brandenburg* imminence requirement has two parts.[190] First, the speaker must have the requisite intent to incite imminent unlawful action.[191] Second, even if the speaker exhibits the requisite intent, there must be a likelihood that imminent unlawful action will actually occur.[192] Initially in its analysis, the Ninth Circuit reviewed the actual language of the Act to determine if there were any provisions or language that did not meet the *Brandenburg* imminence requirement.[193] The court narrowed its review to the provisions of the Act that were contested by Defendants.[194] Subsequently, the Ninth Circuit found provisions in the Act that violated Brandenburg's imminence standard because they infringed on freedom of expression rights under the First Amendment.[195]

B. The Ninth Circuits Analysis of the Anti-Riot Act

The Ninth Circuit found and severed the overbroad provisions that did not comply with the *Brandenburg* imminence requirement because the provisions punished a substantial amount of protected speech.[196] The

183. *Id.*

184. *See* United States v. Booker, 543 U.S. 220, 258-59 (2005) (demonstrating guidelines to the severability doctrine when the Court determined a statute that set "sentencing guidelines" did not have to be completely invalidated for being unconstitutional under the Sixth Amendment but could be severed of its unconstitutional language).

185. S*ee* Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (establishing that the Court "must refrain from invalidating more of the statute than is necessary.").

186. *Booker*, 543 U.S. at 332 n.10 (Thomas, J., dissenting).

187. *Id.*

188. *Id.*

189. *Rundo II*, 990 F.3d at 713.

190. *Brandenburg*, 395 U.S. at 447.

191. *Id.*

192. *Id.*

193. *Rundo II*, 990 F. 3d at 714.

194. *Id.*

195. *Id.* at 721.

196. *Id.* at 714.

Ninth Circuit took three pertinent steps in construing the validity of the Act. First, as previously mentioned, the court looked to both the Seventh and Fourth Circuits to define the overt act provisions as a whole.[197] Second, by focusing on the Act's same overt act provisions, the Ninth Circuit broke down the relevant words in § 2101(a)(1)-(4) to scrutinize the language and determine whether it comports with *Brandenburg's* imminence requirement.[198] Third, the court turned to § 2102(b) to examine the definition provided by Congress to describe its meaning "to incite a riot."[199]

1. Defining the Overt Act Provisions as a Whole

Defendants asserted that all the overt provisions of the Act were unconstitutional because the provisions were "too far removed in time from any riot" to meet the *Brandenburg* imminence requirement.[200] Defendants argued that the use of "overt acts" in the Act was synonymous with overt acts for a conspiracy statute.[201] Analogous with crimes involving a conspiracy, the defendant must have committed an overt act.[202] The type of overt act involved in a conspiracy does not need an "immediate connection to the intended crime."[203] Defendants wanted to establish that the Act's overt act provisions did not meet the *Brandenburg* imminence requirement because the provisions were similar to overt acts in conspiracy cases that do not have a temporal requirement.[204] If successful, Defendants could have insisted that the court declare the Act invalid on its face.[205]

The Ninth Circuit disagreed and looked to both the Seventh and Fourth Circuits to adopt a proffered approach to the overt act provisions.[206] An approach initially reviewed by the Ninth Circuit came out of a similar Fourth Circuit case, *United States v. Miselis*.[207] The Fourth Circuit decided that the overt act provisions were similar to overt acts regarding an attempt statute.[208] Under attempt statutes, an overt act would be considered a "substantial step" taken in the completion of a

197. 18 U.S.C.S. § 2101(a) (1968).

198. *Id.* at 716-17.

199. *See* 18 U.S.C.S. § 2102(b) (1968) (defining "'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 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.").

200. *Rundo II*, at 715.

201. *Id.*

202. *Id.*

203. United States v. Harper, 33 F.3d 1143, 1147 (9th Cir. 1994).

204. *Rundo II*, 990 F. 3d at 719.

205. *Rundo I*, 497 F. Supp. 3d at 880.

206. *Rundo II*, 990 F.3d at 721; United States v. Dellinger, 472 F.2d 340, 361-62 (7th Cir. 1972); *Miselis*, 972 F.3d at 534-35.

207. *Miselis*, 972 F.3d at 518.

208. *Id.* at 534.

crime.[209] In other words, the Fourth Circuit associated the overt act provisions as "substantial steps" where an individual's conduct to either organize, aid, or commit any act of violence in furtherance of a riot violated the Act.[210] The Ninth Circuit rejected this approach, however, because considering the overt act provisions as mere "substantial steps" did not resolve the *Brandenburg* imminence requirement issue.[211] Unlike conspiracy or attempt statutes, to satisfy *Brandenburg*, the person's conduct must be directed and have a likelihood of inciting imminent unlawful action.[212] In the case of attempt, an individual's "substantial step," or significant conduct to complete a crime, does not have to be moments before the crime is committed.[213] By utilizing the "substantial step" approach from attempt statutes, the Fourth Circuit "sidestep[ped]" the imminence issue altogether.[214]

The Ninth Circuit instead adopted the approach of the Seventh Circuit.[215] Under the Seventh Circuit's approach, the overt act provisions are not "substantial steps," but can reasonably be considered goals achieved by a person's conduct "or are themselves the required overt acts."[216] Here, the Seventh Circuit interpreted the overt act provisions to mean that any person, while traveling in interstate commerce or using the facilities of interstate commerce, commits an "overt act" by actually inciting a riot, committing an act of violence, or aiding any person in inciting a riot.[217]

The Ninth Circuit appreciated this "goal" approach, as it made the crucial connection between an individual's speech and its conduct.[218] This "goal" approach satisfies the *Brandenburg* imminence requirement because conduct that is intended "to incite a riot" satisfies the requisite imminent threat element.[219] Through the adoption of the Seventh Circuit's approach, the Ninth Circuit rejected Defendant's argument.[220] The court decided that the overt act provisions were constitutional under the First Amendment.[221]

2. Overbroad terms in § 2101(a)(1)-(4) of the Act

Once the Ninth Circuit determined that as a whole the overt act

209. United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007).
210. *Miselis*, 972 F.3d at 534.
211. *Rundo II*, 990 F.3d at 716.
212. *Brandenburg*, 395 U.S. at 447.
213. *Resendiz-Ponce*, 549 U.S. at 107.
214. *Rundo II*, 990 F.3d at 716.
215. *Id.*
216. *See Dellinger*, 472 F.2d at 361 (interpreting the overt act provisions as "goals" to be achieved, meaning the Act punishes conduct that is "intentionally and successfully causing a riot as a criminal offense.").
217. *Id.* at 362.
218. *Rundo II*, 990 F.3d at 716.
219. *See Dellinger*, 472 F.2d at 361.
220. *Rundo II*, 990 F.3d at 716.
221. *Id.*

provisions complied with *Brandenburg*, the court turned to the individual provisions themselves.[222] Defendants claimed that subparagraphs (1), (2), and (4) under § 2101(a) were overbroad.[223] Again, the Defendants maintained that because the Act punished a substantial amount of protected speech, it was invalid under the First Amendment.[224] In this instance, both Defendants and the district court determined that the Act criminalized words such as "organize," "promote," and "encourage."[225] The Ninth Circuit disagreed, in part, that the language that encompassed the overt act provisions were overly broad and did not meet the *Brandenburg* imminence requirement.[226] The Ninth Circuit found that the language in subparagraphs (1) inciting a riot, (3) committing any act of violence to further a riot, and (4) aiding and abetting any person in furtherance of a riot of § 2101(a), met the proper imminence standard in *Brandenburg*.[227] Adopting the Seventh Circuit's "goal" approach, the Ninth Circuit reasoned that the overt act provisions are, themselves, goals that were intended to be achieved by a violating party's conduct.[228] *Brandenburg* requires that the individual's conduct rise to a likelihood of creating an imminent incitement to a riot.[229] Inciting an actual riot, committing an act of violence, and aiding or abetting another person to perpetrate a riot, all meet the definition of conduct that creates an imminent incitement of unlawful action or riot.[230] Through its analysis of § 2101(a)(1), (3), and (4), the Ninth Circuit ruled that the specific subparagraphs complied with the First Amendment.[231]

However, the Ninth Circuit agreed with Defendants that the terms to "organize," "promote," and "encourage" a riot were overly broad and infringed on a substantial amount of speech.[232] The court noted that in *Brandenburg*, the Supreme Court decided the term "organize" infringed upon a substantial amount of speech because an individual may organize a group of people for a multitude of situations, not all resulting in organizing to incite a riot.[233] The Act's use of "encourage" and "promote" fell under the same category of language that could not be distinguished between "mere advocacy" versus "preparing a group for unlawful

222. *Id.*
223. *Rundo I*, 497 F. Supp. 3d at 878.
224. *Id.* at 880.
225. *Id.*
226. *Rundo II*, 990 F.3d at 719.
227. *Id.*
228. *See id.* (adopting the Seventh Circuit's "goal" approach to the overt act provisions).
229. *Brandenburg*, 395 U.S. at 447.
230. *Rundo II*, 990 F.3d at 719.
231. *Id.*
232. *Miselis*, 972 F.3d at 537.
233. *See Brandenburg*, 395 U.S. at 446 (holding that the speaker, the leader of the KKK rally, had merely stated that the meeting was an "organizers' meeting," the Court determined that at the moment of the KKK leaders' speech there was not an imminent threat of danger).

action."[234] The Ninth Circuit used *United States v. Williams*[235] to illustrate how the Supreme Court made clear that an individual "encouraging" another to do something was akin to "abstract advocacy" and does not satisfy the imminent incitement to violence required under *Brandenburg*.[236] Consistent with Supreme Court jurisprudence, the Ninth Circuit determined that the terms "organize," "encourage," and "promote" were unconstitutionally overbroad under the First Amendment.[237]

3. Congress's Definition § 2102(b) of "Incite a Riot" Does Not Meet Brandenburg

Defendants also attacked the Act's definitions of "riot" and "to incite a riot."[238] The definition of "riot" under the Act encompassed any public disturbance involving acts of violence or threats of violence by one or more people.[239] The Act's definition of a "riot" was held constitutional because it was based solely on conduct, not speech.[240] The Ninth Circuit then turned to the definition of the term "to incite a riot" listed under § 2102(b) finding that it could be severed of unconstitutional language that did not meet the *Brandenburg* imminence requirement.[241] The Ninth Circuit pointed to three phrases that required the court's scrutiny: (1) "to organize, promote, encourage," (2) "urging or instigating," and (3) "advocacy of any acts or acts of violence or assertion of the rightness of or the right to commit, any such acts."[242] In its analysis, the Ninth Circuit limited its meaning of the words in § 2102(b) to only the definitions contained in the statute because the Act defined the terms.[243]

Similar to § 2101(a), the terms "organize," "promote," and "encourage," made another appearance in the Act and the court was quick to rule them unconstitutional.[244] Under the definition "to incite a riot," an individual who is merely promoting, organizing, or encouraging a riot did not rise to the level of imminent threat of unlawful action to meet the *Brandenburg* standard.[245]

234. *See id.* at 445 (establishing that merely teaching a group about violence does not constitute an incitement to imminent unlawful actions).

235. *See* United States v. Williams, 553 U.S. 285, 303 (2008) (establishing that even though the statute infringed on protected speech of law-abiding citizens, the Court was able to narrow the construction, or scope, of the legislation to an interpretation that only punished individuals who possessed child pornography would be punished under the statute).

236. *Brandenburg*, 395 U.S. at 447.

237. *Rundo II*, 990 F.3d at 719.

238. *Id.* (citing 18 U.S.C.S. § 2102).

239. 18 U.S.C.S. § 2102(b) (1968).

240. *Rundo II*, 990 F.3d at 719.

241. *Id.* at 716.

242. *Id.* (citing 18 U.S.C.S. § 2102(a)(1)-(4)(1968).

243. *Id.* at 716-17.

244. 18 U.S.C.S. § 2102(b) (1968).

245. *Rundo II*, 990 F.3d at 716.

a. The Term "Urging" versus "Instigating" under *Brandenburg*

The Ninth Circuit also looked at the definition of the term "urging."[246] Relying on the Fourth Circuit's ruling in *Miselis*, the Ninth Circuit stated that the definition of "urging" was to "*encourage*, advocate, recommend, or advise . . . earnestly and with persistence." [247] Once again, relying on the *Brandenburg* imminence standard, the court found that when an individual is merely encouraging others to commit violence, it does not reach the level of an imminent danger of a riot.[248] The court decided that an individual's speech may "encourage" others to do both lawful and unlawful activities.[249] As a result, there is a substantial amount of protected speech when someone merely encourages or urges another person.[250]

In contrast, the court found that the term "instigating" did comply with the *Brandenburg* imminence requirement.[251] The court demonstrated that if an individual is to "instigate" a riot, that person's speech and conduct would be to "provoke" or compel others to act.[252] As a result, there is inherently a greater likelihood that unlawful action has already taken place when an individual's speech is responsible for "instigating" others to start a riot.[253] The Ninth Circuit explained that even though both "urging" and "instigating" are located in the same provision in the Act, one term can be deemed constitutional while the other is deemed unconstitutionally overbroad.[254]

b. The Limitation on Expression of Belief in § 2102(b)(2)

In *Brandenburg*, the Supreme Court held that a statute that seeks to regulate unprotected speech, through a content-based restriction, must make a clear distinction between speech that is intended to "merely advocate for violence," and speech that is intended to "prepare a group" for imminent unlawful action.[255] In drafting the Act, Congress desired to establish that the law would not apply to the oral or written expression

246. *Id.* at 717.

247. *Id.* (emphasis added).

248. *Brandenburg*, 397 U.S. at 447.

249. *Rundo II*, 990 F.3d at 717; *see also Hess*, 414 U.S. at 108-109 (explaining that the Indiana statute was overly broad when defendant was being accused of incitement of imminent unlawful conduct when he merely exclaimed to a police officer "'[w]e'll take the [f**king] street later. . .'").

250. *Rundo II*, 990 F.3d at 717.

251. *Id.* at 716-17.

252. *Id.* at 716.

253. *Brandenburg*, 397 U.S. at 447.

254. *See Rundo II*, 990 U.S. at 717 (displaying deference to Congress to determine that only "urging" need to be removed from the sentence and that Congress did not intentionally write the provision to include one term that met *Brandenburg* and one that did not); 18 U.S.C. § 2102(b) (incorporating both "instigating" and "urging" in the same provision).

255. *Brandenburg*, 395 U.S. at 447.

that either reveals "advocacy of ideas" or "expression of belief."[256] In compliance with *Brandenburg*, the Act differentiates between advocating or expressing a belief and the type of speech intended to propel the audience to imminent unlawful action.[257]

The Act, however, placed an unconstitutional limitation on a person's right to advocate or express ideas.[258] The limitation prohibits the advocacy of "any act or acts of violence" or any "assertion of the rightness of, or the right to commit" any acts of violence.[259] This added limitation violates *Brandenburg*.[260] The *Brandenburg* court explicitly allowed for the advocacy of violence, so long as the speech is not "directed to inciting or producing imminent lawless action" and there is no likelihood of the speech actually producing unlawful action.[261] The Act then infringes on an individual's ability to express beliefs of violence or of rioting when the expression is merely advocating for violence but does not have a true chance of actually occurring.[262] An individual's ability to simply advocate for the "rightness or the right to commit" violence is still protected under the right to the freedom of expression under the First Amendment.[263] Finding that the limiting statement infringed on a substantial amount of protected speech, the Ninth Circuit decided to sever the entire phrase from the Act.[264]

C. The Ninth Circuit's Holding in Rundo II

In its unanimous decision, the Ninth Circuit decided to reverse and remand *Rundo II* back to the district court.[265] The court established that the Act was not facially overbroad and should not have been invalidated.[266] As a remedy, the court decided to "salvage" the Act through severance.[267] As explained above, the Ninth Circuit had determined, from the onset, that invalidating Congressional legislation was "strong

256. Kletter, *supra* note 152, at 4.
257. *Rundo II*, 990 F.3d at 720.
258. *Id.*
259. 18 U.S.C.S. § 2102(b)(2).
260. *Rundo II*, 990 F.3d at 718.
261. *Brandenburg*, 395 U.S. at 447.
262. *Id.*
263. *Id.*
264. *See Rundo II*, 990 F.3d at 721 (severing the Act, the Ninth Circuit restated § 2102(b) as "'to incite a riot' or participate in, or carry on a riot, includes, but is not limited to instigating other persons to riot, but shall not be deemed to mean the oral or written (1) advocacy of ideas or (2) expression of belief. . .").
265. *Id.* at 721.
266. *Id.*
267. *See id.* at 720-21 (restating § 2101(a)(1)-(4) as "(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) 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. . .").

medicine" not to be used indiscriminately.[268] Still, the court was able to find unconstitutionally overbroad language in the Act and remove it without destroying the original intent of Congress: to prosecute citizens that use interstate commerce to incite riots.[269] In ruling to "salvage" the Act through severing its unconstitutional language, the Ninth Circuit rejected the Defendants' overbreadth argument.[270] In upholding the Act as facially constitutional, the Ninth Circuit further rejected the Defendants' claim that their speech was protected under the heckler's veto doctrine.[271]

1. Defendant's Application of the Heckler's Veto Doctrine is Not Relevant to the Act

Defendants' final contention was that the Act violated the heckler's veto doctrine.[272] The Ninth Circuit summarized the heckler's veto as an unconstitutional content-based speech restriction where the speaker is silenced because their message has the potential to cause a violent reaction from the audience.[273] The court simply determined that the doctrine did not apply to the Act.[274] The doctrine is only applicable to a speaker's message or subject matter where the speaker cannot be held responsible for a hostile mob's reaction to its speech.[275] The court illustrated this point by requiring an individual, through the means of interstate commerce, to perform an overt act such as aiding and abetting another person to incite a riot or an act of violence to find a violation of the Act.[276] The heckler's veto doctrine, in contrast, is similar to fighting words.[277] Here, the Act is geared to criminalize the conduct of a speaker

268. *Rundo II*, 990 F.3d at 721; *see* United States v. Williams, 553 U.S. 285, 293 (2008) (stating "[i]nvalidation for overbreadth is strong medicine that is not to be casually employed.").

269. *Id.*

270. *Id.* at 718.

271. *Id.* at 719.

272. *See Rosenbaum*, 484 F.3d at 1158 (comparing fighting words and unprotected speech, the heckler's veto doctrine is determinative based on the reaction of an audience, where, in contrast, the Act is determinative of an individual's conduct while using interstate commerce).

273. *Id.*

274. *Rundo II*, 990 F.3d at 719.

275. *Rosenbaum*, 484 F.3d at 1158.

276. *Rundo II*, 990 F.3d at 715; *see Dellinger*, 472 F.2d at 361-62. (distinguishing an overt act as purely conduct, and which conduct is not reliant on the reaction of a hostile audience).

277. *See generally* R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992) (establishing that a governmental regulation cannot pick and choose which type, or subject-matter falls under a statute that prohibits the use of fighting words; as a result would be considered an unconstitutional, content-based restriction); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining fighting words as words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace," where defendant had called a police officer a "fascist"); Terminiello v. Chicago, 337 U.S. 1, 2 (1949) (defining fighting words as speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance. . .").

through its overt act provisions and does not rely upon any reaction from an audience.[278] The Ninth Circuit, in finding that the heckler's veto doctrine did not apply, ultimately rejected Defendant's assertion that their conduct was protected expression.[279]

2. The Ninth Circuit's Final Thoughts on Reversal

In its closing remarks, the Ninth Circuit mentioned that protecting the First Amendment is of the "utmost importance in maintaining a truly free society."[280] The court recognized that the Act's purpose was to allow society to strike the proper balance by allowing speech, even if it contains perceived or speculative violence, while attempting to protect citizens from riots.[281] A government that overreaches and denies speech prematurely to stop violence too soon is just as dangerous to society as stopping violent behavior too late. [282] The Act, after the court severed its language to meet the *Brandenburg* imminence requirement, can be a tool used by the government, for the people, to prevent individuals from inciting unlawful actions.[283]

IV. PERSONAL ANALYSIS

This section will provide an analysis of the Ninth Circuit's opinion in *Rundo II*.[284] First, it will comment on the ruling reached by the Ninth Circuit, and how the court missed an important opportunity to extend its decision to bar the federal government's use of the Act on social media posts that do not meet the *Brandenburg* imminence requirement.[285] Second, this section will discuss why individual states should decide how to protect the freedom of non-violent protests and prevent riots. By continuing the analysis of the Act and its history, this section will discuss when the Act should be considered applicable law. Finally, the analysis will consider the future outlook of the Act following the Ninth Circuit's ruling in *Rundo II*.[286]

278. *Rundo II*, 990 F.3d at 719.
279. *Id.*
280. *Id.*
281. *See* Kletter, *supra* note 152, at 4 (discussing the social upheaval of the 1960s which led Congress to enacting the Act, was also attempting to create the proper balance between policing violent protests while not infringing on First Amendment rights).
282. *Rundo II*, 990 F.3d at 721; s*ee generally* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (explaining that if the government steps in too soon to prevent speech from happening, it will result in a chilling effect on First Amendment rights).
283. *Rundo II*, 990 F.3d. at 721.
284. *Id.*
285. *Brandenburg*, 395 U.S. at 448.
286. *Rundo II*, 990 F.3d at 721.

A. Analysis of Rundo II

Though the Ninth Circuit's ruling to reverse and remand the case back to the district court was correct, the Ninth Circuit could have extended its analysis into whether or not, as a whole, the Act could be used to prosecute individuals like the Defendants in *Rundo II*.[287] The Ninth Circuit correctly decided under the *Brandenburg* imminence test to sever the unconstitutional language from the Act. However, the federal government overstepped its enumerated powers by prosecuting Defendants when they purportedly did not leave the state of California.[288] The Ninth Circuit should have rejected the government's argument that Defendants' use of social media violated the Act because it did not meet the *Brandenburg* imminence requirement[289] and was "merely advocacy of ideas."[290]

1. The Ninth Circuit Correctly Severed the Unconstitutional Language from the Act

Finding that the Act was not facially unconstitutional, the Ninth Circuit turned to the severability doctrine to bring the Act into the *Brandenburg* imminence requirement.[291] Ultimately, this was the right decision. As stated in *United States v. Williams*, declaring a Congressional statute completely invalid is "strong medicine."[292] The Ninth Circuit was prudent in giving greater deference to Congress because it upholds the legitimacy of both Congress and the court's inherent power of judicial review.[293] In other words, when a court, for any number of reasons,

287. *Id.*

288. *See* United States v. Comstock, 560 U.S. 126, 133 (2010) (stating "[t]he Federal Government is acknowledged by all to be one of enumerated powers, which means that every law enacted by Congress must be based on one or more of those powers" granted by the Constitution); U.S. CONST. art. I (detailing the enumerated powers granted to Congress). *See also Rundo I*, 497 F. Supp. 3d at 876 (reporting that Defendants traveled to political rallies in Huntington Beach, California; Berkeley, California; and San Bernardino California).

289. *See Brandenburg*, 395 U.S. at 447 (establishing the Brandenburg imminence requirement where: (1) advocacy of the use of force, or of law violation, is "directed to inciting or producing imminent lawless action," and (2) "is likely to incite or produce such action."); *Rundo I*, 497 F. Supp. 3d at 877 (finding that the Act "criminalizes acts taken long before any crowd gathers, or acts that have only an attenuated connection to any riot…").

290. *See* 18 U.S.C.S. § 2102(b) (1968) (severing the exception to written and oral advocacy cannot involve "advocacy of any act or acts of violence, or assertion of the rightness of, or the right to commit, any such act or acts," the Ninth Circuit failed to rule on whether Defendants social media use, under the new version of § 2102(b), violated the Act).

291. *Rundo II*, 990 U.S. at 720.

292. *Williams*, 553 U.S. at 293.

293. *See* William R. MacKay, *Legitimacy in a Federal System*, 2 FED. GOVERNANCE 1, 2 (2005) (explaining, "[a]t a minimum, legitimacy entails governmental action that is consistent with the rule of law," where Congress cannot start adjudicating cases, and the Supreme Court cannot begin writing original legislation).

decides to simply strike an entire piece of legislation, it is essentially saying to the legislature that it did not write an effective law.[294]

Congressional legitimacy is an important principle in a representative democracy because citizens elect federal representatives to create laws that are theoretically meant to meet our needs and concerns.[295] If the unelected federal judiciary were able to merely strike down these laws, the courts would be overstepping the enumerated powers granted under Article III of the Constitution.[296] The Supreme Court's jurisprudence, especially *Williams*, acknowledges that for a federalist system to work, each branch must not overstep its own enumerated powers.[297]

The doctrine of severability strikes the proper balance between upholding a statute by removing any unconstitutional language and respecting legislative powers.[298] In *Rundo II*, the Ninth Circuit was astutely aware that the district court was overstepping its powers by striking down the Act as unconstitutional on its face.[299] The Ninth Circuit showed proper restraint by not simply invalidating the Act as unconstitutional and relying upon *Brandenburg* as the standard in analyzing the Act. Applying *Brandenburg* to the Act, the Ninth Circuit correctly held that provisions that criminalize individuals for "organizing," "urging," or "encouraging" were overly broad.[300]

For example, if one "organized" a group of reasonable people and "encouraged" or "urged" them to walk into a burning building, what is the likelihood they would do so? This elementary example is analogous to facts that would not meet the *Brandenburg* imminence requirement. These terms do not inherently lend themselves to requiring "compulsion" or immediate action.[301] On the other hand, if one were to "provoke" or "instigate" a group of people to burn down a building, by the definitions of the terms, one would have already set the group into motion.[302] The

294 *Id.*

295. *See* League of United Latin American Citizens v. Perry, 548 U.S. 399, 469-70 (2006) (stating that "this Court has concluded that our system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction.").

296. U.S. CONST. art. III.

297. *See* United States v. Peace Info. Ctr., 97 F. Supp. 255, 261 (1951) (defining "enumerated powers" as the powers of the federal government specifically mentioned in the United States Constitution, as well as those that are implied, or implicitly granted, through legal precedents or derived out of necessity).

298. *See Ferber*, 458 U.S. at 769 n.24 (acknowledging that the need to sever Congressional legislation should be a final option, after the court attempts to narrowly construe the statute to meet constitutional requirements).

299. *Id.* (referencing Supreme Court precedence, the Ninth Circuit disagreed with the Central District Court of California's approach when it failed to follow the proper steps after declaring that the Act was unconstitutional by not attempting to sever the unconstitutional language).

300. *See Brandenburg*, 395 U.S. at 448 (establishing that speech that is a "mere abstract teaching" is not considered unprotected speech); 18 U.S.C. §§ 2101-2102.

301. *See Dellinger*, 472 F.2d at 361 (defining terms under the *Brandenburg* imminence test that "require the element of propelling the action" as constitutional).

302. *Id.*

Ninth Circuit found this nuance in the Act's language and correctly removed the overbroad language.

2. The Ninth Circuit Failed to Extend Its Ruling

Severing the overly broad language from the Act was necessary, yet the Ninth Circuit failed to address whether or not the Act should apply to Defendants in *Rundo II*.[303] The district court in *Rundo I* repeatedly mentioned that the Defendants' conduct did not meet the imminence requirement set forth in *Brandenburg*.[304] It rejected the government's argument when the court found Defendants' use of social media posts were written either months before or weeks after the Defendants attended the proffered political rallies.[305] The district court was correct in finding that the Defendants' conduct, though abhorrent, was not punishable under the Act.[306]

Even as social media continues to evolve rapidly, the United States legal system continues to move at a methodical, seemingly intentional, pace.[307] In *Rundo II*,[308] the government stated that the internet was a facility of commerce.[309] However, expanding the list of the "facilities of interstate commerce" to include the internet is an issue in and of itself. Another concerning aspect of the government's argument in *Rundo I* was its attempt to use Defendants' social media posts as reasons to prosecute them under the Act.[310] It is unacceptable under the First Amendment to allow the government to look through citizens' social media posts and

303. *Rundo II*, 990 F.3d at 721.

304. *Rundo I*, 497 F. Supp. 3d at 872 (2019); *see also Brandenburg*, 395 U.S. at 444.

305. *See Rundo I*, 497 F. Supp. 3d at 877-78 (finding that Defendants' overt acts specified in the government's indictment ranged from: (1) a RAM member held a conference call *three months before* any political rally; (2) Defendant Boman posted a news article on Facebook *a day after* the Huntington Beach political rally, (3) *several weeks before* the Berkeley rally, Defendant Eason texted RAM members about attending the political rally to provide "security;" (4) *nine days before* the San Bernardino rally, a RAM member shared photographs on Facebook of signs that RAM members planned to carry; and (5) *three days after* the San Bernardino rally, RAM members sent text message boasting about how beat Antifa)(emphasis added).

306. *See Rundo I*, 497 F. Supp. 3d at 880 (explaining the court did not condone RAM's hateful and toxic ideology, but the government has sufficient means "to prevent and punish such behavior without sacrificing the First Amendment.").

307. *See* Abigail Johnson Hess, *Experts Say 23% of Lawyers' Work can be Automated—Law Schools are Trying to Stay Ahead of the Curve*, CNBC (Feb. 18, 2020, 5:30 AM), www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html [perma.cc/3NZ7-JH8D] (describing the innovations in technology and their effects on the legal profession, while social media companies like Facebook have already created a "virtual reality" portal that someday could enable lawyers the ability to meet with clients "face-to-face" without leaving their law firms); *Introducing Meta: A Social Technology Company*, FACEBOOK (Oct. 28, 2021), www.about.fb.com/news/2021/10/facebook-company-is-now-meta [perma.cc/PD4G-MMJK] (introducing the "metaverse," Facebook's latest innovation and its new parent company, Meta).

308. *Rundo II*, 990 F.3d at 721.

309. *Id.* at 708.

310. *Rundo I*, 497 F. Supp. 3d. at 877.

"select" the messages it found to bolster its criminal indictments.[311]

Social media is very much the marketplace of ideas, akin to what the public square was at the founding of this nation.[312] The government has been preempted, numerous times, from trying to regulate any viewpoints or subject-matter through content-based restrictions.[313] Here, the Ninth Circuit had a great opportunity to establish that the government's argument in *Rundo II*, connecting Defendants' social media posts to the Act, would be a clear content-based restriction violation.[314]

B. Prosecuting Defendants at the State Level and Applying the Act Narrowly

The proposed solutions are simple: allow the states through their powers under the Tenth Amendment to prosecute defendants for their violent conduct. Enforcing federal legislation narrowly and reserving it for situations that call for the application of federal law is crucial in legitimizing the legislative power granted to Congress under the Constitution.[315] Also, narrowing the scope of the Act is important because each state has its own unique set of cultures, ideas, and movements within them, often brought about by social media.[316] The federal government should not be able to overstep its enumerated powers to cast a "blanket" policy over protests in every individual state. Today, it is easy for the majority of Americans to look at the actions and viewpoints of RAM members as detrimental to society. However, the First Amendment applies to *all* of our expressions equally, from the most progressive to the most hateful.[317]

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311. *See id.* at 876 (explaining how the government, in building its case against the Defendants, selected a particular social media post that it deemed demonstrated the Defendants' violent tendencies as unconvincing evidence).

312. *See* Dawn C. Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1523 (2019) (providing that ideas on social media are in a better position, pre-internet, to be "allowed to compete freely in an unregulated market" where "the best ideas will ultimately get accepted."); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (introducing the metaphor "marketplace of ideas" and that the proper way to "test the truth" was to allow ideas to be exposed to the "competition of the market.").

313. *See generally* Renton v. Playtime Theatres, 475 U.S. 41, 55 (1986) (overruling city restriction prohibiting adult theaters based solely on the content and subject-matter of the business); Reed v. Town of Gilbert, 576 U.S. 155, 174 (2015) (overturning sign restriction that singled out and prohibited signs based on content and subject-matter of the sign); Matal v. Tam, 137 S. Ct. 1744, 1750 (2017) (overruling United States Patent and Trademark Office policy that discriminated against the content or subject-matter of the name incorporated into an applicant's trademark application).

314. *Rundo II*, 990 F.3d at 709 (2021).

315. *See* Ian Hurd, *Legitimacy*, ENCYCL. PRINCETONIENSIS, pesd.princeton.edu/node/516 [perma.cc/6AQ7-A2PA] (last visited Aug. 20, 2022) (explaining that "[l]egitimacy is commonly defined in political science and sociology as the belief that a rule, institution, or leader has the right to govern.").

316. *See* Oregon v. Ice, 555 U.S. 160, 171 (2009) (stating that the "[Supreme Court] has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems'" to suit that particular state's requirements).

317. *See* MIGHTY IRA (Foundation for Individual Rights in Education 2020)

1. Leave it to the States' Police Powers to Prevent Riots

It took fifty-three years after the signing of the Anti-Riot Act in 1968 for the Ninth Circuit to find that the Act incorporated unconstitutional language.[318] Even though the standard the Ninth Circuit used in determining which language violated the First Amendment was handed down by the Supreme Court in 1969. [319] As previously mentioned, the Act has been discussed by other circuits.[320] However, after *United States v. Dellinger*, the famous "Chicago Seven" trial, the Act became dormant.[321] The answer is that states already possess their own criminal penal codes.[322] States have been and continue to be well equipped to handle both the protection of non-violent protests and the prevention of riots.[323]

The Central District of California in *Rundo I* was correct in stating that the state of California should be allowed to prosecute the Defendants, not the federal government.[324] The Defendants here are white supremacists.[325] They used social media to spread hate.[326] However, as the district court stated, their postings occurred too far before or after any political rally they disrupted to meet the *Brandenburg* imminence requirement.[327] Defendants harassed, sought out, chased, and assaulted California citizens.[328] California is well within its state police powers, granted under the Tenth Amendment, to properly bring these RAM members to justice.[329]

(recounting American Civil Liberties Union defense of American Nazi's right to protest in Skokie, Illinois, and the importance of defending the "right," not the "motive" of the individual).

318. *See Rundo II*, 990 F.3d at 719 (finding that "the Act criminalizes a substantial amount of protected speech"); Wiener v. F.B.I., 943 F.2d 972, 985 (9th Cir. 1991) (regarding only the "very broad" nature of the Anti-Riot Act, but the Ninth Circuit does not evaluate the Act's unconstitutionality which demonstrates the lack of prior case law leading to a revival of the Act in 2019).

319. *See Recent Case*, *supra* note 42 (describing the federal Anti-Riot Act's "reemergence" as prosecutors begin to use the Act to indict violent protestors).

320. *See generally Dellinger*, 472 F.2d at 340 (analyzing the Act in the famous "Chicago Seven" case after riots took place in Chicago. Illinois, during the 1968 Democratic National Convention); *Miselis*, 972 F.3d at 518 (discussing the constitutionality of the Act after Michael Miselis, with other RAM members, committed violent attacks on counter protesters at political rallies).

321. *See Dellinger*, 472 F.2d at 361-62; *See also Recent Case*, *supra* note 42.

322. *See Rundo I*, 497 F. Supp. 3d at 876.

323. *See id.* at 880 (advocating for both the states and the federal government to look to other legislation besides the Act, however, the court went on to invalidate the Act entirely; which was a factor in suggesting different federal statutes).

324. *See id.* (stating that "law enforcement has its pick of statutes to employ towards these ends.").

325. *See id* at 876 (describing Defendants' organization, "RAM [as] a 'combat-ready, militant group of a new nationalist white supremacy and identity movement.'").

326. *Rundo II*, 990 F.3d at 713.

327. *Brandenburg*, 395 U.S. at 447-48.

328. *Rundo II*, 990 F.3d at 713.

329. *See* CAL. PENAL CODE § 404 (Deering 2021) (inciting a riot); CAL. PENAL CODE § 405 (Deering 2021) (participating in a riot).

A reasonable argument against the use of California's Penal Codes is that they may not allow the government to seek a higher yearly sentence as opposed to the five years a defendant under the Act could receive.[330] However, in this case, the Defendants were not said to have traveled out of state but were being prosecuted for using the facilities of interstate commerce.[331] The issue with the indictments brought by the federal government are that they do not show or accuse Defendants of traveling outside of California.[332]

Overall, the government's argument is weakened because the Defendants' use of the facilities of commerce were either through a credit card, using the telephone, or using the internet.[333] The district court in *Rundo I* correctly found that Defendants' conduct did not meet the imminence requirement laid out in *Brandenburg*.[334] However, there are plenty of examples where other defendants traveled across state lines to either take part in or incite a riot; one such incident was the January 6th Insurrection at the United States Capitol.[335]

2. Apply the Act Narrowly: Insurrection at the U.S. Capitol

On January 6, 2021, our nation witnessed an attack on our democracy from within.[336] The federal Anti-Riot Act, at its very essence, was created for this exact situation. Similar to RAM members in *Rundo II*, a clear majority of the insurrectionists believed in right-wing ideologies and resided in areas of the country where they would be considered political minorities.[337] However, unlike Defendants in *Rundo II*, the insurrectionists' expression met the *Brandenburg* imminence requirement and was thus unprotected by the First Amendment. [338]

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330. *See id.* (the penalties under the California Penal Codes for "participating in a riot" or "inciting a riot" is one year as opposed to the Act's five year sentence, demonstrating a motivation for government officials to attempt to prosecute under the Act to increase sentence length).

331. *See Rundo I*, 497 F. Supp. 3d at 875 (reciting both Count One and Count Two of Defendants' indictments).

332. *See id.* (establishing that Defendants were being charged with unlawful conduct while attending political rallies in: Huntington Beach, CA; Berkeley, CA; and San Bernardino, CA).

333. *See id.* at 877 (finding that the Act "does not just criminalize the behavior of those in the heat of a riot . . . no violence even need[s] to occur . . .. [a] defendant could be convicted for renting a car with a credit card, posting about a political rally on Facebook, or texting friends about when to meet…").

334. *Brandenburg*, 395 U.S. at 448.

335. *See* Brian Duignan, *United States Capitol Attack of 2021*, BRITANNICA (Aug. 4, 2021), www.britannica.com/event/United-States-Capitol-attack-of-2021 [perma.cc/A6J2-4WDM] (recording the events that took place on January 6th, 2021, also referred to as the Insurrection of the U.S. Capitol).

336. *Id.*

337. Sam Cabral & Roderick Macleod, *Capitol Riots: Five Takeaways from the Arrests*, BBC NEWS (Feb. 8, 2021), www.bbc.com/news/world-us-canada-55987603 [perma.cc/UC67-TGNY] (profiling apprehended insurrectionists as right-wing and coming from areas of the country that were more "blue" as opposed to "red").

338. *Brandenburg*, 395 U.S. at 447-48.

The concerns of *Rundo I* and *II* courts were not present here because Defendants did not purportedly leave the state of California to attend their political rallies. [339] On the other hand, many of the insurrectionists used interstate commerce to fly or drive across state lines to Washington D.C.[340] Second, though Defendants are guilty of breaking California Penal Codes, their social media content did not rise to the imminence requirement under *Brandenburg*.[341] However, the insurrectionists of January 6th began with a protest, expressing both their freedom of expression and assembly, but "crossed" the proverbial line when their expression turned to violent conduct.[342]

In terms of the January 6th Insurrection at the U.S. Capitol, the Act can play a vital role in prosecuting individuals whose conduct falls under the language of the Act.[343] This singular event provides the government a strong case to utilize the Act, as it was intended, to support local law enforcement and punish individuals who used interstate commerce to perpetuate a violent insurrection.[344]

C. Moving Forward: Future Outlook on Rundo II

The Ninth Circuit, after severing the Act of its unconstitutional language, reversed and remanded *Rundo II* back to the district court.[345] On remand, the district court will likely still vacate the charges brought against Defendants. In *Rundo I*, the court invalidated the Act entirely for being unconstitutional on its face. The district court emphasized that Defendants' conduct was protected speech.[346] The court, however, was

339. *Rundo I*, 497 F. Supp. 3d at 877 (providing that, under the Act, "[a] defendant could be convicted for renting a car with a credit card, posting. . .on Facebook, or texting friends" as examples of the Act "not just criminalizing the behavior of those in the heat of a riot.").

340. *See* U.S. Att'y's Off. of D.C., *Capitol Breach Cases*, www.justice.gov/usao-dc/capitol-breach-cases [perma.cc/W6LY-QVW6] (last visited Sept. 22, 2022) (providing background and information of the individual defendants that were charged with crimes during the Capitol Riots, many of which defendants do not reside in the District of Columbia; demonstrating that many had to travel interstate to commit the crimes they are being charged with).

341. *Rundo I*, 497 F. Supp. 3d at 876.

342. *See* Duignan, *supra* note 335 (reporting that 140 Capitol police were physically assaulted and $1.5 million worth of damage was caused to the Capitol building).

343. *See id.* (describing violent attacks against law enforcement as a group fits squarely in the scope of the Act).

344. *See* Jacques Billeaud, *Jan. 6 Rioter Who Carried Spear, Wore Horns, Draws 41 Months*, AP NEWS (Nov. 17, 2021), apnews.com/article/prisons-arizona-capitol-siege-5c9ebf384bf936403d42e1a453c89153 [perma.cc/ARP3-5SYB] (reporting that the most recognizable January 6th rioter was sentenced to almost four years behind bars, demonstrates a real-world example of how the federal government could have sought a five year sentence under the Act).

345. *Rundo II*, 990 F.3d at 721.

346. *See Rundo I*, 497 F. Supp. 3d. at 879 (stating that though some of the posts by the defendants are "repugnant, hateful ideas" and other posts advocate for violence, they are protected forms of speech).

careful to maintain that it did not agree with Defendants' viewpoints.[347] However, the Act does not allow the government to punish abhorrent speech when that speech does not bring about an imminent threat of violence required under *Brandenburg*. [348] Even after the circuit court severed the unconstitutional language, the district court is unlikely to change the initial ruling that Defendants' social media use and travel within the state of California garners punishment under a federal anti-riot statute.[349]

The Central District of California does, however, have another option. In his *Rundo I* opinion, Judge Cormac J. Carney makes the point that these Defendants should be prosecuted under California's Penal Codes.[350] The option available to the court on remand is sending this case back to the California state level. This is the correct option. Though the district court found that Defendants' hateful expressions were protected under the First Amendment, their conduct should not go unpunished.[351]

Moving forward, however, the Act must be used narrowly.[352] Today, the government uses the Act in an attempt to prosecute white supremacists.[353] However, as the old adage states, "wait until the shoe is on the other foot." The U.S. could very well be one election away from the Act being used to chill the very speech that it as a society champions in 2022.[354] One need only look no further than the purpose for the Act's creation in 1968, which was designed to "temper" the violent protests occurring in the late 1960s.[355] The Act has a place in the federal penal statutes in prosecuting insurrectionists like those at the January 6th U.S. Capitol riot. However, these crucial freedoms -the freedom of expression

347. *Id.*

348. *Brandenburg*, 397 U.S. at 447.

349. 18 U.S.C.S. §§ 2101-2102 (1968).

350. *Rundo I*, 497 F. Supp. 3d at 880 (citing that California state law enforcement has "its pick" of criminal statutes to prosecute Defendants).

351. *See Rundo II*, 990 F.3d at 712-13 (providing a background to Defendants' conduct at political rallies where RAM members would intentionally confront, pursue, and assault other protestors).

352. *See* Zalman, *supra* note 15, at 911 (providing evidence that the Anti-Riot Act of 1968 was legislated by conservatives in Congress to further criminalize would be protestors and rioters that were gathering across the United States to protest racial injustice and the death of Martin Luther King Jr.).

353. *See Rundo II*, 990 F.3d at 712-13.

354. *See* The Shoe is on the Other Foot, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/the%20shoe%20is%20on%20the%20other%20foot [perma.cc/K78F-CKTM] (defining the saying as it is "used to say that a situation has changed to the opposite of what it was before"); MIGHTY IRA (Foundation for Individual Rights in Education 2020) (cautioning against allowing the government to create laws that restrict speech, even speech of bad actors, because the "political winds" may shift and a group the government supports today could be the same group a new government persecutes tomorrow). *See* Nicole Chavez, *2020: The Year America Confronted Racism*, CNN www.cnn.com/interactive/2020/12/us/america-racism-2020/ [perma.cc/4V38-ZFJN] ((last visited Sept. 22, 2022) (providing a timeline of 2020 and the protests advocating for racial equality).

355. *See* Zalman, *supra* note 15, at 911 (demonstrating a nefarious origin to the federal Anti-Riot Act); *Recent Case, supra* note 42, at 2614.

and the freedom to peaceably assemble- cannot be left to the often politically charged federal government. The rights under the First Amendment must remain protected by the judicial system, as demonstrated by the Ninth Circuit in *Rundo II*, where courts remain stewards of Americans' freedom of expression by adhering to legal precedence.[356]

V. CONCLUSION

"It is easy to champion free speech when it advocates a viewpoint with which we agree."[357] The Ninth Circuit correctly applied the *Brandenburg* imminence requirement and found that the Act could be salvaged by severing its unconstitutional language.[358] At this moment in the United States, where the country has seen social unrest echoing that of the 1960's, protecting an individual's freedom of expression under the First Amendment is vital to our nation's future.[359] In today's marketplace of ideas, social media, we must avoid censorship while also rejecting hatful, degrading speech. Our federal government must temper its use of the Anti-Riot Act to individuals and circumstances that meet the *Brandenburg* imminence requirement.[360]

The future of the United States of America requires a vast number of viewpoints to foster innovation, creativity, and tolerance. We, as citizens, should embrace all forms of expression, and not allow those who are victims of hate to endure it alone. It is our collective duty to expunge hateful speech with more uplifting and inspirational speech.[361] In the words of Dr. Martin Luther King Jr., "I believe that unarmed truth and unconditional love will have the final word in reality."[362]

356. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 249 (2018) (stating that "history has shown time and again that governments are prone to censorial abuse. An enduring challenge for any legal system is balanc[e]" between promoting the freedom of expression and restricting expression that is "tremendously harmful.").

357. *Rundo I*, 497 F. Supp. 3d at 874.

358. *See Brandenburg*, 397 U.S. at 447-48. *See also Rundo II*, 990 F.3d at 721.

359. *See The Sixties: Moments in Time*, *supra* note 29 (providing an in-depth, comprehensive timeline of the major events of the 1960's).

360. *Brandenburg*, 397 U.S. at 447-48.

361. MIGHTY IRA (Foundation for Individual Rights in Education 2020).

362. Martin Luther King Jr., Nobel Peace Prize Acceptance Speech (Dec. 10, 1964).