NO. _____

IN THE

Supreme Court of the United States

HAROLD H. HODGE,
Petitioner,

v.

PAMELA TALKIN, MARSHAL OF THE UNITED STATES SUPREME COURT, *et al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The D.C. Circuit and the District of Columbia Court of Appeals disagree about the meaning of 40 U.S.C. § 6135, which contains two clauses: the Assemblages Clause, which makes it unlawful "to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds," and the Display Clause, which makes it unlawful "to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement."

In *United States v. Grace*, 461 U.S. 171 (1983), this Court held that the Display Clause, as applied to the sidewalks surrounding the Supreme Court building, violates the First Amendment. This Court did not address, however, the constitutionality of the Assemblages Clause, either on its face or as applied, and did not address the constitutionality of the Display Clause as applied to the Supreme Court plaza.

The questions presented are:

1. Is the Assemblages Clause limited to "joint conduct that is expressive in nature and aimed to draw attention," as the D.C. Circuit held in this case, or is the Assemblages Clause an "absolute" prohibition on "congregating on Court grounds," as

the D.C. Court of Appeals has held? If the latter, does such an absolute prohibition violate the First Amendment, and if so, is a limiting construction of the Assemblages Clause fairly possible to save it from being declared unconstitutional on its face or as applied to the Supreme Court plaza?

2. Does the Display Clause prohibit any "conspicuous expressive act with a propensity to draw onlookers," as the D.C. Circuit held in this case, or does its applicability "turn on whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it," as the D.C. Court of Appeals has held? Properly construed, is the Display Clause unconstitutional on its face or as applied to the Supreme Court plaza?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States District Court for the District of Columbia included Plaintiff Harold H. Hodge, and Defendants Pamela Talkin and Ronald C. Machen, Jr., in their official capacities as Marshal of the United States Supreme Court and United States Attorney for the District of Columbia, respectively.

The parties to the proceedings in the United States Court of Appeals for the D.C. Circuit included Plaintiff-Appellee Harold H. Hodge, and Defendants-Appellants Pamela Talkin and Vincent H. Cohen, in their official capacities as Marshal of the United States Supreme Court and Acting United States Attorney for the District of Columbia, respectively. The American Civil Liberties Union of the National Capital Area filed a brief as *amicus curiae* in support of Plaintiff-Appellee Harold H. Hodge.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Harold Hodge respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The district court's opinion is reported at 949 F. Supp. 2d 152 (D.D.C. 2013). 3d 546. App. 62a. The D.C. Circuit's opinion is reported at 799 F.3d 1145 (D.C. Cir. 2015). App. 3a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 28, 2015. A timely petition for rehearing *en banc* was filed on October 13, 2015. The petition for rehearing *en banc* was denied on November 3, 2015. App 1a. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law . . . 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."

40 U.S.C. § 6135 provides:

> "It is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement."

STATEMENT

The D.C. Circuit and the District of Columbia Court of Appeals have split on their interpretation of 40 U.S.C. § 6135. The result of this split leaves visitors to the Supreme Court unsure of precisely what conduct is prohibited by the Assemblages and Display clauses. The split also reflects irreconcilable differences in basic principles of statutory construction.

Until the present case, only the local District of Columbia courts had construed the Assemblages Clause. The District of Columbia Court of Appeals read the Assemblages Clause literally, finding it to be an "absolute" prohibition on "congregating on Court grounds." *Pearson v. United States*, 581 A.2d 347, 356-57 (D.C. 1990). So construed, the Assemblages Clause is obviously unconstitutional on its face. The District

of Columbia Court of Appeals upheld the constitutionality of the Assemblages Clause, however, by adding two additional elements. To sustain a conviction under the Assemblages Clause, the District of Columbia Court of Appeals has held, the conduct must be both directed at the Supreme Court, and compromise the dignity and decorum of the Court. *Id.* at 358. Thus construed, the District of Columbia Court of Appeals held the Assemblages Clause to be constitutional. *Id.*

In this case, the district court below agreed with the District of Columbia Court of Appeals as to its construction of the statute, but disagreed with its remedy. App. 144a-162a. The district court correctly found that there was no basis in the text of the statute that would permit a court to engraft additional elements onto the Assemblages Clause to save it from facial unconstitutionality.

The D.C. Circuit rejected the approach adopted by every previous court to construe the Assemblages Clause. Rather than giving the Assemblages Clause its plain meaning, the D.C. Circuit held that the Assemblages Clause prohibits only "joint conduct that is expressive in nature and aimed to draw attention[.]" App. 48a. So construed, the D.C. Circuit held that the Assemblages Clause is not unconstitutional.

As to the Display Clause, the District of Columbia Court of Appeals held that the statute applies only where there is "an intent to convey a particularized message" and "the likelihood [i]s great that the message would be understood by those who viewed

it[.]" *Potts v. United States*, 919 A.2d 1127, 1130 (D.C. 2007).

The D.C. Circuit construed the Display Clause as requiring the prosecution to prove different elements. The D.C. Circuit's interpretation of the statute looks to neither the intent of the speaker nor the likelihood that the speaker's message will be understood. Instead, the D.C. Circuit interpreted the Display Clause as applying to any "conspicuous expressive act with a propensity to draw onlookers[.]" App. 50a. Construed in this manner, the D.C. Circuit held the Display Clause to be constitutional.

1. On January 28, 2011, Petitioner Harold H. Hodge, Jr. was arrested on the plaza of the Supreme Court for wearing a sign around his neck displaying the words "The U.S. Gov. Allows Police To Illegally Murder And Brutalize African Americans And Hispanic People." App. 14a. Mr. Hodge was charged with a violation of 40 U.S.C. § 6135. App. 15a. Mr. Hodge accepted a diversion agreement which resulted in dismissal of the charge in September 2011. App. 15a.

2. Desiring to return to the plaza to engage in expressive activity, but chilled and deterred from doing so by the prohibitions of 40 U.S.C. § 6135, Mr. Hodge filed suit in the United States District Court for the District of Columbia. App. 15a. Mr. Hodge's lawsuit alleged that 40 U.S.C. § 6135 was unconstitutional on its face and as applied under both the First and Fifth Amendments. He sought a declaration from the district court that the statute is

invalid and a permanent injunction barring its enforcement. App. 16a.

3. The district court agreed with Mr. Hodge that the statute is unconstitutional on its face under the First Amendment and entered summary judgment in favor of Mr. Hodge. App. 63a. The district court's lengthy and well-reasoned opinion reviewed and analyzed all of the previous decisions of the District of Columbia Court of Appeals challenging the constitutionality of the Assemblages and/or Display Clauses, in addition to relevant precedent from this Court and the D.C. Circuit. The court then held that the statute is invalid under the First Amendment, regardless of whether the plaza is a public or nonpublic forum, because the statute's restriction on speech is unreasonable. App. 121a-134a. The district court also found the statute unconstitutionally overbroad because it sweeps within its scope a substantial amount of constitutionally protected conduct, and no limiting construction is fairly possible. App. 134a-162a.

4. The government appealed and a panel of the D.C. Circuit reversed. App. 7a. The D.C. Circuit, without citing or mentioning a single decision from the District of Columbia Court of Appeals, created its own novel interpretation of the Assemblages and Display Clauses. App. 47a-51a. The D.C. Circuit then

relied on its construction of the statute in finding no constitutional infirmity with the statute.

5. Mr. Hodge filed a petition for rehearing *en banc* which was denied on November 3, 2015. App. 1a.

6. This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

For well over half a century, visitors to the Supreme Court have had to conform their conduct while on the plaza to an unknown and unknowable standard, with an incorrect guess at the contours of the law subjecting them to a potential criminal conviction and up to 60 days in jail. 40 U.S.C. § 6137. This state of uncertainty results from a unique confluence of factors. A venue provision allows for violations of 40 U.S.C. § 6135 to be prosecuted in either the United States District Court for the District of Columbia or the Superior Court of the District of Columbia, at the discretion of the United States Attorney. 40 U.S.C. § 6137. However, the United States Attorney has thus far prosecuted every alleged violation of 40 U.S.C. § 6135 in the Superior Court of the District of Columbia. As a result, the District of Columbia Court of Appeals has decided a line of cases interpreting the scope of 40 U.S.C. § 6135 as applied to the Court's plaza, but until this case, no federal court had done so. *See Kinane v. United States*, 12 A.3d 23 (D.C. 2011); *Lawler v. United States*, 10 A.3d 122 (D.C. 2010); *Potts v. United States*, 919 A.2d 1127 (D.C. 2007); *Bonowitz v. United States*, 741 A.2d 18

(D.C. 1999); *Pearson v. United States*, 581 A.2d 347 (D.C. 1990); *United States v. Wall*, 521 A.2d 1140 (D.C. 1987). Because the District of Columbia Court of Appeals' interpretation of a federal statute is not binding on federal courts, visitors to the Supreme Court have had no way of knowing which interpretation of the statute they would be subject to – the District of Columbia Court of Appeals' interpretation, or the yet-to-be-determined federal courts' interpretation.

In this case, the D.C. Circuit has now authoritatively interpreted the Assemblages and Display Clauses. Unfortunately for visitors to the Supreme Court, however, its decision squarely conflicts with the line of precedent from the District of Columbia Court of Appeals. Review of the conflicting decisions of the D.C. Circuit and District of Columbia Court of Appeals is urgently needed to resolve these irreconcilable interpretations of the Assemblages Clause and the Display Clause, and the constitutional implications thereof.

I. The D.C. Circuit and the District of Columbia Court of Appeals are in Conflict Concerning the Scope and Constitutionality of the Assemblages and Display Clauses.

As noted above, the District of Columbia Court of Appeals has issued several opinions in response to challenges to the constitutionality of the Assemblages and Display Clauses. The district court's thorough

opinion below commendably reviewed these prior decisions, attempted to harmonize them where possible, and rejected those decisions which did not contain persuasive legal analysis. App. 144a-162a. The D.C. Circuit did not undertake such a review, however. Indeed, the D.C. Circuit did not even mention any of the decisions of the D.C. Court of Appeals, even after noting that "[p]rior challenges to § 6135 . . . form the legal backdrop for the case we consider today." App. 10a.

A. The Assemblages Clause

The D.C. Circuit construed the Assemblages Clause as extending only to "joint conduct that is expressive in nature and aimed to draw attention." App. 48a. The District of Columbia Court of Appeals, in contrast, has held that "the prohibition in section 13k against congregating on Court grounds is absolute." *Pearson*, 581 A.2d at 357. In order to save the statute from being declared unconstitutionally overbroad, therefore, the District of Columbia Court of Appeals restricted the applicability of the Assemblages Clause "to group demonstrations directed at the Court which compromise the dignity and decorum of the Court or threaten the Court grounds or its property or personnel[.]" *Id.* Thus, the D.C. Circuit imposes two requirements that the District of Columbia Court of Appeals does not: (1) the conduct must be "expressive in nature," and (2) it must be "aimed to draw attention." App. 48a. Conversely, the D.C. Court of Appeals imposed two requirements that the D.C. Circuit does not: the

conduct must be "directed at the Court" and it must "compromise the dignity and decorum of the Court or threaten the Court grounds or its property or personnel[.]" *Pearson*, 581 A.2d at 357.

B. The Display Clause

With respect to the Display Clause, the D.C. Circuit has construed it as prohibiting "conspicuous expressive act[s] with a propensity to draw onlookers," but not "the passive bearing of written words or a logo on one's clothing." App. 50a. The District of Columbia Court of Appeals, by contrast, has held that the applicability of the Display Clause "turn[s] on whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Potts v. United States*, 919 A.2d 1127, 1130 (D.C. 2007). Thus, under the District of Columbia Court of Appeals' interpretation, passively wearing a shirt with a political slogan would be prohibited, even if it wearing the shirt was not a "conspicuous" expressive act. *See Kinane v. United States*, 12 A.3d 23, 27 (D.C. 2011) ("[T]he statute prohibits expression such as . . . wearing t-shirts with protest slogans[.]")

II. The D.C. Circuit's Decision is Wrong and Conflicts with this Court's Jurisprudence.

A. The Assemblages Clause

While acknowledging that the literal language of the statute prohibits "standing" and "moving" in an "assemblage," the D.C. Circuit construed those terms as applying only to "joint conduct that is expressive in nature and aimed to draw attention," because the terms "should be understood in the context of the words that surround them." App. 48a. The D.C. Circuit also supported its conclusion that the Assemblages Clause only prohibits *expressive* conduct by noting that the *Display Clause* "plainly involves expressive conduct." App. 48a-49a.

The maxim of statutory construction that the D.C. Circuit employed – that of *noscitur a sociis* – is inapplicable here, however. "Under the principle of *noscitur a sociis*, the meaning of unclear words may be gleaned by reference to other words associated with it." *Schenkel & Shultz, Inc. v. Homestead Ins. Co.*, 119 F.3d 548, 551 (7th Cir. 1997). Crucially, however, courts "cannot use the doctrine to create uncertainty in an otherwise unambiguous term[.]" *Id.* The statutory prohibition on "standing" and "moving" in an "assemblage" is unambiguous and the D.C. Circuit's opinion does not suggest otherwise. *See Jeannette Rankin Brigade*, 342 F.Supp. at 583 ("There is no ambiguity about the language of Section 193g. It

tells the citizen that it is unlawful for him 'to parade, stand, or move in processions or assemblages' in the Capitol Grounds, except as he has been expressly authorized to do so by a representative of Congress[.]")

The D.C. Circuit rejected the "more expansive reading contemplated by Hodge" which would "presumably bar a familiar occurrence in the Court's regular course of business: the line of people assembled in the plaza to enter the Court for an oral argument session. There is no reason to construe a prohibition aimed to preserve the plaza for its intended purposes in a manner that would preclude use of the plaza for those very purposes." App. 49a. There is an excellent reason to construe the Assemblages Clause in that manner, however. That is what the statute says. *See Pearson*, 581 A.2d at 356-57 ("Thus, as appellants assert, the language prohibits groups of tourists, attorneys or Court employees from standing or moving in 'assemblages.'")

Further, the D.C. Circuit's reasoning was considered and rejected in *Jeannette Rankin Brigade*. There "the Government forcefully argue[d], the present language of the statute is open to absurdities which Congress cannot be taken to have intended," giving as an example that an expansive reading of the statute would prohibit groups from even "being photographed with their Congressman." 342 F. Supp. at 586. The court expressed that it was "not unsympathetic with the reasons which prompt the United States Attorney to ask us to rewrite a curiously inept and ill-conceived Congressional

enactment," but nevertheless held that "that is a function more appropriately to be performed by Congress itself." *Id.* The "flatly prohibitory" language placed the statute beyond a boundary "which it is not appropriate for courts to go in this regard, at least without exposing themselves to the charge that they are usurping the legislative function." *Id.*

Having departed from the statutory text in construing the Assemblages Clause, the D.C. Circuit then found its construction be constitutional because it encompassed only a limited ban on assemblages. App. 48a ("[W]e do not understand the Assemblages Clause to prohibit every instance in which a group of persons stands or moves together in the Supreme Court plaza"). This reading of the Assemblages Clause is in irreconcilable conflict with *Jeannette Rankin Brigade*,[1] which construed identical language in the statute applicable to the Capitol grounds to prohibit literally every assemblage. 342 F. Supp. at 585 ("[T]he terms of § 193g flatly prohibit all assemblages[.]")

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[1] Although *Jeannette Rankin Brigade* was decided by a three-judge panel of the U.S. District Court for the District of Columbia, the decision was summarily affirmed by this Court, and it thus constitutes precedent as to the construction of the statutory language. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) (summary affirmance constitutes precedent as to issues "necessarily decided" in affirming judgment); *Lederman v. United States*, 291 F.3d 36, 41 (D.C. Cir. 2002) ("The Supreme Court summarily affirmed, making *Jeannette Rankin Brigade* binding precedent.")

As this Court has explained, "[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). *See also Northcross v. Bd. of Educ.*, 412 U.S. 427 (1973) (per curiam) (similar language in two statutes should be given the same meaning where "the two provisions share a common raison d'etre.") Thus, the previous construction of identical language in *Jeannette Rankin Brigade* is a "precedent of compelling importance." *See id.* at 234.

Section 193g and the statute at issue here "hav[e] similar purposes" and "share a common raison d'etre." The legislative history of the statute at issue here reveals that it was "based upon the law relating to the Capitol Buildings and Grounds." H.R. Rep. No. 81-814, at 3 (1949). As the district court noted:

> "When Congress promulgated 40 U.S.C. § 13k it was primarily focused on extending the blanket prohibitions on assemblages and displays that had long been in place at the United States Capitol. *See, e.g.*, 95 Cong. Rec. 8962 (1949) (statement of Rep. Celler) (noting that 'all this [House] bill does . . . is to apply the same rules to the Supreme Court building and its adjoining grounds as are now applicable to the Capitol itself - no more and no less.')."

App. 150a. The legislative history thus demonstrates that Congress intended the statute applicable to the Supreme Court building and grounds to have the same meaning as the statute applicable to the Capitol Grounds. Accordingly, the statutory construction of the identical provisions in *Jeannette Rankin Brigade* must control.

The conflict between the interpretations of the Assemblages Clause by the D.C. Circuit in this case and the court in *Jeannette Rankin Brigade* is of great importance. First, and most importantly, the D.C. Circuit's construction of the Assemblages Clause was essential to its holding that it did not violate the Constitution. The D.C. Circuit did not suggest that the Assemblages Clause would survive constitutional scrutiny if it was read to prohibit literally all assemblages, and indeed the D.C. Circuit previously held that, read in such a manner, the Assemblages Clause would be unconstitutional. *Grace v. Burger*, 665 F.2d 1193, 1202 (D.C. Cir. 1981) (hereinafter "*Grace I*") ("In this case, we are concerned with a statute that, as construed, prohibits all expressive conduct in the Supreme Court building and on the Supreme Court grounds"); *accord Pearson*, 581 A.2d at 356-57 ("Thus, as appellants assert, the language prohibits groups of tourists, attorneys or Court employees from standing or moving in 'assemblages.' Such an absolute ban on any group activity is not supported by the government's legitimate and important interests in protecting the integrity of the

Court, preventing the appearance of judicial bias, and safeguarding the Court grounds and personnel.")

Another reason that the conflict is important is that it results in contradictory messages on statutory interpretation more generally. By failing to even address the *Jeannette Rankin Brigade* court's interpretation of the identically-worded provision of a closely related statute, the D.C. Circuit has signaled to district court judges that they need not even consider binding case law addressing identically-worded provisions of closely related statutes. This message sharply conflicts with this Court's decisions declining to adopt different interpretations of identical provisions in related statutes. *See e.g. Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559 (1986) (statutes "should be interpreted in a similar manner" where "the purposes behind both . . . are nearly identical[.]")

B. The Display Clause

With respect to the Display Clause, the D.C. Circuit held, at the government's urging, that "the statute's reference to the 'display' of a 'device' generally would not apply to the passive bearing of written words or a logo on one's clothing." App. 43a. The D.C. Circuit went on to hold, "Rather, we assume that the Display Clause means to capture essentially the same type of behavior addressed by rules we have considered in the context of open-air national memorials—i.e., conspicuous expressive acts with a

propensity to draw onlookers." App. 50a (quotation marks and brackets omitted). This assumption is not well-founded, however, as it is rooted in neither the legislative history nor the explicit text of the statute.

Further, the government has repeatedly argued, with some success, that the Display Clause prohibits passively wearing an expressive article of clothing. In *Grace I*, the government took the position "that even expressive T-shirts or buttons worn on the Supreme Court grounds would be prohibited by § 13k." 655 F.2d at 1194 n.2. More recently, the government defended a false arrest claim against the Supreme Court police by convincing the district court that an individual who was "inside the [Supreme Court] building looking at exhibits on display" while wearing an "Occupy" jacket was violating the plain language of the Display Clause. *Scott v. United States*, 952 F. Supp. 2d 13, 15 (D.D.C. 2013) ("The Supreme Court Police had probable cause to arrest Scott for violating section 6135 because Scott's actions fell squarely within the plain language of the display clause: he was displaying a device (his jacket) in the building which had been adapted to bring public attention to the 'Occupy' movement.") Further, the District of Columbia Court of Appeals was convinced that the Display Clause included the passive wearing of a T-shirt bearing a political slogan. *See Kinane*, 12 A.3d at 27 ("[T]he statute prohibits expression such as . . . wearing t-shirts with protest slogans[.]")

The D.C. Circuit rejected the "argument that the Assemblages Clause reaches so broadly that it leaves

too much discretion to law enforcement to determine which assemblages and processions to allow and which to prohibit." App. 58a (internal quotation marks omitted). The D.C. Circuit found the argument to be flawed because it "rests on the premise that the Assemblages Clause pertains to *any* circumstance in which multiple persons stand or participate in some sort of procession in the plaza, regardless of whether they are engaged in expressive activity." App. 58a (emphasis in original).

As explained above, however, the D.C. Circuit erred in construing the Assemblages Clause narrowly. Because the Assemblages Clause should be understood to apply to "*any* circumstance in which multiple persons stand or participate in some sort of procession in the plaza, regardless of whether they are engaged in expressive activity," App. 58a, the clause leaves too much discretion to law enforcement to determine which assemblages to allow and which to prohibit. *See City of Chi. v. Morales*, 527 U.S. 41, 60 (1999) (ordinance which "reach[ed] a substantial amount of innocent conduct" was unconstitutionally vague where it "necessarily entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on his beat.")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5250 **September Term, 2015**
1:12-cv-00104-BAH

Filed On: November 3, 2015

Harold H. Hodge,

Appellee

v.

Pamela Talkin, Marshal of the United States Supreme Court and Vincent H. Cohen, Jr., in his official capacity as United States Attorney,

Appellants

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Williams, Senior Circuit Judge

O R D E R

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

Appendix B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 23, 2014 Decided August 28, 2015
No. 13-5250

HAROLD H. HODGE, JR.

APPELLEE

v.

PAMELA TALKIN, MARSHAL OF THE UNITED STATES SUPREME COURT, AND VINCENT H. COHEN, JR., ESQUIRE, IN HIS OFFICIAL CAPACITY AS ACTING UNITED STATES ATTORNEY, APPELLANTS

Appeal from the United States District Court for the District of Columbia
(No. 1:12-cv-00104)

Beth S. Brinkmann, Attorney, U.S. Department of Justice, argued the cause for appellants.

On the briefs were *Stuart F. Delery*, Assistant Attorney General, *Ronald C. Machen, Jr.*, U.S. Attorney, and *Michael S. Raab* and *Daniel Tenny*, Attorneys. *Jane M. Lyons*, Assistant U.S. Attorney, entered an appearance.

Jeffrey L. Light argued the cause and filed the brief for appellee.

Arthur B. Spitzer was on the brief for *amicus curiae* American Civil Liberties Union of the National Capital Area in support of appellee.

Before: HENDERSON and SRINIVASAN, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: For more than sixty-five years, a federal statute has restricted the public's conduct of expressive activity within the building and grounds of the Supreme Court. The law contains two prohibitions within the same sentence. The first makes it unlawful "to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds" (the Assemblages Clause). The

second makes it unlawful "to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement" (the Display Clause). 40 U.S.C. § 6135. The statute defines the Supreme Court "grounds" to extend to the public sidewalks forming the perimeter of the city block that houses the Court.

In *United States v. Grace*, 461 U.S. 171 (1983), the Supreme Court held the statute's Display Clause unconstitutional as applied to the sidewalks at the edge of the grounds. The Court found "nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds" or that they "are in any way different from other public sidewalks in the city." *Id.* at 183. Like other public sidewalks, consequently, the sidewalks surrounding the Court qualify as a "public forum" for First Amendment purposes, an area in which "the government's ability to permissibly restrict expressive conduct is very limited." *Id.* at 177, 179-80. But the Court left for another day the constitutionality of the statute's application to the rest of the grounds, including the Court's plaza: the elevated marble terrace running from the front sidewalk to the staircase that ascends to the Court's main doors.

We confront that issue today. The plaintiff in this case, Harold Hodge, Jr., seeks to picket, leaflet, and make speeches in the Supreme Court plaza, with the aim of conveying to the Court and the public what he describes as "political messages" about the Court's decisions. Hodge claims that the statute's Assemblages and Display Clauses, by restricting his

intended activities, violate his rights under the First Amendment. The district court, persuaded by his arguments, declared the statute unconstitutional in all its applications to the Court's plaza. We disagree and conclude that the Assemblages and Display Clauses may be constitutionally enforced in the plaza.

In marked contrast to the perimeter sidewalks considered in *Grace*, the Supreme Court plaza distinctively "indicate[s] to the public"—by its materials, design, and demarcation from the surrounding area—that it is very much a "part of the Supreme Court grounds." *Id.* at 183. The plaza has been described as the opening stage of "a carefully choreographed, climbing path that ultimately ends at the courtroom itself." *Statement Concerning the Supreme Court's Front Entrance*, 2009 J. Sup. Ct. U.S. 831, 831 (2010) (Breyer, J.). For that reason, the Court's plaza—unlike the surrounding public sidewalks, but like the courthouse it fronts—is a "nonpublic forum," an area not traditionally kept open for expressive activity by the public. The government retains substantially greater leeway to limit expressive conduct in such an area and to preserve the property for its intended purposes: here, as the actual and symbolic entryway to the nation's highest court and the judicial business conducted within it.

Under the lenient First Amendment standards applicable to nonpublic forums, the government can impose reasonable restrictions on speech as long as it refrains from suppressing particular viewpoints. Neither the Assemblages Clause nor the Display Clause targets specific viewpoints. They ban

demonstrations applauding the Court's actions no less than demonstrations denouncing them. And both clauses reasonably relate to the government's long-recognized interests in preserving decorum in the area of a courthouse and in assuring the appearance (and actuality) of a judiciary uninfluenced by public opinion and pressure. The Supreme Court recently, in its just-completed Term, strongly reinforced the latter interest's vitality, along with the government's considerable latitude to secure its realization even through speech-restrictive measures. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015). The statute's reasonableness is reinforced by the availability of an alternative site for expressive activity in the immediate vicinity: the sidewalk area directly in front of the Court's plaza. We therefore uphold the statute's constitutionality.

I.

A.

The federal statute in issue, 40 U.S.C. § 6135, makes it unlawful "to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement." Congress enacted the statute in 1949. *See* Act of Aug. 18, 1949, ch. 49, 63 Stat. 616, 617

(1949) (current version at 40 U.S.C. § 6135) (originally codified at *id.* § 13k). Another provision defines "the Supreme Court grounds" to extend to the curbs of the four streets fixing the boundary of the city block in which the Court is situated. 40 U.S.C. § 6101(b). The statute thus encompasses "not only the building," but also "the plaza and surrounding promenade, lawn area, and steps," together with "[t]he sidewalks comprising the outer boundaries of the Court grounds." *Grace*, 461 U.S. at 179.

The front of the Supreme Court grounds, from the street to the building, appears as follows (according to the record in this case and sources of which we take judicial notice, *see* Fed. R. Evid. 201(b); *Oberwetter v. Hilliard*, 639 F.3d 545, 552 n.4 (D.C. Cir. 2011)). The Court's main entrance faces west towards First Street Northeast, across which sits the United States Capitol. Eight marble steps, flanked on either side by marble candelabra, ascend from the concrete sidewalk along First Street Northeast to the Court's elevated marble plaza: an oval terrace that is 252 feet long (at the largest part of the oval) and 98 feet wide (inclusive of the front eight steps). Decl. of Timothy Dolan, Deputy Chief of the Supreme Court Police, ¶ 6 (Dolan Decl.) (J.A. 17-18). The terrace is "paved in gray and white marble" in "a pattern of alternating circles and squares similar to that of the floor of the Roman Pantheon." Fred J. Maroon & Suzy Maroon, *The Supreme Court of the United States* 36 (1996). The plaza contains two fountains, two flagpoles, and six marble benches. Another thirty-six steps lead from the plaza to the building's portico and "the

magnificent bronze doors that are the main entrance into the building." *Id.* at 38. A low marble wall surrounds the plaza and also encircles the rest of the building. And the plaza's white marble matches the marble that makes up the low wall, the two staircases, the fountains, and the building's façade and columns. Pamela Scott & Antoinette J. Lee, *Buildings of the District of Columbia* 138 (1993).

Supreme Court Building, Architect of the Capitol, http://www.aoc.gov/capitol-buildings/supreme-court-building (last visited Aug. 20, 2015).

B.

Prior challenges to § 6135 and related provisions form the legal backdrop for the case we consider today. Section 6135's restrictions on expressive activity in the Supreme Court grounds mirror a parallel statute restricting the same activity in the grounds of the United States Capitol. *See* 40 U.S.C. § 5104(f) (originally codified at *id.* § 193g). The statute applicable to the Capitol became the subject of a constitutional challenge in *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972). There, a three-judge court declared the statute unconstitutional under the First and Fifth Amendments, enjoining the Capitol Police from enforcing it. *Id.* at 587-88. The court ruled that the government's interest in maintaining decorum failed to justify a ban on political demonstrations outside the building housing the nation's elected representatives. *Id.* at 585. The Supreme Court summarily affirmed. *Chief of the Capitol Police v. Jeannette Rankin Brigade*, 409 U.S. 972 (1972).

A few years later, the statute applicable to the Supreme Court grounds also came under attack in the courts. The plaintiffs, Mary Grace and Thaddeus Zywicki, experienced run-ins with the Supreme Court Police when engaged in expressive activity on the public sidewalk fronting the Court along First Street. *Grace*, 461 U.S. at 173-74. Zywicki had distributed written material to passersby on multiple occasions, including articles calling for the removal of unfit judges and handbills discussing human rights in Central American countries. *Id.* Grace had stood on the sidewalk holding a sign displaying the text of the

First Amendment. *Id.* at 174. The district court declined to reach the merits of Grace and Zywicki's suit, *Grace v. Burger*, 524 F. Supp. 815, 819-20 (D.D.C. 1980); but our court did, declaring the statute unconstitutional on its face in all of its applications to the Court grounds, *Grace v. Burger*, 665 F.2d 1193, 1205-06 (D.C. Cir. 1981). The Supreme Court affirmed our judgment in part and vacated it in part. *Grace*, 461 U.S. at 184. Given the decision's obvious salience to our consideration of this case, we review the Court's analysis in some detail.

Before addressing the merits, the Supreme Court significantly narrowed the case in two ways. First, the Court noted that the conduct giving rise to the challenge—solitary leafleting on Zywicki's part, and solitary sign-holding on Grace's—could violate only the statute's Display Clause, not the Assemblages Clause. *Id.* at 175. The Court thus understood the decision under review to be confined to the Display Clause. *Id.* at 175 & n.5. Second, the Court decided, based on the location of Grace's and Zywicki's past conduct, that their "controversy" only concerned the "right to use the public sidewalks surrounding the Court building" to engage in expressive activity. *Id.* at 175. The Court therefore chose to resolve "only whether the proscriptions of [the statute] are constitutional as applied to the public sidewalks," without addressing the constitutionality of the statute's application to the remainder of the Court's statutorily defined grounds. *Id.*

The Court then set out to determine the character of the sidewalks in question for purposes of the

"forum" taxonomy used to assess the constitutionality of speech restrictions on public property. Under that taxonomy, the Court explained, "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *Id.* at 177. "In such places, the government's ability to permissibly restrict expressive conduct is very limited," such that "an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Id.* On the other hand, in public property constituting a "nonpublic forum," the government enjoys significantly greater latitude to regulate expressive activity, including the ability "in some circumstances" to "ban the entry . . . of all persons except those who have legitimate business on the premises." *Id.* at 178.

Applying those principles to the "sidewalks comprising the outer boundaries of the Court grounds," the Court reasoned that they "are indistinguishable from any other sidewalks in Washington, D.C.," and there is "no reason why they should be treated any differently." *Id.* at 179. "Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Id.* With respect to the perimeter sidewalks specifically, the Court observed, there is "no separation, no fence, and no indication whatever to

persons stepping from the street to the curb and sidewalks . . . that they have entered some special type of enclave," and "nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds." *Id.* at 180, 183. "Traditional public forum property" of that variety, the Court explained, "will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.* at 180. The Court therefore held that the "public sidewalks forming the perimeter of the Supreme Court grounds . . . are public forums and should be treated as such for First Amendment purposes." *Id.*

The Court next assessed the constitutionality of the Display Clause under the heightened standards applicable to public forums. It examined the necessity of the Display Clause's restrictions by reference to two asserted governmental interests: first, the interest in maintaining "proper order and decorum" in the Supreme Court building and grounds and in protecting "persons and property therein"; and second, the interest in avoiding the "*appear[ance]* to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court." *Id.* at 182-83. The Court did not doubt the importance and legitimacy of those interests. *Id.* But it found a "total ban" on leafleting and sign-holding on the surrounding public sidewalks unnecessary to promote them. *Id.* For instance, without any indication "to the

public" that the "sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks," the Court "doubt[ed] that the public would draw a different inference from a lone picketer carrying a sign on the sidewalks around the building than it would from a similar picket on the sidewalks across the street." *Id.* at 183. The Court therefore declared the Display Clause unconstitutional as applied to the public sidewalks surrounding the Court, but it vacated our court's invalidation of the statute with regard to the remainder of the grounds. *Id.* at 183-84.

C.

Although *Grace* concerned the Display Clause alone, the Supreme Court Police ceased enforcement of both the Display and Assemblages Clauses on the perimeter sidewalks. Dolan Decl. ¶ 5 (J.A. 17). The Police have continued to enforce both clauses elsewhere in the Supreme Court building and grounds, including in the Court's plaza. This case arises from the enforcement of the statute in the plaza.

On January 28, 2011, Harold Hodge, Jr., stood in the plaza approximately 100 feet from the building's front doors. Am. Compl. ¶¶ 17, 20 (J.A. 10). He hung from his neck a two-by-three-foot sign displaying the words "The U.S. Gov. Allows Police To Illegally Murder And Brutalize African Americans And Hispanic People." *Id.* ¶ 18 (J.A. 10). After a few

minutes, a Supreme Court Police officer approached Hodge and told him he was violating the law. Hodge declined to leave. After three more warnings, the officer arrested him. On February 4, 2011, Hodge was charged with violating 40 U.S.C. § 6135. He entered into an agreement with the government under which he promised to stay away from the Supreme Court grounds for six months in exchange for dismissal of the charge, which occurred in September 2011.

In January 2012, Hodge filed the present action in federal district court. His complaint alleges that he "desires to return to the plaza area . . . and engage in peaceful, non-disruptive political speech and expression in a similar manner to his activity on January 28, 2011." *Id.* ¶ 28 (J.A. 12). In addition to again wearing a sign, Hodge wishes to "picket, hand out leaflets, sing, chant, and make speeches, either by himself or with a group of like-minded individuals." *Id.* ¶ 29 (J.A. 12). Hodge says that the "political message that [he] would like to convey would be directed both at the Supreme Court and the general public, and would explain how decisions of the Supreme Court have allowed police misconduct and discrimination against racial minorities to continue." *Id*. And he states that he desires to engage in those activities "immediately" but is "deterred and chilled" from doing so by "the terms of 40 U.S.C. § 6135" and by his prior arrest and charge. *Id.* ¶ 30 (J.A. 12).

Hodge's complaint asserts a series of constitutional challenges under the First and Fifth Amendments. First, he claims that the Assemblages and Display

Clauses amount to unconstitutional restrictions of speech. Second, he claims that both clauses are overbroad. Finally, he claims that both clauses are unconstitutionally vague. (The complaint also raises claims alleging that the Supreme Court Police selectively enforce the law in a manner favoring certain viewpoints**,** but the district court did not pass on those claims and Hodge does not press them in this appeal.) As relief, Hodge seeks a declaration of § 6135's invalidity "on its face, and as applied to [Hodge]," and a permanent injunction barring the government defendants (the Marshal of the Supreme Court and the United States Attorney for the District of Columbia) from enforcing the statute against Hodge or others. *Id.* p. 10 (J.A. 15).

The district court, finding the statute "plainly unconstitutional on its face," granted summary judgment in favor of Hodge. *Hodge v. Talkin*, 949 F. Supp. 2d 152, 176 & n.24 (D.D.C. 2013). In a thorough opinion, the court invalidated the statute under the First Amendment based on two grounds. The court first held that, regardless of whether the Supreme Court plaza is considered a public forum or a nonpublic forum, the statute amounts to an unreasonable restriction of speech as concerns the plaza. *Id.* at 182-85. Second, the court found the statute unconstitutionally overbroad in light of the potential sweep of its prohibitions. In that regard, the court examined a range of hypothetical applications of the Assemblages and Display Clauses in the plaza which it found to be troubling. *Id.* at 187-89. The court's result was to declare § 6135

"unconstitutional and void as applied to the Supreme Court plaza." *Id.* at 198. The court declined to reach Hodge's alternative challenges, including his vagueness claim. *Id.* at 176 n.24.

The government appeals the district court's grant of summary judgment. We review that court's legal determinations de novo. *Lederman v. United States*, 291 F.3d 36, 41 (D.C. Cir. 2002).

II.

Before addressing the merits of Hodge's constitutional challenges, we initially assure ourselves of his standing for purposes of satisfying Article III's case-or-controversy requirement. The question is whether he demonstrates an "injury in fact" that is "fairly . . . trace[able]" to the statute's challenged provisions. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

There is no dispute about Hodge's standing to challenge the Display Clause. He has been arrested and charged for displaying a political sign while standing in the plaza, and he would do so again "immediately" if not for his fear of another arrest. Am. Compl. ¶¶ 28-30 (J.A. 12). The government does not contest those facts. Given the Supreme Court Police's policy of enforcing § 6135 in the plaza, *see* Dolan Decl. ¶ 7 (J.A. 18), there is a "substantial risk" of another arrest and charge if Hodge were to act on his stated intentions. That suffices to demonstrate a cognizable injury vis-à-vis the Display Clause. *See Susan B.*

Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014).

Hodge's solitary display of a sign, however, did not violate the statute's Assemblages Clause—the prohibition on "parad[ing], stand[ing], or mov[ing] in processions or assemblages." 40 U.S.C. § 6135. The government maintains that the complaint's allegations fail sufficiently to establish Hodge's desire to engage in future conduct that would bring him within that prohibition's scope. The sole allegation bearing on his standing to challenge the Assemblages Clause conveys his desire "to return to the plaza area . . . and picket, hand out leaflets, sing, chant, and make speeches, *either by himself or with a group of like-minded individuals*." Am. Compl. ¶ 29 (J.A. 12) (emphasis added). The allegation's "either/or" phrasing, the government submits, renders Hodge's future intent to violate the Assemblages Clause unduly speculative: Hodge might return with a group of people, but then again, he might go it alone.

Hodge's articulation of his intentions suffices to establish his standing under our precedents. In *Lederman v. United States*, we considered a plaintiff's standing to bring a First Amendment challenge to a regulation banning a laundry list of "demonstration activit[ies]" (including "parading, picketing, leafleting, holding vigils, sit-ins, or other expressive conduct or speechmaking") in designated "no-demonstration zones" within the Capitol grounds. 291 F.3d at 39. The plaintiff had been arrested and charged after leafleting on the Capitol's East Front sidewalk. *Id.* at 39-40. In his complaint asserting a

facial challenge to the entire regulation, the plaintiff alleged that he "wishe[d] to come to Washington in the future . . . to engage in constitutionally- protected demonstration activity in the no-demonstration zone—including, but not necessarily limited to, leafleting and holding signs." *Id.* at 40.

Based on the plaintiff's arrest for leafleting and "his intent to return to the Capitol Grounds to engage in other expressive activity," we found that he had standing to challenge the entire regulation. *Id.* at 41. If the *Lederman* plaintiff's stated desire to engage in prohibited activity "including, but not necessarily limited to" leafleting and holding signs adequately established his intention to violate other parts of the regulation, Hodge's plans to return to the plaza "either by himself or with a group of like-minded individuals" suffices as well.

We therefore proceed to address the merits of Hodge's challenges to both the Display and Assemblages Clauses.

III.

Hodge attacks 40 U.S.C. § 6135 as unconstitutional "on its face and as applied to his desired activities." Am. Compl. ¶ 1 (J.A. 6). In granting summary judgment, the district court examined what it conceived to be two separate First Amendment arguments. First, the court found § 6135 facially unconstitutional as an unreasonable restriction of expressive activity on public property.

Second, the court determined that § 6135 is overbroad. With respect to both conclusions, however, the court confined its analysis to the Supreme Court plaza. *See Hodge*, 949 F. Supp. 2d at 198.

We address below whether Hodge's overbreadth claim affords a separate basis for relief independent of his claim that § 6135 is an unreasonable restriction of speech. *See* Part IV, *infra*. Regarding the restriction-of-speech claim, though, one might ask at the outset whether it is best considered a "facial" or an "as-applied" challenge. We briefly note the question because the distinction sometimes affects the applicable standards.

The Supreme Court often cautions that a facial challenge can succeed only if "'no set of circumstances exists under which the [statute] would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Yet the Court has also indicated that the standard for facial invalidity may be less stringent in some situations, instead turning on whether the statute lacks any "plainly legitimate sweep." *See id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments)); *United States v. Stevens*, 559 U.S. 460, 472 (2010). An ordinary as-applied challenge, by contrast, asks a court to assess a statute's constitutionality with respect to the particular set of facts before it. *See, e.g.*, *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 456-57 (2007). Hodge's challenge eludes ready classification.

In examining Hodge's claim that the statute impermissibly restricts speech, we will naturally hypothesize applications of the law beyond his own particular conduct. On the other hand, notwithstanding Hodge's entreaties to invalidate the statute on its "face," he raises no meaningful challenge to the statute's application anywhere other than the plaza (within the Supreme Court building, for instance). Hodge's claim thus might be conceived of as "as-applied" in the sense that he confines his challenge to the statute's application to a particular site, but "facial" in the sense that he asks us to examine circumstances beyond his individual case.

There is no need for us to definitively resolve those questions of characterization. The "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). For our purposes, it suffices to say that we adhere to the Supreme Court's approach in *Grace*: we will examine the validity of the statute's application to a particular portion of the Supreme Court grounds—the plaza—looking beyond the plaintiff's particular conduct when assessing the statute's fit. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 487 (1995) (O'Connor, J., concurring in judgment in part and dissenting in part) (describing *Grace* as a case in which the Court "declared a statute invalid as to a particular application without striking the entire provision that appears to encompass it," though

noting that the Court's "jurisprudence in this area is hardly a model of clarity").

Having noted the "facial/as-applied" doctrinal undercard, we can now move on to the main event. In asking us to declare § 6135 unconstitutional in all its applications in the Supreme Court plaza, Hodge's claim implicates "the gravest and most delicate duty that [courts are] called on to perform": invalidation of an Act of Congress. *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring). We are not compelled to do so here. We reach that conclusion by examining Hodge's challenge in accordance with the Supreme Court's analysis in *Grace*. First, we assess whether the Supreme Court plaza is a public forum or a nonpublic forum, determining that the plaza is the latter. Next, we apply the First Amendment rules applicable in nonpublic forums. Under those relaxed standards, we conclude that the statute reasonably (and hence permissibly) furthers the government's interests in maintaining decorum and order in the entryway to the nation's highest court and in preserving the appearance and actuality of a judiciary unswayed by public opinion and pressure.

A.

Hodge's desired activities in the Supreme Court plaza— picketing, leafleting, and speechmaking—lie at the core of the First Amendment's protections. Still, he does not have an automatic entitlement to engage in that conduct wherever (and whenever) he would

like. Rather, the "Government, 'no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Grace*, 461 U.S. at 178 (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)). That principle finds voice in the Supreme Court's "forum analysis," which "determine[s] when a governmental entity, in regulating property in its charge, may place limitations on speech." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010).

Some public property, as a matter of tradition, is deemed dedicated to the exercise of expressive activity by the public. The "quintessential" examples of such traditional public forums are streets, sidewalks, and parks, all of which, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). A public forum can also arise by specific designation (rather than tradition) when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). The government "must respect the open character" of a public forum. *Oberwetter*, 639 F.3d at 551. "In such places," accordingly, "the government's ability to

permissibly restrict expressive conduct is very limited." *Grace*, 461 U.S. at 177.

A nonpublic forum, by contrast, is public property that is "not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46. "Limitations on expressive activity conducted on this . . . category of property must survive only a much more limited review." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). In a nonpublic forum, a "challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.*; *see Perry*, 460 U.S. at 46.

We find the Supreme Court plaza to be a nonpublic forum. The Court's analysis in *Grace* directly points the way to that conclusion. In finding that the sidewalks marking the perimeter of the Court's grounds are a public forum, the Court emphasized that there is "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks" that "they have entered some special type of enclave." 461 U.S. at 180. Although certain sidewalks might constitute nonpublic forums if they serve specific purposes for particular public sites (such as providing solely for internal passage within those sites, *see United States v. Kokinda*, 497 U.S. 720, 727-30 (1990) (plurality opinion); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 685 F.3d 1066, 1071 (D.C. Cir. 2012)), the *Grace* Court viewed the Supreme Court's perimeter sidewalks to be "indistinguishable from any other

sidewalks in Washington, D.C.," 461 U.S. at 179. The Court therefore saw "nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds" in particular. *Id.* at 183. As a result, there is "no reason why they should be treated any differently" from the mine-run of public sidewalks, which are "considered, generally without further inquiry, to be public forum property." *Id.* at 179.

Grace's analysis makes evident that the Supreme Court plaza, in contrast to the perimeter sidewalks, is a nonpublic forum. The Court considered it of pivotal significance that there was "nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds," *id.* at 183, or that "they have entered some special type of enclave," *id.* at 180. The opposite is very much true of the Court's plaza.

The plaza's appearance and design vividly manifest its architectural integration with the Supreme Court building, as well as its separation from the perimeter sidewalks and surrounding area. The plaza is elevated from the sidewalk by a set of marble steps. A low, patterned marble wall—the same type of wall that encircles the rest of the building— surrounds the plaza platform and defines its boundaries. And the plaza and the steps rising to it are composed of white marble that contrasts sharply with the concrete sidewalk in front of it, but that matches the staircase ascending to the Court's front doors and the façade of the building itself. As one account explains, perhaps with a degree of romanticism, the "unusually high mica content" of the marble produces "[r]eflections . . . so brilliant on sunny

days that they almost blind the viewer." Scott & Lee, *supra*, at 138.

From the perspective of a Court visitor (and also the public), the "physical and symbolic pathway to [the Supreme Court] chamber begins on the plaza." *Id.* Cass Gilbert, the Supreme Court's architect, conceived of the plaza, staircase, and portico leading to the massive bronze entry doors as an integrated "processional route" culminating in the courtroom. *Id.* Commenting on that design, a sitting Justice has written that, "[s]tarting at the Court's western plaza, Gilbert's plan leads visitors along a carefully choreographed, climbing path that ultimately ends at the courtroom itself." *Statement Concerning the Supreme Court's Front Entrance*, 2009 J. Sup. Ct. U.S. at 831 (Breyer, J.).

In short, whereas there was "nothing to indicate to the public that [the] sidewalks are part of the Supreme Court grounds," *Grace*, 461 U.S. 183, there is everything to indicate to the public that the plaza is an integral part of those grounds. The plaza's features convey in many distinctive ways that a person has "entered some special type of enclave." *Id.* at 180. And in serving as what amounts to the elevated front porch of the Supreme Court building (complete with a surrounding railing), the plaza—like the building from which it extends, and to which it leads—is a nonpublic forum.

The Court in *Grace*, in fact, appeared to foreshadow precisely that result. Referring to the Court's perimeter sidewalks, *Grace* explained that "[t]raditional public forum property" of that kind does

"not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.* at 180. When it described the perimeter sidewalks as "abut[ting] government property that has been dedicated to a use other than as a forum for public expression," the Court presumably had in mind the plaza. The plaza, after all, "abuts" the perimeter sidewalk marking the front edge of the Supreme Court grounds along First Street Northeast. The Court thus seemed expressly to assume that its plaza is a nonpublic forum—*i.e.*, property "dedicated to a use other than as a forum for public expression."

That conclusion is consistent with the treatment of courthouses more generally. The area surrounding a courthouse traditionally has not been considered a forum for demonstrations and protests. In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court rejected a First Amendment challenge to a Louisiana law prohibiting picketing or parades "in or near" courthouses if aimed to impede the administration of justice or influence a court officer. *Id.* at 560. The Court found there to be "no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create." *Id.* at 562.

Citing *Cox*, the three-judge court in *Jeannette Rankin Brigade* (which is "binding precedent" in light of the Supreme Court's summary affirmance, *Lederman*, 291 F.3d at 41) observed that the "area surrounding a courthouse" may "be put off limits to

parades and other political demonstrations." 342 F. Supp. at 583. Whereas the "fundamental function of a legislature in a democratic society assumes accessibility to [public] opinion," the "judiciary does not decide cases by reference to popular opinion." *Id.* at 584. As a result, while the grounds of the United States Capitol are considered a public forum, *see id.*; *Lederman*, 291 F.3d at 41-42, the grounds of a courthouse are not.

Going beyond the realm of courthouses, moreover, the Supreme Court plaza bears a family resemblance to another plaza held not to be a public forum for expression by the general public: the plaza located in the Lincoln Center performing arts complex in Manhattan. *See Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 547-53 (2d Cir. 2002). That plaza is a large, paved "outdoor square that serves as the centerpiece of the Lincoln Center complex." *Id.* at 540. Like the relationship of the Supreme Court plaza to the Court building, the Lincoln Center plaza's "main purpose" is "to serve as the 'forecourt' for the performing arts hall." *Id.* at 547. Although the plaza's "design clearly invites passers-by to stroll through or linger," the Second Circuit reasoned, "plazas that serve as forecourts in performing arts complexes are not the types of public spaces that have traditionally been dedicated to expressive uses." *Id.* at 551-52.

The court thus considered it "self-evident that permitting speech on all manner of public issues in the Plaza would compromise the City's ability to establish a specialized space devoted to contemplation

and celebration of the arts." *Id.* at 552. So too, here: opening the Supreme Court plaza to "speech on all manner of public issues," *id.*, would compromise the plaza's function as an integrated forecourt for "contemplation of the Court's central purpose, the administration of justice to all who seek it." *Statement Concerning the Supreme Court's Front Entrance*, 2009 J. Sup. Ct. U.S. at 831.

Importantly, the Supreme Court plaza's status as a nonpublic forum is unaffected by the public's unrestricted access to the plaza at virtually any time. Indeed, in *Grace* itself, the Court emphasized that "property is not transformed into 'public forum' property merely because the public is permitted to freely enter and leave the grounds at practically all times." 461 U.S. at 178; *see Greer v. Spock*, 424 U.S. 828, 836 (1976). The Second Circuit therefore concluded that the Lincoln Center plaza is not a traditional public forum despite the fact that "public access to the Plaza is unrestricted" and non-patron pedestrians frequently "cross the Plaza en route to other destinations in the neighborhood." *Hotel Emps.*, 311 F.3d at 540. The court reasoned that, notwithstanding the ease and frequency of public access, visitors understand the plaza's function in terms of the property to which it corresponds and accordingly sense that they are not in "a typical . . . town square." *Id.* at 550.

The same is true of open-air monuments held by this court to be nonpublic forums. *See Oberwetter*, 639 F.3d at 553. As our court observed in reference to the interior of the Jefferson Memorial, "[t]hat the

Memorial is open to the public does not alter its status as a nonpublic forum. Visitors are not invited for expressive purposes, but are free to enter only if they abide by the rules that preserve the Memorial's solemn atmosphere." *Id.* Although those visitors may "regularly talk loudly, make noise, and take and pose for photographs . . . none of this conduct rises to the level of a conspicuous demonstration." *Id.* at 552 (internal quotation marks and brackets omitted). Much the same could be said of the Supreme Court plaza.

While a nonpublic forum thus is not "transformed into 'public forum' property" by virtue of the government's permitting access for non-expressive purposes, *Grace*, 461 U.S. at 178, the near converse is also true: a *traditional public* forum is not transformed into *nonpublic* forum property by the expedient of the government's *restricting* access for *expressive* purposes. *See, e.g.*, *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981); *Lederman*, 291 F.3d at 43. The Supreme Court has been clear that the government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums." *Greenburgh Civic Ass'ns*, 453 U.S. at 133. In *Grace*, accordingly, the statute's restriction on expressive activity in an area defined to include the perimeter sidewalks did not itself transform the sidewalks into a nonpublic forum. The Court explained that governmental attempts to "destr[oy]"

public-forum status via such restrictions are "presumptively impermissible." 461 U.S. at 179-80.

While Hodge seeks to invoke that "*ipse dixit*" principle here, his effort is misdirected. The principle has no applicability with respect to the Supreme Court plaza because there is no background assumption—grounded in tradition— that the property is a public forum. The plaza plainly is not a street or sidewalk. Nor is it a park.

With regard to any suggestion that the Court's plaza could be considered some kind of park, the Second Circuit held that the Lincoln Center plaza is not a park for purposes of rendering it a traditional public forum even though the City's regulations define it as a "park" for purposes of establishing the Parks Department's authority over it. *Hotel Emps.*, 311 F.3d at 548-49 & n.10. We reached essentially the same conclusion concerning the Jefferson Memorial, which "is located within the National Park system." *Oberwetter*, 639 F.3d at 552. "[O]ur country's many national parks are too vast and variegated to be painted with a single brush for purposes of forum analysis," we recognized, and many areas within national parks "never have been dedicated to free expression and public assembly." *Id.* (quoting *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010)). Here, Hodge makes no argument that the Supreme Court plaza is defined as a "park" for any reason under the law. And regardless, the plaza, like courthouse grounds in general, has never been dedicated to the public's conduct of assemblages,

expressive activity, and recreation in the manner of a traditional park.

None of this is to say that Congress could not *choose* to dedicate the Supreme Court plaza as a forum for the robust exercise of First Amendment activity by the general public. The plaza could be transformed into a setting for demonstrations and the like. And if Congress were to open up the plaza as a public forum, the space would become subject to the same First Amendment rules that govern across the street on the grounds of the Capitol. *See Summum*, 555 U.S. at 469-70.

But whereas the Capitol grounds are a public forum by requirement of the First Amendment, *see Lederman*, 291 F.3d at 41-42, the Supreme Court plaza would become a public forum by choice of Congress. The difference exists because "[j]udges are not politicians." *Williams-Yulee*, 135 S. Ct. at 1662. And although "[p]oliticians are expected to be appropriately responsive to the preferences" of the public, *id.* at 1667—and therefore are expected to accommodate public expression on the grounds of the legislative chamber, *see Jeannette Rankin*, 342 F. Supp. at 584-85—the "same is not true of judges," *Williams-Yulee*, 135 S. Ct. at 1667. So while Congress *could* elect to dedicate the Court's plaza as a public forum, Congress has not done so. To the contrary, Congress has restricted expressive activity in the plaza through statutes like § 6135.

Nor have the Supreme Court's own enforcement practices transformed the plaza into a nonpublic forum. The Court's allowance of two forms of highly

circumscribed expressive activity in the plaza—attorneys and litigants addressing the media immediately after a Supreme Court argument, and the occasional granting of approval to conduct filming on the plaza for commercial or professional films relating to the Court, Dolan Decl. ¶ 9 (J.A. 18)—is immaterial. The "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985); *see Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998); *Greer*, 424 U.S. at 438 n.10.

For the same reason, it is of no moment that the Supreme Court Police in certain situations might opt to allow demonstrators onto the plaza for a brief period, presumably in an effort to exercise enforcement authority with responsible (and viewpoint-neutral) discretion in unique circumstances. For instance, notwithstanding the Court Police's usual practice of strict enforcement, *see* Dolan Decl. ¶¶ 5, 7, 9 (J.A. 17, 18), the Police apparently did not attempt to prevent a crowd of about 200 demonstrators from briefly "surg[ing] up the off-limits steps of the U.S. Supreme Court" late one night last fall "as part of nationwide protests against a Missouri grand jury's decision not to indict the police officer who fatally shot a Ferguson teenager." Tony Mauro, *Ferguson Protesters Swarm Steps of Supreme Court*, Legal Times, Nov. 25, 2014 (archived on LexisNexis). The protesters evidently moved on after about fifteen minutes, and the Police

made no arrests. *Id.* The fact that the protesters made their way onto the plaza for a quarter of an hour did not somehow transform the plaza into a public forum for all time. Rather, the plaza was then, and remains now, a nonpublic forum.

B.

Having concluded that the Supreme Court plaza is a nonpublic forum, we now examine whether the Assemblages and Display Clauses "survive . . . [the] much more limited review" governing speech restrictions in such areas. *Lee*, 505 U.S. at 679. Under that review, the restrictions "need only be reasonable, as long as [they are] not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.*

There is no suggestion that either clause discriminates on the basis of viewpoint. The Assemblages Clause makes it unlawful "to parade, stand, or move in processions or assemblages," and the Display Clause makes it unlawful to "display" a "flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement." 40 U.S.C. § 6135. Whatever the scope of expressive activities within the reach of those prohibitions (a matter we explore in greater depth below), they operate without regard to the communication's viewpoint. Demonstrations supporting the Court's

decisions and demonstrations opposing them are equally forbidden in the plaza.

The question, then, is whether the restrictions are reasonable in light of the government's interest in preserving the property for its intended purposes. *See Perry*, 460 U.S. at 46. We find that they are.

1.

The government puts forward two primary interests in support of § 6135's application in the Supreme Court plaza. First, the government argues that the statute helps maintain the decorum and order befitting courthouses generally and the nation's highest court in particular. Second, the government contends that the statute promotes the appearance and actuality of a Court whose deliberations are immune to public opinion and invulnerable to public pressure. Precedent lies with the government as to both interests.

With respect to the first, in *Grace*, the government relied on the statute's purpose "to provide for the . . . maintenance of proper order and decorum" in the Supreme Court grounds. 461 U.S. at 182. The Supreme Court concluded that the Display Clause bore "an insufficient nexus" to that interest under the strict standards applicable in a traditional public forum. *Id.* at 181. But for present purposes, what matters is that the Court did "not denigrate the necessity . . . to maintain proper order and decorum within the Supreme Court grounds." *Id.* at 182.

Reinforcing the point, the Court later reiterated that it did "not discount the importance of this proffered purpose for" the statute. *Id.* at 183. The Court's opinion therefore has been cited for the proposition that "it is proper to weigh the need to maintain the dignity and purpose of a public building." *Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring in judgment).

That need fully applies to the Supreme Court plaza. As the actual and figurative entryway to the Supreme Court building and ultimately the courtroom, the plaza is one of the integrated architectural "elements [that] does its part to encourage contemplation of the Court's central purpose, the administration of justice to all who seek it." *Statement Concerning the Supreme Court's Front Entrance*, 2009 J. Sup. Ct. U.S. at 831. And as the public's staging ground to enter the Supreme Court building and engage with the business conducted within it, the plaza, together with the building to which it is integrally connected, is an area in which the government may legitimately attempt to maintain suitable decorum for a courthouse.

The government's concern with preserving appropriate decorum and order in the Court's plaza is not altogether unlike its interest in "promoting a tranquil environment" at the site of an open-air national monument or memorial, where visitors might "talk loudly, make noise, and take and pose for photographs," but cannot engage in "conduct ris[ing] to the level of a conspicuous demonstration." *Oberwetter*, 639 F.3d at 552 (internal quotation marks and brackets omitted). We have described the interest

in maintaining a tranquil environment in such places to be "substantial." *Id.* at 554; *see Henderson v. Lujan*, 964 F.2d 1179, 1184 (D.C. Cir. 1992). And that interest, as with the interest in maintaining suitable decorum in the area of a courthouse, is "no less significant for being subtle, intangible and nonquantifiable." *Henderson*, 964 F.2d at 1184.

The second interest the government invokes here was also recognized in *Grace*. There, the Court described the interest in preserving the appearance of a judiciary immune to public pressure as follows:

> Court decisions are made on the record before them and in accordance with the applicable law. The views of the parties and of others are to be presented by briefs and oral argument. Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing or pressure groups.

Grace, 461 U.S. at 183. Because the Court viewed the perimeter sidewalks to be no "different from other public sidewalks in the city," it "doubt[ed] that the public would draw a different inference from" picketing on the perimeter sidewalks than from picketing "on the sidewalks across the street." *Id.* But the Court did "not discount the importance" of the interest in averting an "*appear[ance]* to the public

that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court." *Id.*

The Supreme Court has credited the same interest both before and after *Grace*. When it upheld a ban on courthouse-area demonstrations aimed to influence the judicial process in *Cox v. Louisiana*, the Court recognized the state's prerogative to "adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence." 379 U.S. at 562. And, while allowing that "most judges will be influenced only by what they see and hear in court," the Court affirmed that a state "may also properly protect the judicial process from being misjudged in the minds of the public." *Id.* at 565. The *Cox* Court hypothesized a scenario in which "demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed," and then "a judge, completely uninfluenced by these demonstrations, dismissed the indictments." *Id.* "[U]nder these circumstances," the Court explained, a state "may protect against the possibility of a conclusion by the public . . . that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *Id.*

The decision in *Cox* came down fifty years ago. Since then, it may have become fashionable in certain quarters to assume that any reference to an apolitical judiciary "free from outside control and influence," *id.* at 562, should be met with a roll of one's eyes, or

perhaps to view any suggestion to that effect as antiquated or quaintly idealistic. If so, the government's interest in preserving (or restoring) the public's impression of a judiciary immune to outside pressure would have only gained in salience. In fact, in its just-completed Term, the Supreme Court forcefully reaffirmed the vitality of the interest in preserving public confidence in the integrity of the judicial process.

In *Williams-Yulee v. Florida Bar*, the Court considered a First Amendment challenge to a Florida ban on judicial candidates' personal solicitation of campaign contributions. Calling "public perception of judicial integrity" a governmental interest of "the highest order," 135 S. Ct. at 1666, the Court upheld the Florida ban as narrowly tailored to meet that compelling interest, *id.* at 1672. The Court explained that "[t]he importance of public confidence in the integrity of judges stems from the place of the judiciary in the government":

> Unlike the executive or the legislature, the judiciary "has no influence over either the sword or the purse; . . . neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the

> Court, "justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14 (1954).

Williams-Yulee, 135 S. Ct. at 1666.

The *Williams-Yulee* Court acknowledged that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record." *Id.* at 1667. Despite the interest's "intangible" character, *id.* at 1671, "no one" could deny "that it is genuine and compelling," *id.* at 1667. The government therefore is on strong footing in invoking that interest here.

2.

Unlike in a public forum, there is no requirement in a nonpublic forum "that the restriction be narrowly tailored" to advance the government's interests. *Cornelius*, 473 U.S. at 809. Rather, the government's "decision to restrict access to a nonpublic forum need only be *reasonable*," and even then, "it need not be the most reasonable or the only reasonable limitation." *Id.* at 808. Judged by those standards, § 6135, as applied to the Supreme Court plaza, reasonably serves the government's interests in maintaining order and decorum at the Supreme Court and in avoiding the

impression that popular opinion and public pressure affect the Court's deliberations.

a.

To begin with, restricting expressive assemblages and displays promotes a setting of decorum and order at the Supreme Court. Congress could reasonably conclude that demonstrations and parades in the plaza, or the display of signs and banners, would compromise the sense of dignity and decorum befitting the entryway to the nation's highest court. A nonpublic forum like the plaza "by definition is not dedicated to general debate or the free exchange of ideas." *Id.* at 811. Instead, "when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business." *Perry*, 460 U.S. at 53. Here, the Supreme Court plaza serves as the integrated staging area through which to approach the Supreme Court building and encounter the important work conducted within it. Rather than "restrict use" of the plaza "to those who participate in the [Court's] official business," *id.*, the government grants access to all comers. In doing so, the government does not lose its ability to require visitors to comport themselves in a manner befitting the site's basic function.

The statute also promotes the understanding that the Court resolves the matters before it without regard to political pressure or public opinion. Allowing

demonstrations directed at the Court, on the Court's own front terrace, would tend to yield the opposite impression: that of a Court engaged with— and potentially vulnerable to—outside entreaties by the public. At the least, the *appearance* of a Court subject to political pressure might gain increasing hold.

This case illustrates the point. Hodge tells us he wants to use the plaza to send a "political message . . . directed . . . at the Supreme Court" explaining how its decisions "have allowed police misconduct and discrimination against racial minorities to continue." Am. Compl. ¶ 29 (J.A. 12). Congress may act to prevent just those sorts of conspicuous efforts on the courthouse grounds to pressure the Court to change its decision-making—efforts that could well foster an impression of a Court subject to outside influence. Reserving the plaza as a demonstration-free zone counters the sense that it is appropriate to appeal to the Court through means other than "briefs and oral argument." *Grace*, 461 U.S. at 183. It thereby protects the judicial process, and the Supreme Court's unique role within that process, "from being misjudged in the minds of the public." *Cox*, 379 U.S. at 565.

Insofar as the prohibitions of the Assemblages and Display Clauses may reach beyond what is strictly necessary to vindicate those interests, Congress is allowed a degree of latitude in a nonpublic forum. The Supreme Court's admonition that a restriction "need not be the most reasonable or the only reasonable limitation" captures that understanding. *Cornelius*, 473 U.S. at 808. Considered in that light, Hodge reaches too far in arguing that § 6135 is unnecessary

because another statute, 18 U.S.C. § 1507, already addresses the government's concerns. Especially when operating under the relaxed standards applicable in a nonpublic forum, there is nothing "improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest." *United States v. O'Brien*, 391 U.S. 367, 380 (1968); *see Initiative & Referendum*, 685 F.3d at 1073.

Section 1507, at any rate, does not fully address Congress's concerns. That statute bars enumerated expressive activities near a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer." 18 U.S.C. § 1507. It therefore contains a specific-intent requirement not present in § 6135. The latter, unlike the former, accounts for protesters in the Supreme Court plaza who may create the appearance of attempting to influence the Court's deliberations while lacking any subjective intent to do so.

There is also a difference between the two statutes with regard to the interest in maintaining decorum and order within the Supreme Court grounds. Section 1507 is principally addressed to protests directed at judicial business. But people may—and do—wish to use the Supreme Court's front porch as a platform for attracting attention to a wide range of causes, some of which might have no evident connection to the Supreme Court or the administration of justice. And Congress is generally concerned with *any*

demonstration, regardless of subject, tending to compromise the decorum and order it seeks to maintain in the Court's grounds. Because the *Grace* Court interpreted § 6135 to reach "almost any sign or leaflet carrying a communication"—including leaflets about "the oppressed peoples of Central America," 461 U.S. at 173, 176—the statute addresses Congress's concerns to an extent that § 1507 likely cannot.

b.

Hodge, echoing the district court, argues not only that the Assemblages and Display Clauses are unreasonably *narrow* in failing to do work not already done by § 1507, but also that the clauses are unreasonably *broad* in prohibiting various conduct in the Supreme Court plaza that should remain permissible. The prohibitions' terms, the latter argument runs, carry the capacity to sweep in a range of expressive activity bearing an inadequate connection to the government's interests. For instance, a solitary, peaceful protester unassumingly holding an inconspicuous sign in the corner of the plaza, perhaps on a day when the Court conducts no business, might seem an unlikely candidate to raise substantial concerns about breaching appropriate decorum in the Supreme Court grounds or engendering a misperception regarding the Court's receptiveness to outside influences.

It is often possible, however, to formulate hypothetical applications of a challenged statute that

may call into question the law's efficacy in those discrete instances. But "the validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). It bears reemphasis in this regard that restrictions of expressive activity in a nonpublic forum need not satisfy any least-restrictive-means threshold, and "a finding of strict incompatibility between the nature of the speech . . . and the functioning of the nonpublic forum is not mandated." *Cornelius*, 473 U.S. at 808-09. Rather, Congress may prophylactically frame prohibitions at a level of generality as long as the lines it draws are reasonable, even if particular applications within those lines would implicate the government's interests to a greater extent than others.

The Supreme Court's recent decision in *Williams-Yulee* affords an illuminating reference point on that score. The petitioner, a former candidate for state judicial office, acknowledged that Florida's interest in preserving the appearance of judicial integrity might justify a ban on individualized, in-person solicitations for campaign contributions. *Williams-Yulee*, 135 S. Ct. at 1670. She argued, though, that Floridians were unlikely to lose confidence in their judiciary as a result of "a letter posted online and distributed via mass mailing" to "a broad audience." *Id.* at 1671. The Supreme Court was unpersuaded. Although Florida's interest "may be implicated to varying degrees in particular contexts," the Court reasoned, the state

had "reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance . . . that may cause the public to lose confidence in the integrity of the judiciary." *Id.* "The First Amendment requires" that the law "be narrowly tailored," the Court explained, "not that it be perfectly tailored." *Id.* (internal quotation marks omitted).

If that understanding won the day even when applying "strict scrutiny," *id.* at 1666, it carries even more force when (as in this case) the First Amendment does not call for narrow tailoring. Here, as in *Williams-Yulee*, certain kinds of expressive conduct barred by the Assemblages and Display Clauses "of course . . . raise greater concerns than others." *Id.* at 1671. "But most problems arise in greater and lesser gradations, and the First Amendment does not confine [the government] to addressing evils in their most acute form." *Id.* Congress therefore was under no obligation to fashion § 6135's reach so as to encompass only those forms of expressive activity in the Supreme Court plaza that most acutely implicate the government's concerns. Congress could paint with a broader brush.

The *Williams-Yulee* Court went on to observe, moreover, that the "impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary." *Id.* That same "intangible" interest is at work here. And the alternative interest in maintaining decorum and order likewise forms a "subtle, intangible and nonquantifiable" baseline

against which to apply any rigorous tailoring inquiry. *Henderson*, 964 F.2d at 1184.

Williams-Yulee highlights the limited utility of attempting to address every conceivable application of § 6135 at the margins. When the heartland of a law's applications furthers the government's interests, the existence of hypothetical applications bearing a lesser connection to those interests does not invalidate the law. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960), *quoted in Wash. State Grange*, 552 U.S. at 450. While we are therefore cognizant of the need to keep our judicial imagination in check, we think it warranted to give a measure of attention to the district court's (and Hodge's) concerns with certain hypothetical applications of § 6135 in the Supreme Court plaza, and to explain why those concerns may be borne of an unduly expansive reading of the statute's prohibitions.

We first consider the Assemblages Clause's prohibition against "parad[ing], stand[ing], or mov[ing] in processions or assemblages." 40 U.S.C. § 6135. The district court feared that the clause would criminalize *any* group of people standing together in the Supreme Court plaza. That might include attorneys, tourists, Court employees gathering for lunch, or even a "line of preschool students . . . on their first field trip to the Supreme Court." *Hodge*, 949 F. Supp. 2d at 188. Hodge similarly protests that the clause "is so broad as to cover not only people

congregating to engage in expressive activity," but also people "congregating for any other reason." Appellee Br. 6. But insofar as the clause covers congregating for reasons other than expressive activity, those applications to *non*-expressive conduct would raise no First Amendment concern in the first place. In any event, we do not understand the Assemblages Clause to prohibit every instance in which a group of persons stands or moves together in the Supreme Court plaza (nor, for that matter, does the government, *see* Appellants Br. 35-37).

Though the language addresses "standing" and "moving" in an "assemblage," those terms should be understood in the context of the words that surround them. And the surrounding language bespeaks joint conduct that is expressive in nature and aimed to draw attention. The verb "parade" and the noun "procession" connote actions that are purposefully expressive and designed to attract notice. *See Oxford English Dictionary* (online ed. 2015) (definition 1a of "parade": "[t]o march in procession or with great display or ostentation; to walk up and down, promenade, etc., in a public place, esp. in order to be seen; to show off"); *id.* (definition 1a of "procession": [t]he action of a body of people going or marching along in orderly succession in a formal or ceremonial way, esp. as part of a ceremony, festive occasion, or demonstration").

In addition, the Assemblages Clause appears in the same textual sentence as the Display Clause, and the conduct addressed by one naturally informs the reading of the other. The Display Clause plainly

involves expressive conduct, fortifying the understanding that its sister clause is analogously addressed to expressive assemblages. Moreover, the Display Clause's modifying phrase "designed or adapted to bring into public notice" reinforces the statutory focus on conduct meant to attract attention. The more expansive reading contemplated by Hodge, by contrast, would presumably bar a familiar occurrence in the Court's regular course of business: the line of people assembled in the plaza to enter the Court for an oral argument session. There is no reason to construe a prohibition aimed to preserve the plaza for its intended purposes in a manner that would preclude use of the plaza for those very purposes.

We next consider the Display Clause's bar against "display[ing] in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement." 40 U.S.C. § 6135. Again, the *Grace* Court understood that "almost any sign or leaflet carrying a communication . . . would be 'designed or adapted to bring into public notice [a] party, organization, or movement.'" 461 U.S. at 176. Signs or leaflets, as the Court suggested, by nature aim to exhibit or relay the bearer's message to an audience—that is their essential purpose. The inquiry has the potential to become more complicated, however, with respect to certain types of "device[s]." The district court expressed concerns about (what it perceived to be) the government's concession that the Display Clause prohibits "an individual or group [from] . . . wearing t-shirts displaying their school, church, or organization logo" in the Supreme Court

plaza. *Hodge*, 949 F. Supp. 2d at 188-89. The government maintains that it never intended to make that concession. It now takes the position that the statute's reference to the "display" of a "device" generally would not apply to the passive bearing of written words or a logo on one's clothing. *See* Appellants Reply Br. 11-13.

We agree. Because the statute speaks in terms of an affirmative act of "displaying" a "device," and because the other listed mediums of a "flag" or "banner" involve brandishing an object for the purpose of causing others to take note of it, we assume that the "display" of a "device," within the meaning of § 6135, would ordinarily require something more than merely wearing apparel that happens to contain words or symbols. The statute, moreover, not only contemplates an act of display akin to brandishing an object, but also requires a display that is "designed or adapted to *bring into public notice* a party, organization, or movement." 40 U.S.C. § 6135 (emphasis added). The passive bearing of a logo or name on a t-shirt, without more, normally would not cause the public to pause and take notice in the manner presumably intended by § 6135.

Rather, we assume that the Display Clause means to capture essentially the same type of behavior addressed by rules we have considered in the context of open-air national memorials—*i.e.*, "conspicuous expressive act[s] with a propensity to draw onlookers." *Oberwetter*, 639 F.3d at 550. We will not attempt to canvass the various forms of conduct involving clothing that may come within the compass of that

description; those cases can await adjudication as they might arise. But a single person's mere wearing of a t-shirt containing words or symbols on the plaza—if there are no attendant circumstances indicating her intention to draw onlookers—generally would not be enough to violate the statute.

c.

With respect to expressive activity that *does* fall within the statute's prohibitions, it is a mark in favor of the statute's reasonableness that the barred activity can be undertaken in an adjacent forum—the sidewalk running along First Street Northeast. The Supreme Court's "decisions have counted it significant that other available avenues for the . . . exercise [of] First Amendment rights lessen the burden" of a restriction in a nonpublic forum. *Christian Legal Soc'y*, 561 U.S. at 690; *see Oberwetter*, 639 F.3d at 554; *Hotel Emps.*, 311 F.3d at 556. The sidewalk area fronting the Supreme Court along First Street is over fifty feet deep. Dolan Decl. Attach. (J.A. 20). And demonstrations, protests, and other First Amendment activities "regularly occur" there, as is often seen in pictures. *Id.* ¶ 5 (J.A. 17). The public generally must pass through the sidewalk to enter the plaza, moreover, arming someone engaged in expressive activity on the perimeter with exposure

to the vast majority of people who go onto the platform.

Hodge makes no argument that the sidewalk in front of the Court is a physically inadequate or less effective forum for communicating his message. Instead, Hodge contends that the sidewalk's availability should count as a strike *against* the statue's reasonableness. He reasons that the adverse effects of First Amendment activity in the plaza would also be felt from the same activity on the adjacent sidewalk, rendering the distinction between the two an unreasonable one. We are unpersuaded.

Once again, the analysis in *Williams-Yulee* is highly instructive. There, the former judicial candidate sought to invalidate Florida's bar against solicitations by candidates themselves on the ground that Florida's allowing solicitations by a candidate's campaign committee essentially raises the same dangers. *Williams-Yulee*, 135 S. Ct. at 1669. In rejecting that argument (and doing so under strict scrutiny), the Court explained: "However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public." *Id.*

Here, the government could similarly conclude that protests in the Supreme Court plaza and protests on the public sidewalk "present markedly different appearances to the public." In *Grace*, the Court doubted whether the public would view protest activity on the Court's perimeter sidewalks to be more suggestive of the Court's vulnerability to public opinion than if the same activity were conducted on

the public sidewalks across the street. 461 U.S. at 183. But that was because there was "nothing to indicate to the public" that the Court's perimeter sidewalks "are part of the Supreme Court grounds or are in any way different from other public sidewalks." *Id.* The opposite is true of the raised marble plaza, as we have explained. For that reason, Congress could conclude that the public might form a different impression about the Court's susceptibility to public opinion if it saw a Court seemingly inviting demonstrators onto its own front porch (as opposed to a Court tolerating demonstrators on a public sidewalk "indistinguishable from any other sidewalks in Washington, D.C.," *id.* at 179).

* * *

In the end, unless demonstrations are to be freely allowed inside the Supreme Court building itself, a line must be drawn somewhere along the route from the street to the Court's front entrance. But where? At the front doors themselves? At the edge of the portico? At the bottom of the stairs ascending from the plaza to the portico? Or perhaps somewhere in the middle of the plaza? Among the options, it is fully reasonable for that line to be fixed at the point one leaves the concrete public sidewalk and enters the marble steps to the Court's plaza, where the "physical and symbolic

pathway to [the] chamber begins." Scott & Lee, *supra*, at 138.

Of course, this case would be decidedly different if the line—wherever exactly it lay—were geared to shield the Supreme Court from having to face criticism just outside its own front door. A law that discriminated on the basis of viewpoint in that way would plainly infringe the First Amendment even in a nonpublic forum. Section 6135, however, bans demonstrations and displays in the plaza regardless of whether they support or oppose (or even concern) the Court.

The statute requires that result because *all* demonstrations on the Court's front porch—even those seeking to give the Court a pat on the back, not a slap in the face—could fuel the impression of a Court responsive to public opinion or outside influence, and could compromise the decorum and order suitable in the entryway to a courthouse, the nation's highest. But demonstrations can take place on the adjacent public sidewalk, where the concerns justifying the statute's restrictions of speech are not as much in evidence. For all those reasons, § 6135 is a reasonable, viewpoint-neutral—and thus permissible—means of vindicating the government's important interests in the Supreme Court plaza.

IV.

In addition to his claim that § 6135 amounts to an unreasonable restriction on First Amendment activity

on public property, Hodge also asserts a First Amendment overbreadth claim as a separate basis for across-the-board invalidation of the statute as to the plaza. The overbreadth doctrine, traditionally understood, amounts to an exception to the general rule against third-party standing. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). Because overbroad laws have a chilling effect, potential speakers who could assert successful challenges to the law's application against them might instead refrain from speaking at all. Recognizing that possibility, the overbreadth doctrine enables a person whose activity validly falls within the challenged law's scope to make a First Amendment argument on behalf of those who might engage in protected speech but for the law's chilling effect. *See Hicks*, 539 U.S. at 119.

This, however, is not such a case. Hodge never argues that § 6135 may be constitutionally applied to his own conduct but is unconstitutional in its application to the protected speech of others. Instead, he contends that § 6135 cannot be applied to anyone (including himself) in the Supreme Court plaza, because the law curtails too much speech in light of the government's underlying interests. Descriptively, that is indeed an argument that the law is "overly broad." But we have already addressed the substance of that argument in evaluating the reasonableness of § 6135's restrictions on speech in light of the purposes of the forum. Having concluded that the government's means-ends fit is reasonable, we see no viable avenue

for concluding nonetheless that § 6135 has too many unconstitutional applications to survive.

We therefore decline to run what would amount to the same analysis a second time. Our approach breaks no new ground. In *Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008), the plaintiff brought an overbreadth claim alongside a challenge to a speech restriction in a government forum. *Id.* at 894 & n.**. In that case, as here, we upheld the challenged regulation as a reasonable measure in a nonpublic forum. *Id.* at 894-98. We noted that the plaintiff "separately claim[ed]" that the regulation was "unconstitutionally overbroad." *Id.* at 894 n.**. But we declined to "address that claim separately" because it was "analytically identical to [the] claim" of an invalid restriction of speech in a government forum. *Id.* We face the same situation here, and we follow the same course.

V.

Hodge advances an additional claim seeking across-the- board invalidation of § 6135's application to the Supreme Court plaza: statutory vagueness. The district court, having found the statute unconstitutional on other grounds, did not reach Hodge's vagueness challenge. *See Hodge*, 949 F. Supp. 2d at 197 n.37. Hodge nonetheless presses his vagueness claim on appeal as an alternative basis for affirming the district court's judgment. While we generally refrain from considering an issue not passed

upon below, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). Here, we find it appropriate to consider Hodge's vagueness claim. Not only does he ask us to address the challenge, but it raises pure questions of law. And the government joins issue with Hodge's arguments on the merits rather than suggesting that we forbear from resolving the matter.

"Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008). "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* Hodge puts forth various arguments urging that the terms of § 6135 suffer from one or both of those failings.

Significantly, however, Hodge makes no claim that the statute is vague with respect to its coverage of his *own* conduct—either his act of displaying a sign that led to his arrest or the additional expressive acts he intends to carry out in the plaza in the future. His vagueness claim thus runs up against "the rule that '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman*

Estates, Inc., 455 U.S. 489, 495 (1982)). "That rule," the Supreme Court has explained, "makes no exception for conduct in the form of speech." *Id.* As a result, "even to the extent a heightened vagueness standard applies" to statutes prohibiting speech, "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice." *Id.*

Here, the bulk of Hodge's vagueness arguments fit in the "lack of notice" category (*i.e.*, claims that the statute "fails to provide . . . fair notice of what is prohibited," as opposed to claims that the statute "is so standardless that it authorizes or encourages seriously discriminatory enforcement," *Williams*, 553 U.S. at 304). The sole exception is Hodge's argument that the Assemblages Clause reaches so broadly that it leaves too much "discretion to law enforcement to determine which assemblages and processions to allow and which to prohibit." Appellee Br. 38. That argument, however, rests on the premise that the Assemblages Clause pertains to *any* circumstance in which multiple persons stand or participate in some sort of procession in the plaza, regardless of whether they are engaged in expressive activity. Because we have already rejected that premise, Part III.B.2.b, *supra*, Hodge's vagueness argument on this score necessarily fails. His remaining vagueness arguments as to the Assemblages Clause,

including those sounding in "fair notice," rest on the same flawed premise.

With regard to the Display Clause, Hodge sees unconstitutional vagueness in the terms "flag, banner, or device," as well as in the phrase "bring into public notice a party, organization, or movement." 40 U.S.C. § 6135. Again, Hodge makes no argument that it is unclear whether his carrying of signs and distribution of leaflets are prohibited, nor whether his conveying a "political message" about police misconduct and racial discrimination would qualify. *See* Am. Compl. ¶ 29 (J.A. 12). Because his arguments instead rest on the lack of fair notice as to the conduct of others, they seemingly come within the rule generally barring the assertion of a Fifth Amendment vagueness claim by someone to whom the challenged statute unambiguously applies. *See Humanitarian Law Project*, 561 U.S. at 20. In *United States v. Williams*, however, the Supreme Court engaged with a fair- notice vagueness claim against a statute criminalizing speech even though the claim was premised on the scope of the law's applicability to hypothetical persons not before the Court rather than to the defendant himself. *See* 553 U.S. at 304-07. We have no need here to examine precisely when, and to what extent, there remains room to bring those sorts of vagueness claims. Regardless, Hodge's challenges to the Display Clause fail on the merits.

The Display Clause's language does not "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited." *Id.* at 304. The words "flag, banner, or device" do not call for "wholly subjective

judgments"—unlike terms such as "annoying" or "indecent," which yield "indeterminacy" of a kind occasioning invalidation on vagueness grounds. *Id.* at 306. Of course, there might be cases in which there is some ambiguity about the statute's applicability—whether the circumstances involve a "device," for instance. But as we have explained, the reference to "device" takes meaning from the adjacent terms "flag" and "banner," connoting brandishing of an object in a manner aimed to cause others to take note of it. *Supra* pp. 39-40. And in any event, "[c]lose cases can be imagined under virtually any statute," and it is a "mistake" to "belie[ve] that the mere fact that close cases can be envisioned renders a statute vague." *Williams*, 553 U.S. at 305-06.

The phrase "designed or adapted to bring into public notice a party, organization, or movement" also lies well outside the territory of "wholly subjective judgments." Hodge contends that the statute is ambiguous as to whether it covers displays communicating "any expression of views, regardless of whether the message is associated with an identifiable party, organization, or movement." Appellee Br. 43. But that alleged ambiguity, even assuming it would raise Fifth Amendment vagueness concerns, was resolved in *Grace*. The Supreme Court held that "almost any sign or leaflet carrying a communication"—including Zywicki's leaflets concerning judicial tenure and foreign human rights issues and Grace's sign displaying the First Amendment's text—would "be 'designed or adapted to bring into public notice [a] party, organization, or

movement.'" 461 U.S. at 176. The Court thus rejected the position advanced by Justice Stevens that Grace's conduct fell outside the Display Clause because a "typical passerby could not, merely by observing her sign, confidently link her with any specific party, organization, or 'movement.'" *Id.* at 188 (Stevens, J., concurring in part and dissenting in part). Hodge evidently thinks that Justice Stevens had the better view, *see* Appellee Br. 43, but that is not a viable argument about the present indeterminacy of the phrase.

We therefore find Hodge's vagueness challenge to be without merit.

* * * * *

For the foregoing reasons, we reverse the judgment of the district court.

So ordered.

Appendix C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD H. HODGE, JR., Plaintiff, v. PAMELA TALKIN, *et al.*, Defendants.	Civil Action No. 12-00104 (BAH) Judge Beryl A. Howell

MEMORANDUM OPINION

Following his arrest for violation of 40 U.S.C. § 6135 for wearing a sign while standing "quietly and peacefully" on the Supreme Court plaza, the plaintiff, Harold Hodge, Jr., brought this lawsuit to challenge the constitutionality of that statute under the First and Fifth Amendments "on its face and as applied to his desired activities," which include returning to the Supreme Court plaza to "engage in peaceful, non-disruptive political speech and expression." Amended Complaint ("Am. Compl."), ECF No. 8, ¶¶ 1, 20, 28. The defendants − Pamela Talkin, Marshal of the

United States Supreme Court, and Ronald Machen, Jr., U.S. Attorney for the District of Columbia, in their official capacities – have moved to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Alternatively, they have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). Defs.' Mot. to Dismiss or in the Alternative, for Summ. J. ("Defs.' Mot."), ECF No. 14. For the reasons explained below, the defendants' motion is denied because the Court finds the challenged statute unconstitutional under the First Amendment. Summary judgment will therefore be entered for the plaintiff pursuant to Federal Rule of Civil Procedure 56(f).[2]

I. BACKGROUND

The plaintiff, as noted, has been arrested for violating the statute he now challenges on constitutional grounds. Set forth below is pertinent factual and legal background to evaluate his claim and the pending motion.

A. The Plaintiff's Protest and Arrest at the Supreme Court Plaza and Subsequent Prosecution

[2] While the plaintiff has not filed a motion for summary judgment, the Court, as explained in more detail below, will grant summary judgment for the nonmoving plaintiff pursuant to Federal Rule of Civil Procedure 56(f). *See* FED. R. CIV. P. 56(f) ("After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant").

The plaintiff, Harold Hodge, Jr., is a citizen of Maryland and a full time-student at the College of Southern Maryland. Am. Compl. ¶ 5. According to the Amended Complaint, the plaintiff, on January 28, 2011, visited the Supreme Court plaza ("the plaza") wearing a sign "approximately 3 feet long and 2 feet wide" that read: "The U.S. Gov. Allows Police To Illegally Murder and Brutalize African Americans And Hispanic People." Am. Compl. ¶¶ 17-20. The plaintiff states that his purpose in standing on the plaza and wearing the sign "was to engage in expression on a political matter of public interest and importance and to raise public awareness about the adverse treatment of minorities by law enforcement." Am. Compl. ¶ 18. According to the plaintiff, he "approached the Supreme Court building from the west . . . and . . . proceed[ed] up the steps leading up to the plaza in front of the Supreme Court building." Am. Compl. ¶ 19. Once there, the plaintiff "stood quietly and peacefully upon the plaza area near the steps leading to the sidewalk in front of the Supreme Court Building, approximately 100 feet from the doors of the main entrance leading into the Supreme Court Building." Am. Compl. ¶ 20. After standing there for a few minutes, the plaintiff was approached by an officer of the Supreme Court of the United States Police, who "informed Mr. Hodge that he was violating the law and . . . told [him] to leave the plaza." Am. Compl. ¶ 21. After the plaintiff was given three warnings, and refused to depart, the officer told the plaintiff "that he was under arrest for violating 40 U.S.C. § 6135." Am. Compl. ¶¶ 22-23. The plaintiff

"was told to place his hands behind his back, and he peacefully and without resistance complied with this request." Am. Compl. ¶ 23. The plaintiff was "then handcuffed and taken to a holding cell within the Supreme Court building [and then] transported to U.S. Capitol Police Headquarters where he was booked and given a citation for violating 40 U.S.C. § 6135." Am. Compl. ¶ 24.

On February 4, 2011, the plaintiff was charged in an information filed in the Superior Court for the District of Columbia by the U.S. Attorney for the District of Columbia with violating 40 U.S.C. § 6135. Am. Compl. ¶ 25. The information alleged specifically that the plaintiff "'did unlawfully parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to [sic] display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.'" Am. Compl. ¶ 25 (quoting Information). The plaintiff and the government reached an agreement, pursuant to which the charge under 40 U.S.C. § 6135 would be dropped if the plaintiff stayed away from the Supreme Court Building and grounds for six months. Am. Compl. ¶ 26. The plaintiff complied with the agreement, and, on September 14, 2011, the charge under 40 U.S.C. § 6135 was dismissed. Am. Compl. ¶ 27.

B. **The Instant Lawsuit**

On January 23, 2012, the plaintiff filed this lawsuit challenging the constitutionality of 40 U.S.C.

§ 6135.[3] The plaintiff claims that he "desires to return to the plaza area . . . and engage in peaceful, non-disruptive political speech and expression in a similar manner to his activity on January 28, 2011." Am. Compl. ¶ 28. He also "desires to return to the plaza area in front of the Supreme Court building and picket, hand out leaflets, sing, chant, and make speeches, either by himself or with a group of like-minded individuals." Am. Compl. ¶ 29. Specifically, the plaintiff is interested in "convey[ing]" a "political message," "directed both at the Supreme Court and the general public," namely to "explain how decisions of the Supreme Court have allowed police misconduct and discrimination against racial minorities to continue." Am. Compl. ¶ 29. He claims, however, that he is "deterred and chilled from doing so because of the terms of 40 U.S.C. § 6135 and his prior arrest on January 28, 2011 and subsequent prosecution for violating that statute." Am. Compl. ¶ 30. The Court held argument on the pending motion on April 26,

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[3] The initial complaint named as defendants Pamela Talkin, the District of Columbia, and Cathy Lanier, Chief of Police of the Metropolitan Police of the District of Columbia. Compl. ECF No. 1. On May 15, 2012, the plaintiff filed the Amended Complaint, which is the operative pleading in this case, naming as defendants Pamela Talkin and Ronald Machen, Jr. Am. Compl. ¶¶ 6-7. As the Marshal of the Supreme Court, Ms. Talkin's job requirements include, *inter alia*, "[t]ak[ing] charge of all property of the United States used by the [Supreme] Court or its members . . . [and] [o]versee[ing] the Supreme Court Police." 28 U.S.C. §§ 672(c)(3), (c)(8); Am. Compl. ¶ 6. Mr. Machen, the U.S. Attorney for the District of Columbia, is responsible for prosecuting violations of 40 U.S.C. § 6135, the challenged statute. Am. Compl. ¶ 7; 40 U.S.C. § 6137(b).

2013, and, following that hearing, both parties, with the permission of the Court, supplemented their briefing regarding issues raised at the motions hearing. [4] *See* Defs.' Supplemental Brief ("Defs.' Supplemental Br."), ECF No. 19; Pl.'s Supplemental Opp'n to Defs.' Mot. to Dismiss or in the Alternative for Summ. J. ("Pl.'s Supplemental Opp'n"), ECF No. 20.

C. **The Challenged Statute – 40 U.S.C. § 6135**

The challenged statute, 40 U.S.C. § 6135, provides in full that:

> It is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.

40 U.S.C. § 6135. The statute is comprised of two clauses: first, the "Assemblages Clause," which provides that "[i]t is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds," and, second, the "Display Clause," which makes it unlawful "to display in the

[4] The Court relies on the court reporter's rough transcript of the April 26, 2013 motion hearing in this Memorandum Opinion. *See* Rough Transcript of Oral Argument (Apr. 26, 2013) ("Tr.").

Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement." 40 U.S.C. § 6135. The plaintiff was charged with violating both clauses of the statute. *See* Am. Compl. ¶ 25.

The Court's "Building and grounds" referenced in the statute include the Supreme Court Building as well as the grounds extending to the curbs of four streets, namely "the east curb of First Street Northeast, between Maryland Avenue Northeast and East Capitol Street[,]" "the south curb of Maryland Avenue Northeast, between First Street Northeast and Second Street Northeast[,]" "the west curb of Second Street Northeast, between Maryland Avenue Northeast and East Capitol Street[,]" and "the north curb of East Capitol Street between First Street Northeast and Second Street Northeast[.]" 40 U.S.C. § 6101(b)(1). Violations of section 6135, which may be prosecuted in the United States District Court for the District of Columbia or the Superior Court of the District of Columbia, are subject to a fine or imprisonment for "not more than 60 days, or both[,]" except if "public property is damaged in an amount exceeding $100, the period of imprisonment for the offense may be not more than five years." 40 U.S.C. § 6137(a)-(c).

D. **History of the Challenged Statute**

A review of the history of the challenged statute and the case law addressing its constitutionality is necessary to set the plaintiff's instant challenge in

context. The statute was enacted in 1949 and originally codified at 40 U.S.C. § 13k. The bill introducing the statute was "patterned very largely after the law which authorized special guards to police the Capitol grounds." S. Rep. No. 81-719, at 1828 (1949). Thus, the Court first briefly examines the statute promulgated to govern the policing of the Capitol grounds, 40 U.S.C. § 193g.

1. **Statute Governing Capitol Grounds, 40 U.S.C. § 193g**[5]

From 1810 until 1935, the Supreme Court was housed in the United States Capitol Building. *See*

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[5] Neither party briefed in any detail the history of and case law addressing the Capitol Grounds statute, which was a precursor to the challenged statute. The defendants do not so much as cite the statute, or the case ruling the statute unconstitutional. The plaintiff discusses the statute only briefly and cites to *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) ("*Jeannette Rankin Brigade II*"), the case holding the statute unconstitutional. *See* Pl.'s Opp'n at 17-18, 36. Nevertheless, given that the challenged statute was rooted directly in the Capitol Grounds statute, which was ruled unconstitutional, and is clearly relevant here, the Court takes judicial notice of this history because these facts "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2). At oral argument, when the Court queried the government about the relevance of the legislative history of statutes "in connection with the building of the Supreme Court building[,]" the government again did not reference the Capitol Grounds statute or its relationship to the challenged statute, but did acknowledge that the Court may consider legislative history and that the Court may take judicial notice of legislative history or the history of the Supreme Court building. Tr. 2-6.

Architect of the Capitol, Old Supreme Court Chamber, http://www.aoc.gov/capitol-buildings/old-supreme-court-chamber (last visited June 10, 2013). During that period, in 1882, Congress enacted legislation "to regulate the use of the Capitol Grounds," then including the Supreme Court, and "to prevent the occurrence near it of such disturbances as are incident to the ordinary use of public streets and places[.]" 22 Stat. 126 (1882); *see also* 13 Cong. Rec. 1949 (1882) (statement of Morrill) (stating that the bill to regulate the use of the Capitol Grounds was necessary because "[c]onstant damage is committed on the Capitol, pieces of the bronze doors are stolen, ink is strewed from the bottom to the top of the stairs, plants are stolen from the grounds in large numbers, shrubs and trees are injured" and "I believe there can be no objection to giving the police court some chance to prevent the constant mutilation of the Capitol and of the trees and shrubs and grounds around about it"). The legislation included, in section 6, essentially the same language that would, more than a half century later, appear in 40 U.S.C. § 6135 and its predecessor statute, 40 U.S.C. § 13k:

> Sec. 6. That it is forbidden to parade, stand, or move in processions or assemblages, or display any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

22 Stat. 127 (1882) (hereinafter, "Capitol Grounds statute"). From 1882 until 1969, there were "several

recodifications, and various changes in and additions to the surrounding statutory provisions relating to conduct upon the Capitol Grounds[,] [b]ut the absolute prohibition against all 'processions or assemblages' . . . remained untouched." *Jeannette Rankin Brigade v. Chief of Capitol Police*, 421 F.2d 1090, 1106 (D.C. Cir. 1969) ("*Jeannette Rankin Brigade I*") (Bazelon, C.J., dissenting) (footnote omitted). This was "despite suggestions to the legislature that passing years and progressive developments in the protection of First Amendment freedoms may have sorely dated the statute." *Id.* (citing *Security of the Capitol Buildings: Hearing on S. 2310 Before the S. Subcomm. on Pub. Bldgs. and Grounds of the S. Comm. on Pub. Works*, 90th Cong., 1st Sess. at 9-10, 26 (1967)).[6]

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[6] The Senate Hearing cited by Chief Judge Bazelon in *Jeannette Rankin Brigade I* included, for example, the following discussion between members of the Senate and Mr. David Bress, then United States Attorney for the District of Columbia, regarding the Capitol Grounds statute:

> Senator COOPER. In your view, as I think would be mine, wouldn't the present provision of the law with an absolute provision be unconstitutional in view of the holdings of the Court?
>
> Mr. BRESS. The present statute has not been tested in the courts. There is enough language to indicate some doubt. I am not prepared to say that the present law is unconstitutional. On the

> contrary, it is our belief that the law as it now stands is probably constitutional.
>
> Senator COOPER. Do you think the absolute prohibition of parades and demonstrations on the Capitol Grounds is unconstitutional? . . . Do you think we could absolutely prohibit by statute parade or assemblage on the Capitol Grounds?
>
> Mr. BRESS. I believe that that presents a problem. It is hazardous to predict that the Court would uphold that. I believe that in the first amendment area this does present a problem.
>
> Senator COOPER. I believe you can have reasonable regulation, but I don't believe you can prohibit.
>
> . . .
>
> Mr. BRESS. The indications are that reasonable regulations evenhandedly enforced as a regulatory measure over the area adjacent to a legislative assembly would be valid under the recent Supreme Court decisions, but that is different from providing for an outright abolition without any regulatory steps.
>
> Senator TYDINGS. Any type of regulation or restriction would have to do with the orderly conduct of a legislative body. It couldn't have to do with outright forbidding of people to picket or peacefully present petitions. There was a revolution fought about that.

Security of the Capitol Buildings: Hearing on S. 2310 Before the S. Subcomm. on Pub. Bldgs. and Grounds of the S. Comm. on Pub. Works, 90th Cong., 1st Sess. at 9-10 (1967).

In the 1960s and 1970s, this nearly century-old Capitol Grounds statute was subject to scrutiny both by the D.C. Court of Appeals, which imposed a limiting construction on the statute,[7] and by a three-

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[7] The federal Capitol Grounds statute, 40 U.S.C. § 193g, has "a peculiar duality" in that "[i]t appears both in the United States Code and the District of Columbia Code; and violations of it may be prosecuted either in the local District of Columbia courts or in the federal district court for the District of Columbia." *Jeannette Rankin Brigade II*, 342 F. Supp. at 580 (citing 40 U.S.C. § 193h). Before 1973, the United States Code authorized the Committee on the Judiciary of the House of Representatives "to print bills to codify, revise, and reenact the general and permanent laws relating to the District of Columbia[.]" 1 U.S.C. § 203 (1964). Thus, the statute at issue "relating" to the District of Columbia was codified by Congress in both the U.S. Code and the D.C. Code. *See* D.C. Code § 9-124 (1967). Since 1973, the District of Columbia Council has been empowered to "set forth the general and permanent laws relating to or in force in the District of Columbia, whether enacted by the Congress or by the Council of the District of Columbia[.]" *See* D.C. Code 45-102. Since then, despite being held unconstitutional in 1972, the statute has been recodified at D.C. Code § 9-113 (1981) and § 10-503.17 (2013), which currently reads in full:

> § 10-503.17. Parades, assemblages, and displays forbidden. It is forbidden to parade, stand, or move in processions or assemblages in said United States Capitol Grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement, except as hereinafter provided in §§ 10-503.22 and 10-503.23.

The statute has remained substantively the same over the years, including the provision of an exception ("except as hereinafter provided in . . .") for suspension of prohibitions for "occasions of

judge panel of this Court, which found the statute unconstitutional, a holding summarily affirmed by the Supreme Court. Some discussion of those cases is necessary to provide context for this Court's examination of 40 U.S.C. § 6135.

In 1970, the D.C. Court of Appeals affirmed the judgment of the Chief Judge of what was then the D.C. Court of General Sessions, who imposed a limiting construction on the Capitol Grounds statute. In that case, the appellees, who refused to leave the East Capitol steps after being ordered to do so by the Capitol police, had moved to dismiss the charging informations on grounds that § 9-124 of the D.C. Code, or 40 U.S.C. § 193g, was unconstitutional. The trial court acknowledged "the overbroad scope of § 9-124[,]" but nevertheless found "sufficient basis in legislative and other materials" to limit its scope. *United States v. Nicholson*, 263 A.2d 56, 57 (D.C. 1970). Specifically, the trial court limited the statute "to the imposition of criminal punishment for acts or conduct which interferes [sic] with the orderly processes of the Congress, or with the safety of individual legislators, staff members, visitors, or tourists, or their right to be free from intimidation, undue pressure, noise, or inconvenience." *Id*. (internal quotation marks omitted). Limited in that manner, the trial court found the statute constitutional, while simultaneously concluding that the facts did not justify convictions based on this limited construction

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national interest." *Compare* D.C. Code § 9-124 (1967) *with* D.C. Code § 10-503.17 (2013).

of the statute. *Id*. The D.C. Court of Appeals affirmed the dismissal of the informations for failure to state an offense. *Id*.; *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 580 (D.D.C. 1972) ("*Jeannette Rankin Brigade II*") (quoting the D.C. Court of General Sessions as further explaining that "[i]t is appropriate, therefore, under the statute, to bar or order from the Capitol, any group which is noisy, violent, armed, or disorderly in behavior, any group which has a purpose to interfere with the processes of Congress, any member of Congress, congressional employee, visitor or tourist; and any group which damages any part of the building, shrubbery, or plant life" (citation omitted)).

Two years later, in 1972, a three-judge panel of the District Court for the District of Columbia, including two D.C. Circuit judges, reviewed a complaint by a coalition of women against the Vietnam War, challenging the validity of the Capitol Grounds statute, 40 U.S.C. § 193g, under the First and Fifth Amendments. *Jeannette Rankin Brigade II*, 342 F. Supp. at 577-

In that case, the defendants "assure[d]" the panel that, although they disagreed with the *Nicholson* interpretation of the statute, they had nonetheless adhered to that interpretation of the statute in enforcing it. *Id*. at 580. The panel refused to embrace the *Nicholson* limiting construction, however, nor the government's argument that, *inter alia*, the statute should "not be read literally as forbidding all assemblages, but . . . should be taken as providing that

there may be no assemblages larger than 15 in number[,]" *id.* at 586,[8] and found the statute facially unconstitutional.[9] The panel concluded that "it is difficult to imagine a statute which could more plainly violate the principle that 'First Amendment freedoms need breathing space to survive [and] government may regulate in the area only with narrow specificity.'" *Id.* at 585 (alteration in original) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)). The panel further expounded that "[w]hile some substantial governmental interests in the Capitol Grounds may warrant protection, none have been alleged which are sufficiently substantial to override the fundamental right to petition 'in its classic form' and to justify a blanket prohibition of all assemblies, no matter how peaceful and orderly, anywhere on the Capitol Grounds." *Id.*[10] The panel also noted the

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[8] The panel noted that the "Government forcefully argues" that "[w]ithout such judicial emendations . . . the present language of the statute is open to absurdities which Congress cannot be taken to have intended." *Jeannette Rankin Brigade II*, 342 F. Supp. at 586.

[9] As the panel explained, since the statute appears both in federal and local law, and violations may be prosecuted in either federal or local courts, "the construction of the statute by the local courts has no binding effect on the federal courts if the Government elects to prosecute violations here." *Jeannette Rankin Brigade II*, 342 F. Supp. at 580.

[10] Notably, the panel in *Jeannette Rankin Brigade II* suggested in dictum that there are some areas, including "[t]he area surrounding a courthouse," where the government "may absolutely prohibit the exercise of First Amendment rights, especially the right to assemble." *Jeannette Rankin Brigade II*,

difficulties that the "flatly prohibitory language" of the statute posed for those enforcing the statute, stating that "[t]hey bear the burden of trying to enforce and sustain a statute which, however unremarkable it may have appeared to be in 1882 when it was first enacted, fairly bristles with difficulties when it is sought to be enforced 90 years later." *Id*. at 586.[11]

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342 F. Supp. at 583 (citing *Cox v. Louisiana*, 379 U.S. 559 (1965) ("*Cox II*")); *see also id*. at 584 (contrasting the functions of the judiciary and legislature, and determining that "the primary purpose for which the Capitol was designed – legislating" is not "incompatible with the existence of all parades, assemblages, or processions which may take place on the grounds"). To the extent that the panel's recognition that the area surrounding a courthouse could justify a broader restriction on expressive activity, the panel's citation to *Cox II* lends no support to the defendants' argument that a blanket prohibition on expressive activity passes constitutional muster. The panel was emphatic regarding the vulnerability of section 193g to constitutional challenge, and its language regarding the different considerations that may be in play in the area surrounding a courthouse does not undermine that conclusion, particularly where the panel provided a citation to a case concerning a statute with an intent requirement that was much more narrowly drawn than the challenged statute. *See infra* note 15.

[11] The D.C. Circuit issued an earlier decision in *Jeannette Rankin Brigade I* in 1969, following an appeal from a district judge's decision not to grant the plaintiffs' motion for a three-judge panel pursuant to 28 U.S.C. §§ 2282 and 2284. Chief Judge Bazelon dissented from the panel's decision granting a three-judge panel, and would have instead reached the merits of the case, stating: "I would find that the sweep of Section 193g so far exceeds whatever limitations the public interest might justify upon the right to petition Congress that we must declare this law

The panel in *Jeannette Rankin Brigade II* reflected that "[t]he local courts of the District of Columbia have . . . felt unable to recognize [the constitutional propriety of the statute] without putting a substantial gloss upon Section 193g by an expansive interpretation of its terms," but refused the invitation to adopt this construction or create a limiting construction of its own that could save the statute's constitutionality. *Jeannette Rankin Brigade II*, 342 F. Supp. at 586. The panel also discussed failed attempts in 1967 by the U.S. Attorney for the District of Columbia "to warn the Congress that this statute was in trouble, and to make a proposal for its revision" to limit its scope. *Id*. Specifically, the panel highlighted the U.S. Attorney's testimony before Congress that Section 193g "'presents a problem,'" and his statement that "'[t]he indications are that reasonable regulations even-handedly enforced as a regulatory measure over the area adjacent to a legislative assembly would be valid under recent Supreme Court decisions, but that is different from providing for an outright abolition without any regulatory steps.'" *Id*. at 586 n.14 (quoting *Security of the Capitol Buildings: Hearing on S. 2310 Before the S. Subcomm. on Pub. Bldgs. and Grounds of the S. Comm. on Pub. Works*, 90th Cong., 1st Sess. at 10 (1967)).[12] The government

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unconstitutional on its face." *Jeannette Rankin Brigade I*, 421 F.2d at 1096 (Bazelon, C.J., dissenting).

[12] At the time, the U.S. Attorney's "proposed amendment to 193g would have abolished the absolute prohibition and merely substituted the requirement that organizations notify the Chief of the Capitol Police five days prior to any parade or demonstration." *Jeannette Rankin Brigade II*, 342 F. Supp. at

urged the *Jeannette Rankin Brigade II* panel to save the Capitol Grounds statute by adopting its own limiting construction of the statute. *Id*. at 586-87. The panel did not mince words in rejecting that proposal, however. While the panel was "not unsympathetic with the reasons which prompt the United States Attorney to ask us to rewrite a curiously inept and ill- conceived Congressional enactment, we think that is a function more appropriately to be performed by Congress itself." *Id*. at 587. The Supreme Court summarily affirmed the panel's decision later that year. *See Chief of Capitol Police v. Jeannette Rankin Brigade*, 409 U.S. 972, 972 (1972).[13]

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586 n.14. The proposal was rejected "over the dissents of Senators Gruening, Cooper, and Young, in whose view the statute as written was plainly unconstitutional." *Id*.

[13] Although the Supreme Court summarily affirmed the three-judge panel's decision that the federal Capitol Grounds statute was unconstitutional, just as with the local codification of this law, *see supra* note 6, the federal statute has never been repealed but was re-codified in 2002 at 40 U.S.C. § 5104(f), *see* Public Buildings, Property, and Works, Pub. L. No. 107-217, § 1, § 5104(f), 116 Stat. 1062, 1176 (2002). In its current form, 40 U.S.C. § 5104(f) reads as follows:

> Parades, assemblages, and display of flags. Except as provided in section 5106 of this title [40 USCS § 5106], a person may not--
>
> parade, stand, or move in processions or assemblages in the Grounds; or

2. **History of the Challenged Statute, 40 U.S.C. § 6135**

As noted, the immediate predecessor to the challenged statute was 40 U.S.C. § 13k, which was introduced as part of a bill intended "to provide positive statutory authority for the policing of the Supreme Court Building and grounds, defining the exact territorial limits thereof, authorizing the appointment of special police, and defining their duties and powers." S. Rep. No. 81-719, at 1828 (1949). This legislation had become necessary because, although the Supreme Court had occupied its own building since 1935, from 1935 until 1948, the Supreme Court Building and grounds were policed under the authority of the District of Columbia's government. *Id*. In 1948, however, the governing body of the District of Columbia, the Board of Commissioners, "cancel[led] all special police commissions, including the ones for the guards for the Supreme Court Building" because of uncertainty over the authority the Commission could give to the police assigned to the Supreme Court. *Id*. This prompted introduction in Congress of legislation modeled after

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> display in the Grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.

40 U.S.C. § 5104(f). Section 5106, which is referenced in the text of 40 U.S.C. § 5104(f), provides for the suspension of the prohibitions "[t]o allow the observance in the United States Capitol Grounds of occasions of national interest becoming the cognizance and entertainment of Congress[.]" 40 U.S.C. § 5106(a).

the statute governing the U.S. Capitol Building and grounds to govern the policing of the Supreme Court and grounds. *Id.*; H.R. Rep. No. 81-814, at 2 (1949) (noting that when the uncertainty over the authority of the Supreme Court guards was brought to the attention of the Chief Justice, "the Marshal was directed to have a bill prepared similar to the legislation providing for the Capitol Police, 'To define the area of the United States Capitol Grounds, to regulate the use thereof and for other purposes[.]'" (citing 60 Stat. 718, ch. 707 (1946)).

The legislation for the Supreme Court Building and grounds defined the territory covered and provided for regulations governing "[v]arious acts, such as sale of goods in the building, display of advertising, soliciting alms, injury to the building or grounds, discharging of firearms, making speeches, parading or picketing." S. Rep. No. 81-719, at 1828 (1949). The legislation, *inter alia*, authorized the Marshal of the Supreme Court "to restrict and regulate travel and occupancy of the building and adjacent grounds and to prescribe rules and regulations for the protection of said premises and the maintenance of order and decorum." *Id.* The Senate Report accompanying the legislation noted that "[i]n keeping with the dignity which should surround the Supreme Court of the United States and the building and grounds which house it, the committee feel [sic] that this legislation should be enacted promptly." *Id.* The House Report also noted the urgency of enacting the legislation, explaining that "[u]nless the authority requested in this bill is provided at this session of

Congress, the guards of the Supreme Court will have no authority as special policemen to make arrests for offenses committed in the Supreme Court or grounds after November 1, 1949[,]" and noting that "[i]t is the belief of the Committee on the Judiciary that in keeping with the dignity of the highest Court in the land, provision should be made for the policing of its building and grounds similar to that which is made for the U.S. Capitol." H.R. Rep. No. 81-814, at 2 (1949).

Section 6 of the legislation contained the prohibition that would later be codified at 40 U.S.C. § 13k. The House Report accompanying the legislation summarized section 6, stating that it "prohibits parades or displaying of any flag or banner designed to bring into public notice any party, organization or movement[,]" and that the section was "based upon the law relating to the Capitol Buildings and Grounds." H.R. Rep. No. 81-814, at 3 (1949). As enacted, 40 U.S.C. § 13k is nearly identical to the challenged statute, providing in full:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

Pub. L. No. 81-250, § 6, 63 Stat. 616, 617 (1949) (codified at 40 U.S.C. § 13k).[14]

The statute was in the same form in 1981 when the D.C. Circuit considered the constitutionality of 40 U.S.C. § 13k in *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981) (hereinafter, "*Grace I*"), and found the statute unconstitutional on its face. In that case, two individuals, who were threatened with arrest while separately distributing leaflets and wearing a sign on the sidewalks surrounding the Supreme Court, filed a complaint "seeking a declaratory judgment that 40 U.S.C. § 13k is unconstitutional on its face, and a permanent injunction prohibiting the Supreme Court police from enforcing the statute." *Grace I*, 665 F.2d at 1195.

The D.C. Circuit considered the statute in its entirety and found the statute wholly "repugnant to the First Amendment of the Constitution." *Id*. at 1194. Specifically, while the Circuit acknowledged that "public expression that has an intent to influence the administration of justice may be restricted," *id*. (citing *Cox v. Louisiana*, 379 U.S. 559 (1965) ("*Cox II*")), it found that Congress had already achieved that result in a "more narrowly drawn statute," *id*., namely 18 U.S.C. § 1507, enacted in 1950 as part of the Subversive Activities Control Act of 1950, Title I, Pub.

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[14] The challenged statute differs in three nonmaterial ways from the original version: 40 U.S.C. § 6135 says "It is unlawful" rather than "It shall be unlawful[;]" "in the Building and grounds" rather than "therein[;]" and "a party" rather than "any party." *Compare* 40 U.S.C. § 13k *with* 40 U.S.C. § 6135.

L. No. 81-831, § 31(a), 64 Stat. 987, 1018 (1950). That statute provided in full:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $ 5,000 or imprisoned not more than one year, or both.

18 U.S.C. § 1507 (1976) (quoted in *Grace I*, 665 F.2d at 1203).[15] As Justice Clark explained in *Cox II*, 18 U.S.C. § 1507 was "written by members of [the Supreme Court] after disturbances . . . occurred at

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[15] 18 U.S.C. § 1507 has the same operative language today; the only changes since 1976 to the statute's language are

(1) the fine provision was changed from "fined not more than $ 5,000" to "fined under this title[,]" and (2) the addition of the following sentence: "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." 18 U.S.C. § 1507.

buildings housing federal courts." *Cox II*, 379 U.S. at 585 (Clark, J., concurring and dissenting).[16]

In *Grace I*, the D.C. Circuit compared the total ban on expressive activity set out in 40 U.S.C. § 13k unfavorably to the more narrowly drawn provision in 18 U.S.C. § 1507. *See Grace I*, 665 F.2d at 1203. Specifically, the Court explained that 18 U.S.C. § 1507 "prohibits expressive conduct on the Supreme Court grounds designed to influence Supreme Court Justices or to interfere with the administration of justice[,]" and concluded that it was "unable to find any other significant governmental interest to justify the absolute prohibition of all expressive conduct

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[16] The Supreme Court decided two cases in 1965 called *Cox v. Lousiana*, 379 U.S. 536 (1965) ("No. 24") ("*Cox I*") and 379 U.S. 559 (1965) ("No. 49") ("*Cox II*"). In the excerpt cited, Justice Clark was "concurring in No. 24 and dissenting in No. 49." *Cox II*, 379 U.S. at 585 (Clark, J., concurring and dissenting). Although the constitutionality of 18 U.S.C. § 1507 has not been directly challenged, in addressing a challenge to the constitutionality of a Louisiana statute, which "was taken *in haec verba* from a bill which became 18 U.S.C. § 1507 (1958 ed.)," *Cox II*, 379 U.S. at 585 (Clark, J., concurring and dissenting), the Supreme Court held that the Louisiana statute was a facially "valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Cox II*, 379 U.S. at 564. The Supreme Court found, furthermore, that the statute was "precise" and "narrowly drawn." *Id*. at 562. The Louisiana statute is identical to 18 U.S.C. § 1507 except for the specifics of the fine provision and the fact that the Louisiana statute refers to "a court of the State of Louisiana" rather than "a court of the United States." *Compare* LA. REV. STAT. ANN. § 14:401 *with* 18 U.S.C. § 1507.

contained in section 13k[.]" *Id.* at 1194, 1203. The D.C. Circuit therefore rejected the government's argument that the total ban on expressive conduct was necessary "to maintain the dignity and decorum of the Supreme Court." *Id.* at 1203. While the Circuit acknowledged that "it would appear that this is the sole justification of the statute advanced in the legislative history" for 40 U.S.C. § 13k, the Circuit "[did] not believe that this concern alone is sufficient to justify the absolute prohibition of free expression contained in this statute." *Grace I*, 665 F.2d at 1203; *see also id.* at 1203 n.18 (citing, *e.g.*, 95 Cong. Rec. 8962 (1949) (statement of Rep. Celler) ("(All) this bill does . . . is to apply the same rules to the Supreme Court building and its adjoining grounds as are now applicable to the Capitol itself-no more and no less."); *id.* at 1204 ("[E]ven if the asserted interest [in the 'peace' and 'decorum' of the Supreme Court] is legitimate by itself, it cannot justify the total ban at issue here."). Thus, the D.C. Circuit found the statute "unconstitutional and void." *Id.* at 1194.

In its decision, the D.C. Circuit analogized the challenged statute with the "similarly worded" statute governing the policing of the Capitol Building and grounds. The Circuit pointed out that the three-judge panel in *Jeannette Rankin Brigade II*, 342 F. Supp. at 585, had "unequivocally stated, '[the] desire of Congress, if such there be, to function in the 'serenity' of a 'park-like setting' is fundamentally at odds with the principles of the First Amendment.'" *Grace I*, 665 F.2d at 1204 (quoting *Jeannette Rankin Brigade II*, 342 F. Supp. at 585). Acknowledging the different

institutions that were the focus of the Capitol Grounds statute and the precursor to the challenged statute, the Circuit nevertheless found the constitutional infirmity the same, explaining that, "while the Capitol and Supreme Court buildings house different government entities, justifying different restrictions on free expression, . . . an interest in 'the glorification of a form of government through visual enhancement of its public buildings' can no more justify an absolute prohibition of free expression on the Supreme Court grounds than on the grounds of the United States Capitol." *Id*. (no citation provided). The Circuit further explained that:

> The sight of a sole picketer may indeed mar an otherwise pristine morning or perfectly centered snapshot. However, it is just that annoyance-if such be the case-that may cause bystanders or passerby to stop and take notice, to become aware of an issue, to formulate a response to a companion. This awareness and interchange is, in part, precisely what the First Amendment is designed to protect.

Id. The Circuit went so far as to emphasize that "we believe that it would be tragic if the grounds of the Supreme Court, unquestionably the greatest protector of First Amendment rights, stood as an island of silence in which those rights could never be exercised in any form." *Id*. at 1205. While noting a preference "to adopt a narrowing construction of the

statute in order to avoid a holding that section 13k is unconstitutional," the Circuit nevertheless concluded that a "validating construction is simply impossible here" where the legislative history is "slim" and "suggests only the desire on the part of Congress to surround the Court with the same cordon of silence that Congress attempted to place around the Capitol," a measure found unconstitutional. *Id*. at 1205-06.

Following the D.C. Circuit's clear rejection as facially unconstitutional of the precursor to the challenged statute, the Supreme Court took a narrower approach to its review of the statute. By contrast to the D.C. Circuit, which held the entire statute unconstitutional, the Supreme Court limited its review to the Display Clause as the plaintiffs were threatened with arrest only for violation of that clause. *United States v. Grace*, 461 U.S. 171, 175 (1983) (hereinafter, "*Grace II*").[17] Upon review of the statute and its legislative history, the Supreme Court concluded that "it is fair to say that the purpose of the Act was to provide for the protection of the building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum" and that, in particular, section 6, codified at 40 U.S.C. § 13k, "was one of the provisions apparently designed for these purposes." *Id*. at 182 (noting that

[17] The Supreme Court explained that, while the D.C. Circuit's opinion could be read as finding the entire statute unconstitutional, "the decision must be read as limited" to the Display Clause of the statute. *Grace II*, 461 U.S. at 175 n.5.

"[a]t least, no special reason was stated for [the] enactment" of 40 U.S.C. § 13k).

The Supreme Court echoed the D.C. Circuit's decision in part, however, and expressed the view that, while "[w]e do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, . . . we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes." *Id*. Indeed, finding that "[a] total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city[,]" the Supreme Court found the Display Clause unconstitutional as applied to the public sidewalks surrounding the Supreme Court. *Id*. at 182-84 (explaining that "this is not to say that those sidewalks, like other sidewalks, are not subject to reasonable time, place, and manner restrictions, either by statute or by regulations"). The Supreme Court thus "affirmed" the judgment of the D.C. Circuit "to the extent indicated by [its] opinion" with respect to the Display Clause as applied to the sidewalks surrounding the Court, and "otherwise vacated" the D.C. Circuit's decision without reaching the broader questions of the facial constitutionality of the Display Clause or the statute as a whole. *Id*. at 184.[18]

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[18] The Supreme Court, notably, also refrained from comment about how the D.C. Court of Appeals had thus far construed the statute. The Supreme Court in *Grace II* explained that appellee

Justice Marshall concurred in part and dissented in part with this decision, finding the Display Clause of 40 U.S.C. § 13k "plainly unconstitutional on its face" and asserting that he "would not leave visitors to this Court subject to the continuing threat of imprisonment if they dare to exercise their First Amendment rights once inside the sidewalk." *Grace*

Thaddeus Zywicki consulted with an attorney before distributing handbills regarding oppression in Guatemala on the sidewalk in front of the Supreme Court, and was informed by his attorney "that the Superior Court for the District of Columbia had construed the statute that prohibited leafleting, 40 U.S.C. § 13k, to prohibit only conduct done with the specific intent to influence, impede, or obstruct the administration of justice." *Grace II*, 461 U.S. at 173-74 (citing *United States v. Ebner*, No. M-12487-79 (D.C. Super. Ct. Jan. 22, 1980)). Furthermore, when Zywicki was told he would be arrested if he continued to distribute leaflets, he "complained that he was being denied a right that others were granted, referring to the newspaper vending machines located on the sidewalk." *Id.* at 174. The Supreme Court noted that the *Ebner* case was on appeal pending the outcome of its decision in *Grace II*, but otherwise made no comment regarding the construction of the statute, including the purported intent requirement it attributed to the D.C. Superior Court. *See id*. at 173-74 & n.2. Following *Grace II*, the appeal in the *Ebner* case was evidently dismissed on the "the joint motion of the parties to dismiss appeals[.]" *See* Order, *Turner v. United States*, No. M-5572-79; *United States v.*

Ebner, No. 12487-79 (D.C. undated); Superior Court docket for *United States v. Ebner*, No. M-12487-79 (noting "Order received from the D.C.C.A. dismissing said appeal" on June 15, 1983). As explained below, the D.C. Court of Appeals does not rely on the decision in *Ebner* for its limiting construction of the challenged statute, nor does it currently graft an intent requirement on the challenged statute.

II, 461 U.S. at 185, 188 (Marshall, J., concurring in part and dissenting in part) (emphasis and footnote omitted). More clearly aligning with the D.C. Circuit's decision, Justice Marshall concluded that it "is not a reasonable regulation of time, place, and manner for it applies at all times, covers the entire premises, and, as interpreted by the Court, proscribes even the handing out of a leaflet and, presumably, the wearing of a campaign button as well." *Id*. at 185-86 (citations omitted).

Justice Marshall would thus have found the Display Clause of the statute unconstitutional "[s]ince the continuing existence of the statute will inevitably have a chilling effect on freedom of expression, there is no virtue in deciding its constitutionality on a piecemeal basis." *Id*. at 184; *see also id*. at 187 (noting that the Supreme Court has "repeatedly recognized that a statute which sweeps within its ambit a broad range of expression protected by the First Amendment should be struck down on its face"); *id*. at 188 ("As Justice Brennan stated in his opinion for the Court in [*NAACP v. Button*], First Amendment freedoms 'are delicate and vulnerable' and '[the] threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.'" (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963) (emphasis omitted)).

Following the Supreme Court's decision in *Grace II*, the statute was recodified in 2002 at 40 U.S.C. § 6135 with only minor stylistic changes as part of the revision of Title 40 of the United States Code. *See*

Pub. L. No. 107-217, § 1, 116 Stat. 1183 (2002); H.R. Rep. No. 107-479, at 1-3, reprinted at 2002 U.S.C.C.A.N. 827, 828-29 ("Although changes are made in language, no substantive changes in the law are made."); Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss or in the Alternative, for Summ. J., ECF No. 14 ("Defs.' Mem."), at 5 n.1. After 2004, prosecutions under the statute may occur in the District Court for the District of Columbia in addition to the Superior Court of the District of Columbia, where any prosecutions before 2004 took place. *See* 40 U.S.C. § 6137(b); Declaration of Timothy Dolan ("Dolan Decl."), ECF No. 14-1, ¶ 8.[19]

3. **The District of Columbia Court of Appeals' Limiting Construction of the Assemblages Clause and Upholding of the Challenged Statute**

The Supreme Court's decision in *Grace II* focused only on the constitutionality of the Display Clause in 40 U.S.C. § 13k as applied to the sidewalks surrounding the Supreme Court's grounds, but left unresolved the facial constitutionality of the Display Clause and Assemblages Clause. In a series of subsequent cases, the D.C. Court of Appeals has examined both the Assemblages Clause and the Display Clause of 40 U.S.C. § 13k, and its successor, 40 U.S.C. § 6135, and found both clauses to be

[19] To date, no prosecutions under this statute have occurred in the District Court for the District of Columbia. *See* Dolan Decl. ¶ 8.

constitutional. A review of the decisions, which are not binding on this Court, underscores the extent to which the local courts have struggled to save the challenged statute from constitutional challenge. As with the Capitol Grounds statute, "[t]he local courts of the District of Columbia have . . . felt unable to recognize [the constitutional propriety of the statute] without putting a substantial gloss upon [the statute] by an expansive interpretation of its terms." *Jeannette Rankin Brigade II*, 342 F. Supp. at 585.

At the outset, the government acknowledges, and the D.C. Court of Appeals "recognized[,]" that "the literal language of section 6135 may be read to prohibit *any type* of group activity on the Court grounds, including congregation on the plaza by groups of tourist[s], or even by Court employees." Defs.' Mem. at 7 (emphasis added). Rather than declare the statute, or at least the Assemblages Clause, unconstitutional, however, the D.C. Court of Appeals instead imposed a limiting construction upon the Assemblages Clause to "save it from any possible constitutional challenge." *Id*. Thus, the D.C. Court of Appeals has found the clause constitutional in challenges brought over the last two decades only by adopting a limiting construction of the Assemblages Clause. Notably, in these decisions, the D.C. Court of Appeals has not grappled with the panel decision in *Jeannette Rankin Brigade II* regarding the ineffectiveness of a limiting construction to cure the constitutional defects in the closely analogous Capitol Grounds statute, 40 U.S.C. § 193g, nor the D.C.

Circuit's similar discussion in *Grace I* regarding 40 U.S.C. § 13k.

By contrast to the Assemblages Clause, the local courts have not expressly adopted a limiting construction of the Display Clause. Yet, the local courts' opinions examining the Display Clause follow a long line of cases upholding the constitutionality of the Assemblages Clause, and the statute, because of the limiting construction of the Assemblages Clause.

Indeed, while not binding on this Court, the government urges this Court to accept the D.C. Court of Appeals' limiting construction of the Assemblages Clause before undertaking its constitutional analysis of the statute. *See, e.g.*, Defs.' Mem. at 20-21 (arguing that "[b]ecause there have never been any prosecutions under the statute in federal court, this is, for all practical purposes, the definitive judicial construction of the statute" and asserting that "the District of Columbia courts have had no difficulty in determining that, limited in this way, the statute is not overly broad because it only prohibits the types of activity that are consistent with the legitimate interests it is intended to address" (citation omitted)). This Court thus briefly reviews how the local D.C. courts have construed and limited this statute.

The Court first addresses the Assemblages Clause cases. In *United States v. Wall*, 521 A.2d 1140, 1142 (D.C. 1987), the D.C. Court of Appeals reversed a decision by the trial court that, while Wall's conduct violated 40 U.S.C. § 13k, the application of that

statute to his activity would be unconstitutional because the plaza area and main steps of the Supreme Court are public fora "available for the free expression of ideas under the [F]irst [A]mendment, so long as the Supreme Court is not in session." The D.C. Court of Appeals, while not determining whether the Supreme Court plaza and main entrance steps of the Supreme Court were public or nonpublic fora, found that the Assemblages Clause was both reasonable and viewpoint neutral, and thus constitutional, if the plaza and main entrance steps of the Supreme Court were considered nonpublic fora. *Id*. at 1142, 1144. In addition, the D.C. Court of Appeals concluded this clause was a reasonable time, place, and manner restriction, and thus constitutional, if those areas were considered public fora. *Id*. In doing so, the court concluded that the Assemblages Clause was not overbroad, and, in fact, was "narrowly drawn to serve" the "'significant' governmental interests" articulated by the government in that case – namely (1) "to permit the unimpeded access and egress of litigants and visitors to the Court," and (2) "to preserve the appearance of the Court as a body not swayed by external influence." *Id*. at 1144-45. The court found that these interests were reflected in the statute's provisions and legislative history, which suggested that the purpose of the statute "was to provide for the protection of the building and grounds of the Supreme Court, and of persons and property therein, as well as to maintain proper order and decorum." *Id*. at 1144 n.6 (citing *Grace II*, 461 U.S. at 182). *But see id*. at 1145 (Ferren, J., concurring) (agreeing that the

Assemblages Clause "is not unconstitutional" if the plaza and main entrance steps are considered a nonpublic forum, but "not prepared to say that the blanket prohibition against processions or assemblages . . . amounts to 'reasonable time, place and manner regulations' that 'are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication'" if the plaza and steps are considered a public forum (quoting *Grace II*, 461 U.S. at 177)).

The D.C. Court of Appeals next examined the Assemblages Clause in *Pearson v. United States*, 581 A.2d 347 (D.C. 1990). There, the court considered whether, as the appellants contended, recent Supreme Court precedent following *Wall* – namely *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), *Frisby v. Schultz*, 487 U.S. 474 (1988), and *Boos v. Barry*, 485 U.S. 312 (1988) – meant that section 13k (as well as a separate, related regulation) were "far broader than necessary to achieve any legitimate governmental objectives and consequently fail to meet the narrowly tailored standard." *Pearson*, 581 A.2d at 351 (internal quotation marks omitted). The *Pearson* court concluded that none of these intervening cases altered the court's analysis regarding the constitutionality of the Assemblages Clause. *See id.* at 354-55. The court acknowledged, in response to the appellants' overbreadth claim, that "[s]uch an absolute ban on any group activity is not supported by the government's legitimate and important interests in protecting the integrity of the Court, preventing the appearance of judicial bias, and safeguarding the

Court grounds and personnel." *Id*. at 356-57 (footnotes omitted). Nevertheless, the court confirmed that the Assemblages Clause is, as the *Pearson* trial court and the *Wall* court had found, "susceptible to a narrowing construction, confining the scope of the clause to protection of 'the [Supreme Court] building and grounds and of persons and property within, as well as the maintenance of proper order and decorum,' and 'to preserve the appearance of the Court as a body not swayed by external influence.'" *Id*. at 357 (internal citation omitted) (quoting *Grace II*, 461 U.S. at 182-83; *Wall*, 521 A.2d at 1144); *see also id*. at 358 (noting that "there is no requirement that a limiting construction must be derived from the express language of the statute, merely that the statute itself be susceptible to the narrowing construction"). With that limiting construction, the court concluded that the statute could withstand the appellants' overbreadth challenge. *Id*. at 358-59.

Following *Pearson*, the D.C. Court of Appeals again examined the Assemblages Clause, holding expressly in *Bonowitz v. United States*, 741 A.2d 18, 22 (D.C. 1999), that "the Supreme Court plaza is a nonpublic forum" because of the Supreme Court's "selective process of allowing only certain classes of speakers access to the plaza and requiring individual members of these classes to obtain advance permission[.]" Relying on the "two primary purposes" of section 13k, as articulated in *Wall* – "to permit the unimpeded access and egress of litigants and visitors to the Court, and to preserve the appearance of the Court as a body not swayed by external influence," *id*.

at 23, – the Court of Appeals again found that "'13k's prohibition on processions and assemblages in the plaza area and main entrance steps of the Supreme Court is reasonable'" and viewpoint neutral. *Id.* (quoting *Wall*, 521 A.2d at 1144). Furthermore, relying on *Pearson*'s limiting construction of the Assemblages Clause, the Court of Appeals rejected the appellants' argument that the statute was unconstitutionally vague. *See id.*[20]

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[20] The court also addressed, in a footnote, the trial court's assertion, in dicta, that application of a so-called "tourist standard" may be appropriate for section 13k, although the D.C. Court of Appeals had not yet applied that standard

– employed in rulings brought pursuant to a D.C. Code regulation "dealing with buildings associated with the legislative branch" – in rulings related to section 13k. *See Bonowitz*, 741 A.2d at 23 n.4 (citing *Berg v. United States*, 631 A.2d 394, 398 (D.C. 1993)). The D.C. Court of Appeals has imposed the "tourist standard" in cases involving the U.S. Capitol Rotunda in order "to save content-neutral statutes regulating the time, place, and manner of expression from unconstitutionality in their application." *Berg*, 631 A.2d at 398. The standard "restricts the scope of statutes by penalizing only conduct that is more disruptive or more substantial (in degree or number) than that normally engaged in by tourists and others and routinely permitted." *Id.* (citation and internal quotation marks omitted). In *Bonowitz*, the trial court stated that "'it may be that the terms "order and decorum of the court" necessarily confine themselves to activity more disruptive or more substantial (in degree or number) than normally engaged in by tourists.'" *Bonowitz*, 741 A.2d at 23 n.4. Although the trial court believed that application of the tourist standard seemed "appropriate" for section 13k, the D.C. Court of Appeals declined to apply the standard "[b]ecause of the manifest difference between the legislative branch—which

The D.C. Court of Appeals, as noted, has also addressed the Display Clause. In *Potts v. United States*, 919 A.2d 1127 (D.C. 2007), for example, without relying on the limiting construction used to save the Assemblages Clause from unconstitutionality, the D.C. Court of Appeals found the Display Clause constitutional on its face and as applied to the appellants, who were part of a small group of protestors at the Supreme Court plaza. The court also, *inter alia*, rejected the appellants' claim that the Display Clause was unconstitutionally vague, explaining that "[t]he Supreme Court's decision in *Grace*, coupled with the plain text of the statute, makes it clear that protestors may not demonstrate on the Supreme Court steps and plaza." *Id.* at 1130.

Even more recently, in *Lawler v. United States*, 10 A.3d 122, 126 (D.C. 2010), the D.C. Court of Appeals affirmed convictions under the Display Clause, noting that "[a]ppellants' actions here, in displaying a large banner to convey the message that the death penalty should be abolished, clearly fell within the reach of the statute." Finally, in *Kinane v. United States*, 12 A.3d 23 (D.C. 2011), *cert. denied*, 132 S. Ct. 574, 181 L. Ed. 2d 424 (2011), the D.C. Court of Appeals affirmed the conviction under the Display Clause of appellants

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must be accessible to expressions of popular opinion—and the judicial branch—which renders opinions free from the pressure of popular opinion." *Id.* The trial court's instinct to graft a tourist standard on section 13k simply underscores the overbreadth of the statute.

demonstrating on the plaza and within the Supreme Court building regarding Guantanamo detainees and construed the statute as "prohibit[ing] expression such as picketing, leafleting, and wearing t-shirts with protest slogans because such expression is 'designed . . . to bring into public notice [a] party, organization, or movement[.]'" *Kinane*, 12 A.3d at 27 (quoting *Potts*, 919 A.2d at 1130).

As this discussion reveals, the D.C. courts have for decades affirmed convictions under the challenged statute but without delving deeper into constitutional analysis than did the decisions in *Wall* and *Pearson*. Rather, later D.C. decisions have simply followed in line with *Wall* and *Pearson* in upholding the statute from constitutional challenge. Yet, those earlier decisions, as noted, failed to engage fully with the reasoning of the D.C. Circuit's decision in *Grace I*, which, even if vacated in part, provided a persuasive analysis. They likewise failed to grapple at any length with the panel's decision in *Jeannette Rankin Brigade II*, and the fate of the closely analogous Capitol Grounds statute.

4. **Challenges to Related Regulations in this Jurisdiction**

Other restrictions related to the Supreme Court Building and grounds have also been subject to constitutional scrutiny in this jurisdiction. In 2000, in *Mahoney v. Lewis*, a district court rejected plaintiffs' challenge to the constitutionality of Regulation Six, promulgated by the Marshal of the Supreme Court,

pursuant to 40 U.S.C. § 13l. *See Mahoney v. Lewis*, No. 00- 1325, 2000 U.S. Dist. LEXIS 10348 (D.D.C. June 23, 2000), *aff'd*, No. 00-5341, 2001 U.S. App. LEXIS 4014 (D.C. Cir. Feb. 23, 2001). This regulation sets forth restrictions on the size, composition, and number of signs used to protest and picket outside of the Supreme Court.[21] The court granted summary

[21] In that case, Regulation Six is described as follows:

> Regulation Six states that (1) no signs shall be allowed except those made of cardboard, posterboard, or cloth; (2) supports for signs must be entirely made of wood, have dull ends, may not be hollow, may not exceed three-quarter inch at their largest point, and may not include protruding nails, screws, or bolt-type fastening devices; (3) hand-carried signs are allowed regardless of size; (4) signs that are not hand-carried are allowed only if they are no larger than four feet in length, four feet in width, and one-quarter inch in thickness and may not be elevated higher than six feet; they may not be used so as to form an enclosure of two or more sides; they must be attended by an individual within three feet of the sign at all times; and they may not be arranged in such a manner as to create a single sign that exceeds the four feet by four feet by one- quarter inch size limitations; and (5) no individual may have more than two non-hand-carried signs at any one time. *See* Reg. Six (Pl's Ex. A). The Regulation further provides that "notwithstanding the above, no person shall carry or place any sign in such a manner as to impede pedestrian traffic, access to and from the Supreme Court Plaza or Building, or to cause any safety or security hazard to any person." *Id.* The stated purposes of this Regulation are "to protect

judgment for the defendant, finding, *inter alia*, that Regulation Six was (1) content neutral, (2) narrowly tailored to serve significant government interests, and that it (3) left open ample alternative means of communication. *See Mahoney*, 2000 U.S. Dist. LEXIS 10348, at *11-22. In finding the statute constitutional under the First Amendment, the district court notably emphasized that Regulation Six does not "ban speech entirely," *id*. at *12, but instead constitutes a valid time, place, and manner regulation. While the court asserts broadly that "[a]nyone can protest or picket *outside the Supreme Court* as long as their signs conform to the requirements of Regulation Six[,]" *id*. at *12 (emphasis added), the decision appears to focus only on signage displayed on *public sidewalks* surrounding the Supreme Court, *see id*. ("According to Marshal Bosley's testimony, he enacted Regulation Six because[,]" *inter alia*, "he determined that excessively large signs erected on the Supreme Court sidewalks threaten the safety and security of Court personnel, visitors, demonstrators and pedestrians using the sidewalk."); *id*. at *17 (noting that "Regulation Six serves several significant and

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> the Supreme Court Building and grounds and persons and property thereon, and to maintain suitable order and decorum within the Supreme Court Building and grounds." Any person failing to comply with Regulation Six is subject to a fine and/or imprisonment.

Mahoney v. Lewis, 2000 U.S. Dist. LEXIS 10348, at *2-4.

judicially recognized governmental interests[,]" including "protecting the safety and security of Court personnel, visitors, demonstrators, and pedestrians using the sidewalk, ensuring access and the appearance of access to the Court, allowing passersby and visitors to the Court an unobstructed view of the Court building and maintaining suitable order and decorum within the grounds of the Supreme Court"); *id*. at *20 (noting that the requirement "that the regulation leave open ample alternative channels of communication, is easily met here" because "Plaintiffs may still protest on the sidewalks of the Supreme Court at the time that they prefer, with signs"). Thus, that decision, while similarly related to the display of signage "outside the Supreme Court," did not reference nor contemplate the broader ban on displays of signage, of any size, number, or composition, enshrined in the challenged statute as related to the Supreme Court plaza.[22]

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[22] The *Mahoney* court also rejected the plaintiffs' due process challenge to 40 U.S.C. § 13l, which is now codified with slight stylistic revisions at 40 U.S.C. § 6102, and authorizes the Marshal to "prescribe such regulations, approved by the Chief Justice of the United States, as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds." 40 U.S.C. § 13l(a) (quoted in *Mahoney*, 2000 U.S. Dist. LEXIS 10348, at *2 n.2). In doing so, the court noted correctly that "Section 13[l] was implicitly approved by the Supreme Court in *Grace*, where it noted that Supreme Court sidewalks are 'subject to reasonable time, place, and manner restrictions, either by statute or by regulations issued pursuant

E. The Supreme Court Plaza Today

1. Description of the Supreme Court Plaza

The plaintiff's challenge relates to enforcement of 40 U.S.C. § 6135 on the plaza area outside of the Supreme Court building. Thus, a brief description of the plaza is necessary. The Supreme Court plaza is oval in shape and approximately 252 feet in length from North to South at the largest part of the oval, and approximately 98 feet from East to West from the sidewalk to the steps leading up to the front entrance of the Supreme Court building. *See* Am. Compl. ¶ 11; Pl.'s Ex. 5, ECF No. 18-5, at 1-2 ("The Court Building" from the Supreme Court website, available at http://www.supremecourt.gov/about/courtbuilding.aspx); Defs.' Statement of Material Facts Not in Dispute ("Defs.' Facts"), ECF No. 23, ¶¶ 1-2; Dolan Decl. at ¶¶ 2, 6; *id*. at 5 (drawing of Supreme Court grounds, including plaza). The marble plaza "is separated from the sidewalk between First Street, N.E., and the Supreme Court building grounds by a few small steps which lead up about 3 feet to the plaza." Am. Compl. ¶ 11; *see* Dolan Decl. ¶ 6. "While the perimeter sidewalks are made of concrete, the plaza is made of marble and is visually distinct from the sidewalk." Defs.' Facts ¶ 3; *see* Dolan Decl. ¶ 6. Specifically, the declaration of Timothy Dolan, Deputy Chief of the Supreme Court of the United States Police, states that "[t]he plaza is set off from the front sidewalk by a set

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to 40 U.S.C. § 13[l]." *Mahoney*, 2000 U.S. Dist. LEXIS 10348, at *24.

of eight steps, and a marble wall separates it from the natural space on the North and South sides of the plaza." Dolan Decl. ¶ 6. "Flanking these steps is a pair of marble candelabra with carved panels on their square bases depicting: Justice, holding sword and scales, and The Three Fates, weaving the thread of life." Pl.'s Ex. 5 at 2. "On either side of the plaza are fountains, flagpoles, and benches." *Id*. "The plaza ends with a second set of steps, with thirty-six more steps leading to the main entrance of the Supreme Court." *Kinane*, 12 A.3d at 25 n.1.

The plaza is "open to the public 24 hours a day, except under special circumstances when it is closed by the Marshal," and "[t]he public is free to enter and leave the Supreme Court plaza at all hours." Am. Compl. ¶ 13. Besides its function as a working office building for the Justices of the Supreme Court, and their staff, as well as other Court employees, the Supreme Court attracts numerous tourists, and, in 2011, for example, was host to 340,000 visitors. Dolan Decl. ¶ 2. There is "no gate" or "fence" separating the plaza from other parts of the Supreme Court grounds, Am. Compl. ¶ 14, which "include the area within the curbs of the four streets surrounding the Court, *i.e.*, First Street, N.E.; Maryland Avenue, N.E.; Second Street, N.E.; and East Capitol Street," Dolan Decl. ¶ 3 (citing 40 U.S.C. § 6101(b)).

2. Types of Activities Permitted on Supreme Court Plaza

Pursuant to 40 U.S.C. § 6121, the Marshal of the Supreme Court and the Supreme Court Police have the authority, *inter alia*, "to police the Supreme Court Building and grounds and adjacent streets to protect individuals and property" and "to protect – (A) the Chief Justice, any Associate Justice of the Supreme Court, and any official guest of the Supreme Court; and (B) any officer or employee of the Supreme Court while that officer or employee is performing official duties[.]" Under the authority of 40 U.S.C. § 6135, as limited by case law, the Supreme Court Police have distinguished between the types of activities permitted on the plaza and those permitted on the surrounding sidewalks. Specifically, "demonstrations or other types of expressive activity" on the plaza that are deemed violative of the challenged statute are not permitted. Defs.' Facts ¶¶ 5-6; Dolan Decl. ¶ 7.

While the plaintiff states that the "Supreme Court plaza has historically been used for First Amendment activities," Am. Compl. ¶ 12, the Deputy Chief of the Supreme Court Police disputes this characterization and explains that "some form of expressive activity is allowed on the Supreme Court plaza" only in "two very limited circumstances." Dolan Decl. ¶ 9. These two circumstances are where: (1) "the Court allows attorneys and parties in cases that have been argued to address the media on the plaza immediately following argument[,]" which "typically occurs for less than one hour, and only on the approximately 40 days

each year when the Court hears oral arguments"[23] and (2) "the Court on very limited occasion allows commercial or professional filming on the plaza[,]" in which case "[s]uch filming must be approved by the Court's Public Information Officer, the project in question must relate to the Court, and substantial filming projects are typically authorized only on weekends or after working hours." Dolan Decl. ¶ 9.

If the Supreme Court Police determine that individuals or groups are in violation of section 6135, the police "inform them of the violation and of the fact that they will be arrested if they do not discontinue their conduct or leave the plaza." Defs.' Facts ¶ 7; Dolan Decl. ¶ 7. The Deputy Chief of the Supreme Court Police explains that "[t]ypically, multiple warnings are given to ensure that the individuals understand that their conduct is illegal and have the opportunity to conform their conduct to the law." Dolan Decl. ¶ 7; Defs.' Facts ¶ 7. The Supreme Court Police "have employed substantially this same practice" over the last twenty-five years. Dolan Decl. ¶ 7.

Sidewalks surrounding the Supreme Court grounds do not fall within these limitations, because the Supreme Court has held that the Supreme Court's perimeter sidewalks are a public forum and that

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[23] In that case, "[m]embers of the media must have press credentials issued or recognized by the Supreme Court's Public Information Office to participate in this session, which occurs near the sidewalk on the southern portion of the plaza." Dolan Decl. ¶ 9.

section 6135's restrictions "are unconstitutional as applied to those sidewalks." Dolan Decl. ¶ 5 (citing *Grace II*, 461 U.S. 171). Accordingly, the Supreme Court Police "do not enforce section 6135 on the perimeter sidewalks[,]" and "[v]arious forms of demonstrations and protest regularly occur on the perimeter sidewalk directly in front of the Court." Dolan Decl. ¶ 5; Defs.' Facts ¶ 4. If the Supreme Court Police are in contact "with representatives of organizations planning to protest at the Court, those individuals are typically informed that they have the right to demonstrate on the sidewalk, but not elsewhere at the Court." Dolan Decl. ¶ 5.

It is against this backdrop, where the challenged statute and its precursors have already been subject to extensive scrutiny and notable disfavor, that the plaintiff brings his constitutional challenge.

II. LEGAL STANDARD

Since the Court relies on materials outside the pleadings to resolve the plaintiff's claim, the Court applies the standard for summary judgment. Specifically, the Court has relied upon Deputy Chief Dolan's declaration describing the Supreme Court plaza and the enforcement policies and practices of the Supreme Court police in connection with the challenged statute.

Federal Rule of Civil Procedure 56 provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment

as a matter of law." FED. R. CIV. P. 56(a). The burden is on the moving party to demonstrate that there is an "absence of a genuine issue of material fact" in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In ruling on a motion for summary judgment, the Court must draw all justifiable inferences in favor of the nonmoving party and shall accept the nonmoving party's evidence as true. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Estate of Parsons v. Palestinian Auth.*, 651 F.3d 118, 123 (D.C. Cir. 2011); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

The Court is only required to consider the materials explicitly cited by the parties, but may on its own accord consider "other materials in the record." FED. R. CIV. P. 56(c)(3). For a factual dispute to be "genuine," *Estate of Parsons*, 651 F.3d at 123, the nonmoving party must establish more than "[t]he mere existence of a scintilla of evidence" in support of its position, *Anderson*, 477 U.S. at 252, and cannot simply rely on allegations or conclusory statements, *see Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *See Anderson*, 477 U.S. at 250. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50 (citations omitted).

While the only pending motion was filed by the defendants, and there is no pending motion filed by the plaintiff, since there are no genuine issues of

material fact, and the defendant believes the record before the Court is "adequate" for this Court to resolve a facial challenge, *see* Tr. at 50-51 ("This is a facial challenge, and the record before the [C]ourt is adequate. . . . [W]e don't need discovery."), the Court shall exercise its authority to resolve this matter on the defendants' motion. *See* FED. R. CIV. P. 56(f) ("After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant"). Pursuant to Federal Rule of Civil Procedure 56(f), the Court provided the parties notice and a reasonable time to respond as to "why the Court should not grant summary judgment to the nonmoving plaintiff, who has not moved for summary judgment, under Federal Rule of Civil Procedure 56(f) if there is no genuine dispute of fact on a given claim." Minute Order (May 22, 2013). As the plaintiff indicates correctly, the defendants have previously "argued that the record is 'adequate' and [have] pointed to no adjudicative facts that are in dispute." Pl.'s Resp. to Defs.' Resp. to the Court's Order to Show Cause, ECF No. 24 ("Pl.'s Resp."), at 5-6.[24] The Court

[24] In their response to the Court's minute order, the defendants did not "speculat[e] about what particular facts the Court may view as material," and suggested a "better course" for the Court: (1) "Plaintiff [could] file a formal motion for summary judgment along with a statement of material facts that are not in genuine dispute[,]" or, alternatively, (2) "the Court could issue an opinion ruling on Defendants' pending motion to dismiss" and "issue an order to show cause why summary judgment in [the plaintiff's] favor should not be entered[,]" so that "Defendants would be able to take an informed position on the issue because they would know which facts this Court views as material." Defs.' Resp. to

therefore concludes that resolving this matter on the defendants' motion and granting the nonmoving plaintiff summary judgment is appropriate.

III. DISCUSSION

The plaintiff challenges 40 U.S.C. § 6135 both on its face and as applied. In his Amended Complaint, he raises five claims. Specifically, he claims that both the Assemblages Clause and Display Clause of the statute (1) are facially unconstitutional under the First Amendment (Count I), (2) are overbroad and violate the First and Fifth Amendments (Count II), and (3) are unconstitutional under the First and Fifth Amendments because they are void for vagueness (Count III). The plaintiff also claims that the Display Clause of the statute is unconstitutional (4) under the

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Order to Show Cause, ECF No. 21 ("Defs.' Resp."), at 2-3. The defendants also expressed concern about the plaintiff's filing of an "errata" to his Opposition brief the night before oral argument, including exhibits "that were presumably intended to lend support to various factual assertions made in that brief." *Id.* at 2. Nothing in the defendants' response persuades the Court that a different "course" is more appropriate here, however. Since the Court does not believe that there are any issues of material fact, and the defendants earlier acknowledged on the record at the oral argument that the record in this case was "adequate" to evaluate the plaintiff's facial challenge, *see* Tr. at 50-51, granting summary judgment for the nonmovant is both well within this Court's discretion pursuant to Federal Rule of Civil Procedure 56(f) and the best course here. Furthermore, as the plaintiff notes, the non-record exhibits filed in his errata were all "previously cited in Plaintiff's brief." Pl.'s Resp. at 5. Thus, the defendants already had an opportunity to address these exhibits in their Reply brief in support of the instant motion.

First Amendment, because, as applied, it "discriminates in favor of corporate speech and against political speech," and "discriminates in favor of speech supportive of the United States government and the Supreme Court and against speech critical of the United States government and the Supreme Court," (Count IV), and (5) under the Fifth Amendment because, as applied, "it discriminates in favor of [the] United States government, litigants before the Supreme Court, and their attorneys, as speakers, and against private citizens as speakers." (Count V). Am. Compl. at 8-9.

In moving to dismiss the claim or, in the alternative, for summary judgment, the defendants argue, *inter alia*, that because the Supreme Court plaza is a "nonpublic forum" under First Amendment forum analysis, restrictions on speech activity must only be "reasonable and content-neutral," criteria the statute easily satisfies under the limiting construction adopted by the Court of Appeals in *Pearson v. United States*, 581 A.2d 347 (D.C. 1990). *See* Defs.' Mem. at 1, 17-29. For the reasons explained below, the Court disagrees, rejects the defendants' invitation to accept the D.C. Court of Appeals' limiting construction, or to create its own, and finds the statute unconstitutional as unreasonable and overbroad under the First Amendment, and void.[25] The Court addresses below

[25] Since the Court finds the statute plainly unconstitutional on its face as unreasonable and overbroad, as alleged in Counts I and II of the Amended Complaint, it ends its analysis there and declines to reach the plaintiff's other claims, namely Count II as related to the Fifth Amendment and Counts III through V. The

(1) the scope of the plaintiff's challenge to, and this Court's review of, the statute, (2) a forum analysis of the Supreme Court plaza, and (3) the other considerations – namely, that the statute is substantially overbroad and not susceptible to a limiting construction – that ultimately require this Court to find 40 U.S.C. § 6135 unconstitutional on its face.

A. **The Scope of the Plaintiff's Challenge and this Court's Review**

As a preliminary matter, the Court must address the scope of the plaintiff's challenge to the statute at issue and the plaintiff's standing to raise these claims. While neither of the parties explicitly addressed these issues in their briefs, the defendants suggested at oral argument that "[i]t might be possible" for the Court to "construe the complaint" to find that the plaintiff does not have standing to raise a claim regarding the Assemblages Clause. *See* Tr. at 18-19. It appears to be undisputed that the plaintiff's conduct is covered by the Display Clause of the statute. *See* Defs.' Reply in Supp. of Mot. to Dismiss or in the Alternative, for Summ. J. ("Defs.' Reply"), ECF No. 17, at 15 (explaining that "[t]his plaintiff was arrested for wearing a sign that protested against the treatment of minority groups by police"); *id.* at 15-16 (commenting that "[n]o one of common intelligence

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Court also denies the plaintiff's request for discovery made on the record at the April 26, 2013 oral argument, *see* Tr. 30-33, as discovery is unnecessary to rule on the plaintiff's facial challenge.

could doubt that the sign he wore violated the statute").[26]

The government's suggestion at oral argument that the plaintiff may lack standing to challenge the Assemblages Clause and that the Court limit its review to the Display Clause as the Supreme Court did in *Grace II*, *see* Tr. at 19, must be rejected for at least two reasons. First, unlike in *Grace II*, the plaintiff here was formally charged in the Information with violation of the statute as a whole, and the plaintiff has expressed his intent to return with a group to assemble on the plaza in violation of the Assemblages Clause. *See* Am. Compl. ¶ 29 ("In addition to wearing a sign while on the Supreme Court Plaza as he did before, Mr. Hodge also desires to return to the plaza area in front of the Supreme Court building and picket, hand out leaflets, sing, chant, and make speeches, either by himself or with a group of like-minded individuals."). His challenge to the constitutionality of the statute as a whole is therefore properly before the Court. *See, e.g.*, *Lederman v. United States*, 291 F.3d 36, 41 (D.C. Cir. 2002) (plaintiff had standing to challenge entire regulation given his arrest for leafleting and his "intent to return . . . to engage in other expressive

[26] Although the plaintiff did "stand," a term used in the Assemblages Clause, he did not do so in a "procession[] or assemblage[][,]" which requires a group or at least more than one person. *See Grace I*, 665 F.2d at 1207 (MacKinnon, J., dissenting in part and concurring in part) (stating that the Assemblages Clause "applies to group activity only" and not "solitary conduct").

activity[,]" through which he "established a 'distinct and palpable' threat of future and 'direct injury'—arrest" (quoting *Meese v. Keene*, 481 U.S. 465, 472 (1987))).

These facts are notably in contrast to the facts underlying the Supreme Court's decision in *Grace II* to limit its review to the Display Clause of the statute. There, the plaintiffs had not been arrested or charged, but only threatened with arrest; each was threatened with arrest on separate days while handing out leaflets or wearing a sign alone, and only on the sidewalk in front of the Supreme Court. The Supreme Court clarified that while the D.C. Circuit "purport[ed] to hold § 13k unconstitutional on its face," that decision "must be read as limited" to the Display Clause because "[e]ach appellee appeared individually on the public sidewalks to engage in expressive activity, and it goes without saying that the threat of arrest to which each appellee was subjected was for violating the prohibition against the display of a 'banner or device.'" *Id*. at 175 & n.5. Absent a formal charging instrument specifying the precise clause of the statute that the plaintiffs were accused of violating, the Supreme Court cabined its review to the precise facts underlying the constitutional challenge, which the Court found limited to enforcement of the Display Clause on the sidewalks surrounding the Supreme Court. *Id*. at 183.

Second, the expressive activities prohibited by the Assemblages Clause and Display Clause are related, or "intertwined," and require the same analysis. *See,*

e.g., *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2985 (2010) (noting that "speech and expressive-association rights are closely linked" and "[w]hen these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association" (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (understanding associational freedom as "implicit in the right to engage in activities protected by the First Amendment")). Thus, while the Court considers the Assemblages Clause and Display Clause separately, the Court's analysis is essentially the same.

B. **Forum Analysis**

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Thus, the Supreme Court has warned that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* Nonetheless, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without

regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799-800 (1985). Acknowledging that the government, "'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,'" *id*. at 800 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)), the Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes[,]" *id*. Consequently, the defendants urge the Court to conduct a forum analysis of the Supreme Court plaza as the threshold issue in evaluating the constitutionality of the statute, and to find "that the Supreme Court plaza is a nonpublic forum under First Amendment analysis." Defs.' Reply at 2.

In conducting a forum analysis, the Court "proceed[s] in three steps: first, determining whether the First Amendment protects the speech at issue, then identifying the nature of the forum, and finally assessing whether the [government's] justifications for restricting . . . speech 'satisfy the requisite standard.'" *Mahoney v. Doe*, 642 F.3d 1112, 1116 (D.C. Cir. 2011) (quoting *Cornelius*, 473 U.S. at 797). For purposes of this analysis, government property is divided into three categories – traditional public forum, designated public forum, and nonpublic forum. *Id*. The category "determines what types of restrictions will be permissible" on that property.

Initiative & Referendum Inst. v. U.S. Postal Serv., 685 F.3d 1066, 1070 (D.C. Cir. 2012) (hereinafter, "*Initiative & Referendum Inst. II*"). First, a traditional public forum, such as a public street or park, is government property "that has 'by long tradition or by government fiat . . . been devoted to assembly and debate.'" *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see also Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) ("[W]e have repeatedly referred to public streets as the archetype of a traditional public forum, noting that time out of mind public streets and sidewalks have been used for public assembly and debate." (internal quotation marks and citations omitted)). Any restriction based on the content of speech in a public forum "must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Christian Legal Soc'y Chapter of the Univ. of Cal.*, 130 S. Ct. at 2984 n.11 (internal quotation marks and citations omitted); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (noting that in a traditional public forum, "[r]easonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest" (citations omitted)). Second, a designated public forum is "property that 'the State has opened for use by the public as a place for expressive activity.'" *Initiative & Referendum Inst. II*, 685 F.3d at 1070 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45). "[S]peech restrictions in

such a forum are subject to the same strict scrutiny as restrictions in a traditional public forum." *Christian Legal Soc'y Chapter of the Univ. of Cal.*, 130 S. Ct. at 2984 n.11 (internal quotation marks and citation omitted). Finally, a nonpublic forum is "'not by tradition or designation a forum for public communication.'" *Initiative & Referendum Inst. II,* 685 F.3d at 1070 (quoting *Perry Educ. Ass'n*, 460 U.S. at 46). In a nonpublic forum, the government "may 'reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id*. (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

Thus, if the Court concludes that the Supreme Court plaza is a "nonpublic forum," as the defendants urge, "it is . . . black-letter law that . . . the government . . . can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188-89 (2007). As a nonpublic forum, the government would have the most leeway in limiting access to the plaza for otherwise protected expressive activity. Indeed, "[l]imitations on expressive activity conducted on this last category of property must survive only a much more limited review" than would be the case for public or designated public fora. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

In contrast, the plaintiff argues that the Court should not allow "forum analysis to trump traditional principles of First Amendment jurisprudence where, as here, the restriction at issue is an absolute ban on a broad category of protected speech, rather than a narrow time, place, or manner regulation." Pl.'s Opp'n to Defs.' Mot. to Dismiss or in the Alternative, for Summ. J. ("Pl.'s Opp'n"), ECF No. 15, at 4. In this regard, the plaintiff echoes the view that "courts must apply categories such as 'government speech,' 'public forums,' 'limited public forums,' and 'nonpublic forums' with an eye toward their purposes — lest we turn 'free speech' doctrine into a jurisprudence of labels." *Pleasant Grove City*, 555 U.S. at 484 (Breyer, J., concurring). "Consequently, we must sometimes look beyond an initial categorization . . . to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective." *Id*. In any event, the plaintiff contends that, even assuming the Supreme Court plaza is a nonpublic forum, both the Assemblages Clause and the Display Clause are unconstitutional. Pl.'s Opp'n at 14-15, 30. The Court agrees with the plaintiff.

1. **The Plaintiff's Speech is Protected by the First Amendment**

As a preliminary matter, this Court must "determin[e] whether the First Amendment protects the speech at issue." *Mahoney*, 642 F.3d at 1116 (citing *Cornelius*, 473 U.S. at 797). In this case, the plaintiff stood on the Supreme Court plaza with a sign

reflecting a message that the U.S. government sanctions the adverse treatment of "African Americans and Hispanic People" in order "to engage in expression on a political matter of public interest and importance and to raise public awareness about" this issue. Am. Compl. ¶ 18. "There is no doubt that as a general matter peaceful picketing[,]" as the Court will construe the plaintiff's standing with a sign, is an "expressive activit[y] involving 'speech' protected by the First Amendment." *Grace II*, 461 U.S. at 176 (collecting cases). Moreover, the message reflected on the plaintiff's sign was speech addressing a matter of public concern, which "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder*, 131 S. Ct. at 1215 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations marks omitted)) (holding that the First Amendment affords such speech special protection because "speech concerning public affairs is more than self-expression; it is the essence of self-government" (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (internal quotations omitted)).

2. **Assumption That The Supreme Court Plaza Is A Nonpublic Forum**

The Court next turns to "identifying the nature of the forum" at issue. *Mahoney*, 642 F.3d at 1116 (citing *Cornelius*, 473 U.S. at 797). The defendants, as noted, vehemently urge the Court to follow the lead of the D.C. Court of Appeals and conclude that the Supreme Court plaza is a "nonpublic forum," which would permit the government to place restrictions on

expressive activity so long as the restriction is "reasonable" and "viewpoint neutral." Defs.' Mem. at 17. The defendants advance five separate arguments in support of their contention that "[t]he policies and historical usage of the Supreme Court plaza make clear that it is a nonpublic forum, as the District of Columbia Court of Appeals has consistently found." *Id*. at 11. First, the defendants highlight the history of the Supreme Court plaza, and point out that the Supreme Court plaza has not been used for assembly, communication between citizens, and the discussion of public questions since at least 1949 when 40 U.S.C. § 13k was enacted. *Id*. at 12. Moreover, the defendants argue that the two instances when the Supreme Court allows limited expression on the Supreme Court plaza – first, when attorneys and parties in a case before the Court are permitted to address the media after oral argument in the case, and, second, when the Supreme Court allows filmmakers to film on the plaza – "do not alter [the plaza's] character as a nonpublic forum, since they are a far cry from the type of demonstration in which [the plaintiff] in this case was engaged." *Id*. at 14. Second, the defendants indicate that the current and past practice of the Supreme Court police, in determining whether a particular activity is permitted on the Supreme Court plaza, is to "look to the language of section 6135, utilizing the narrowing construction of the Assemblages Clause that has been adopted by the District of Columbia courts." *Id*. at 12. Third, the defendants aver that the "physical nature" of the Supreme Court plaza also supports their theory that it is a nonpublic forum. *Id*. at 13. They point out

that the plaza is set off from the perimeter sidewalks by eight steps, and both the steps and the plaza are made of marble stone, in contrast to the concrete steps "which are made of concrete like many other sidewalks throughout the city[,]" such that "even a casual observer would have no difficulty recognizing that this grand plaza is a very different type of space from the typical sidewalk throughout the rest of the city of Washington." *Id*. (citing *Oberwetter v. Hilliard*, 639 F.3d 545, 552-53 (D.C. Cir. 2011) (holding that the inside of the Jefferson Memorial is a nonpublic forum in part based on the physical characteristics of the space). The defendants argue, furthermore, that a finding that the Supreme Court plaza is a "nonpublic forum" is consistent with the Supreme Court's decision in *Grace II* that the sidewalks surrounding the Supreme Court are public fora, and that the Supreme Court's "carv[ing] out" of the perimeter sidewalks in *Grace II*, while declining to apply the same reasoning to the plaza, suggests that the Supreme Court recognized the differences between the plaza and sidewalk. *Id*. at 13-14. Fourth, the defendants argue that there is a longstanding and important recognized interest "in protecting the appearance of the courts as free from outside influence or the appearance from such influence." *Id*. at 13 (citing *Cox II*, 379 U.S. 559, 562 (1965)). Finally, the defendants point to the long-standing conclusion of the D.C. Court of Appeals' courts, which have found that the Building and grounds of the Supreme Court are nonpublic fora. *Id*. at 6 (citing *Lawler v. United States*, 10 A.3d 122, 124 (D.C. 2010), *Potts v. United*

States, 919 A.3d 1127, 1129 (D.C. 2007), and *Bonowitz v. United States*, 741 A.2d 18, 22 (D.C. 1999)).

The plaintiff, by contrast, warns of the "limited utility" of forum analysis. Pl.'s Opp'n at 3 (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984)). In particular, the plaintiff urges the Court to reject the "circular logic" that could be created by relying on the statute's ban on expressive activity, which has worked effectively over the past 60 years to squelch such activity on the Supreme Court plaza, to "constitute a reason in itself for determining that a forum is nonpublic." Pl.'s Opp'n at 3. The plaintiff argues that the Court should "eschew the use of the labels 'public' or 'nonpublic' in order to avoid addressing the question of whether the legislation is supported by a sufficient governmental interest which outweighs the public's First Amendment rights." *Id*. at 4. If the Court does engage in forum analysis, however, the plaintiff argues that the plaza is either a traditional or designated public forum "[b]ased on its history, uses, status, and characteristics." *Id*. at 6-7. Moreover, the plaintiff argues that even if the plaza is considered "a nonpublic forum or not a forum at all," the statute is still facially unconstitutional. *Id*. at 14, 30.

The Court assumes, without deciding, that the Supreme Court plaza is a nonpublic forum. The defendants' arguments that the plaza is a nonpublic forum "because traditionally it has not been a place of public assembly, communication and discourse, and

its physical characteristics separate it clearly from the nearby sidewalks where expressive activity is lawful[,]" Defs.' Mem. at 17, all weigh in favor of a decision that the plaza is a nonpublic forum. Nevertheless, these factors – including traditional physical characteristics – are not dispositive here. The Court is mindful that this "tradition" is largely due to the enforcement of the challenged statute's absolute ban on expressive conduct in the form of assembling and displays on the plaza and, therefore, this history is to a significant extent artificially induced and should not itself be a basis for characterizing the property as a nonpublic forum. [27] Moreover, the physical features of the Supreme Court plaza – with its long benches and fountains and wide open space in front of an iconic American building open to the public

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[27] That the Supreme Court plaza has been subject to a statute banning expressive activity, which is now challenged as unconstitutional, for much of its existence makes the forum analysis more difficult than if this regulation had been imposed on an area which earlier was unregulated by this statute for any significant period of time. This is unlike the situation the Supreme Court faced in *Grace II*, when it focused only on the application of the statute to public sidewalks, which were, by tradition, public before the enactment of 40 U.S.C. § 13k. *See, e.g*, Robert C. Post, Melville B. Nimmer Symposium, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987) (explaining that "public forum status is determined as of the situation prior to the attempted regulation of the resource" and, "[o]n no account, therefore, would the statute at issue in *Grace* be determinative of the public forum status of the Court's sidewalks"). Given the length of time that the challenged statute has been in effect for the Supreme Court plaza, the precise nature of the forum is more difficult to untangle.

– suggest a more welcoming invitation to the public and public expression than is suggested by the defendants or the statute. Certainly, unless told otherwise, it seems clear the public believes that the Supreme Court plaza is a public forum. *See, e.g.*, Pl.'s Opp'n at 8 n.13 (quoting website news source noting that "the Supreme Court plaza has become the public square as justices weigh in on the constitutionality of President Barack Obama's health care law" (citation omitted)).[28] In this case, however, categorizing the Supreme Court plaza as a public or nonpublic forum is not necessary. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 738 (1990) (Kennedy, J., concurring) (finding it unnecessary "to make a precise determination whether this sidewalk and others like it are public or nonpublic forums" where the "regulation at issue meets the traditional standards we have applied to time, place, and manner restrictions of protected expression"); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299,

[28] The defendants rely heavily on *Oberwetter* for their theory that the physical characteristics of the Supreme Court plaza weigh in favor of a conclusion that it is a nonpublic forum. *See, e.g.*, Defs.' Mem. at 13, 17. The Court notes, however, that the D.C. Circuit in *Oberwetter* repeatedly emphasized the nature of the Jefferson Memorial as a "memorial" in concluding that the interior of the monument was a nonpublic forum. That case is thus distinguishable from the instant case, which challenges a statute banning expressive conduct in an open area in front of the Supreme Court Building, which is not a memorial but a symbol of and setting for legal debate about the key issues at stake for the country. Furthermore, as explained *infra*, the regulation at issue in *Oberwetter* is also distinguishable from the statute challenged here.

1313 (D.C. Cir. 2005) (hereinafter, "*Initiative & Referendum Inst. I*"). Even if the Court were to conclude that the plaza is a nonpublic forum, the absolute ban on speech set forth in 40 U.S.C. § 6135 is not reasonable and, thus, the Court concludes that the [government's] "justifications for restricting . . . speech" on the Supreme Court plaza simply do not "'satisfy the requisite standard.'" *Mahoney*, 642 F.3d at 1116 (quoting *Cornelius*, 473 U.S. at 797).[29]

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[29] Judge Silberman's concurrence in a case related to demonstrations on the Capitol grounds counsels in favor of declining to decide the nature of the Supreme Court plaza. Noting that his panel was "certainly bound" by *Jeannette Rankin Brigade II*, in which the panel recognized the Capitol Grounds as a public forum, he suggested that it was possible that the Supreme Court could decide otherwise if the Court granted *certiorari*. In so doing, he referred specifically to the Court's consideration of the precursor to the challenged statute in *Grace II*, noting that it is "distinctly possible" that the Court's decision in *Grace II*, "particularly the Court's implicit rejection of Justice Marshall's position that the whole of the Supreme Court's grounds are a traditional public forum, betokens a more sympathetic reception to the government's arguments" (presumably referring to the government's arguments that the East Front Sidewalk within the Capitol Grounds is a nonpublic forum). *Lederman v. United States*, 291 F.3d 36, 48 (D.C. Cir. 2002) (Silberman, J., concurring) (noting that "[t]o be sure, *Jeannette Rankin Brigade* was summarily affirmed, but the Court rarely considers itself bound by the reasoning of its prior opinions . . . let alone a summary affirmance."). Since the Court finds the challenged statute unreasonable, deciding whether the Supreme Court plaza is by nature a "nonpublic forum" is unnecessary.

3. The Challenged Statute Is Not A Reasonable Limitation on Speech

"The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Id.* at 811. In assessing whether a regulation is reasonable, the Court must examine whether "it is consistent with the government's legitimate interest in maintaining the property for its dedicated use." *Initiative & Referendum Inst. II*, 685 F.3d at 1073; *see also Greer*, 424 U.S. at 836 ("'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" (citation omitted)). In this regard, the restriction "'need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.'" *Id.* (quoting *Cornelius*, 473 U.S. at 808).

Here, the defendants argue that the statute is plainly a "reasonable limitation on speech" because it is based on "two significant interests that are furthered by the statute[,]" namely, first, "permitting the unimpeded ingress and egress of visitors to the Court," and, second, "preserving the appearance of the Court as a body not swayed by external influence." Defs.' Mem. at 18. The defendants point to the D.C. Court of Appeals' recognition of these two significant

government interests in finding the statute reasonable, and argue that this Court should as well. Defs.' Mem. at 18-19.

The Court disagrees. First, the Court does not find that an interest in allowing "unimpeded ingress and egress" of visitors to the Court is a sufficiently significant interest to justify the absolute prohibition on expressive activity on the plaza enshrined in the two clauses of the statute. The statute encompasses not only a ban on activity that actually impedes ingress and egress, and/or is intended to impede ingress and egress, but also bans a variety of other unobtrusive actions ranging from the assembling of groups of two or more individuals on a bench on one side of the plaza, an individual standing in one place holding a sign of limited size, or the display of political messages on a T-shirt by one individual or a group of individuals all wearing the same T-shirt. *See* Tr. at 24-27. A broad prohibition of expressive activity of this nature is simply not "reasonable in light of," *Perry*, 460 U.S. at 49, the government's stated purpose of providing for "unimpeded ingress and egress." While the restriction need not be "'the most reasonable or the only reasonable limitation[,]'" it must be reasonable, *Initiative & Referendum Inst. II*, 685 F.3d at 1073 (quoting *Cornelius*, 473 U.S. at 808). This restriction is not reasonable, just as the D.C. Circuit determined a ban on pure solicitation in a nonpublic forum was not reasonable. *See Initiative & Referendum Inst. II*, 685 F.3d at 1073; *Initiative & Referendum Inst. I*, 417 F.3d at 1315 ("It is clear that a broadscale prohibition against asking postal patrons to sign petitions at

other locations, whether such requests are made verbally or in distributed pamphlets, is unconstitutional even if all postal properties are nonpublic forums.").

Second, the Court is also not convinced that the statute furthers the second "significant" government interest proffered by the defendants, namely "preserving the appearance of the Court as a body not swayed by external influence." Defs.' Mem. at 18. In support of their argument that section 6135 furthers this interest, and is thus reasonable, the defendants indicate that the "Supreme Court has explained that a state 'has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create.'" *Id.* (quoting *Cox II*, 379 U.S. at 562). But the challenged statute, which is plainly distinguishable from the statute at issue in *Cox II* because, for example, it does not include an intent requirement, not only covers people assembling on the plaza for picketing but also people assembling for any other reason, and with no intention of picketing or exerting any influence on the Supreme Court. It is hard to imagine how tourists assembling on the plaza wearing t-shirts bearing their school's seal, for example, could possibly create the appearance of a judicial system vulnerable to outside pressure. While there may be a legitimate interest in protecting the decorum of the judiciary, the challenged statute is not a reasonable way to further that interest.

As the D.C. Circuit concluded decades ago, "[w]hile public expression that has an intent to influence the administration of justice may be restricted, ... Congress has accomplished that result with a more narrowly drawn statute, 18 U.S.C. § 1507, that is fully applicable to the Supreme Court grounds." *Grace I*, 665 F.2d at 1194 (citation omitted). The D.C. Circuit in *Grace I* was "unable to find any other significant governmental interest to justify the absolute prohibition of all expressive conduct contained in section 13k," *id*., and thus held this precursor statute to 40 U.S.C. § 6135 "unconstitutional and void," *id*. Even assuming the plaza is a nonpublic forum, where "the government need not adopt the most narrowly tailored means available," *Initiative & Referendum Inst. II*, 685 F.3d at 1073, this Court believes that the D.C. Circuit's reasoning in *Grace I* is still instructive, and finds that none of the asserted governmental interests justifies the absolute ban on expressive activity enshrined in the statute, regardless of whether this area, which members of the public are free to visit, is considered a public or nonpublic forum. *See, e.g.*, *Grace II*, 461 U.S. at 184 (Marshall, J.) (concurring in part and dissenting in part) (concluding that 40 U.S.C. § 13k is unconstitutional on its face and noting that "[w]hen a citizen is in a place where he has every right to be, he cannot be denied the opportunity to express his views simply because the Government has not chosen to designate the area as a forum for public discussion" (internal citation and quotation marks omitted)); *Initiative & Referendum Inst. II*, 685 F.3d at 1069 (explaining that "[e]ven in nonpublic

forums restrictions must be reasonable, and a ban on merely asking for signatures" in a nonpublic forum "would not be" (citing *Initiative & Referendum Inst. I*, 417 F.3d at 1314-16)); *Initiative & Referendum Inst. I*, 417 F.3d at 1315 (explaining that the Supreme Court has "repeatedly held absolute bans on pamphleteering and canvassing invalid, whether applied to nonpublic governmental forums or to private property, because of their substantial overbreadth" (footnotes omitted)).

"The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 811. Yet, it cannot possibly be consistent with the First Amendment for the government to so broadly prohibit expression in virtually any form in front of a courthouse, even the Supreme Court, in the name of concerns about "ingress and egress" and "preserving the appearance of the Court as a body not swayed by external influence." Thus, even accepting the defendants' argument that the Supreme Court plaza is a nonpublic forum, "in light of the purpose of the forum and all the surrounding circumstances," *id.* at 809, the Court finds the statute unreasonable as untethered to any legitimate government interest or purpose. As explained in more detail below, the statute is also substantially overbroad, and not susceptible to a limiting instruction, and thus

unconstitutional on its face and void as applied to the Supreme Court plaza.[30]

It is worth pausing here to address the extent to which this Court is bound by the D.C. Circuit's decision in *Grace I*, and the decision of the three-judge panel in *Jeannette Rankin Brigade II*, which was summarily affirmed by the Supreme Court. In both cases, as explained *supra*, the panels found the language of the challenged statute – in the form of the precursor to the Supreme Court statute and in the form of the Capitol Grounds statute, respectively – unconstitutional. While both of these panels were clear in their disdain for the broad prohibition on expressive activity enshrined in the language of this statute, the Supreme Court in *Grace II* (1) limited its own holding to the Display Clause as applied to the sidewalks surrounding the Supreme Court, even though it had earlier summarily affirmed the panel's decision in *Jeannette Rankin Brigade II*, declaring void the entire Capitol Grounds statute, and (2) affirmed the D.C. Circuit's *Grace I* decision only to the extent that it held the Display Clause unconstitutional as applied to the sidewalks surrounding the Supreme Court, and otherwise vacated the decision. *See Grace II*, 461 U.S. at 183-84. Notably, however, in declining to reach the facial constitutionality of the statute, the Supreme Court did not reverse *as wrong* any of the D.C. Circuit's

[30] Since the Court finds the statute unreasonable, it need not reach the question of whether the statute is "viewpoint- neutral" in this forum analysis discussion.

reasoning in *Grace I*. In light of this guidance from the Supreme Court, this Court finds that it is not bound by the D.C. Circuit's opinion in *Grace I*, nor the Supreme Court's summary affirmance of the three-judge panel in *Jeannette Rankin Brigade*, related to a similar but different statute. Nevertheless, this Court finds the reasoning in these decisions persuasive and instructive as it proceeds with an analysis of the overbreadth of the challenged statute.

C. **The Challenged Statute is Overbroad in Violation of the First Amendment**

The challenged statute fails not only the forum analysis test as an unreasonably over- broad restriction on expressive activity, even in a nonpublic forum, to further the dual governmental interests of unobstructed access to, and the maintenance of order and decorum at, the Supreme Court plaza, but also "'a second type of facial challenge,' whereby 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.'" *United States v. Stevens*, 130 S. Ct. 1577, 1591-92 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)); *Initiative & Referendum Inst. I*, 417 F.3d at 1312-13 (explaining that the "overbroad" analysis is "the rule for facial challenges brought under the First Amendment"). Such a showing "'suffices to invalidate *all* enforcement of that law.'" *Initiative & Referendum Inst. I*, 417 F.3d at 1313 (quoting *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003)).

To prevail on a facial overbreadth theory under the First Amendment, "particularly where conduct and not merely speech is involved," a plaintiff must show that a challenged law prohibits a "real" and "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973); s*ee also Members of City Council of Los Angeles*, 466 U.S. at 796, 800-01 (acknowledging that "[t]he concept of 'substantial overbreadth' is not readily reduced to an exact definition[,]" but it generally requires "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court"); *Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975) (since invalidation may result in unnecessary interference with a state regulatory program, "a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts").

The Supreme Court has "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech — especially when the overbroad statute imposes criminal sanctions." *Virginia*, 539 U.S. at 119; *see also Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) ("Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct

may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court -- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'" (citation omitted)). When people "choose simply to abstain from protected speech" to avoid the risk of criminal penalties, the harm is not only to themselves "but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia*, 539 U.S. at 119.

Obviously, both analyses, *i.e.,* whether the challenged statute suffers from unconstitutional overbreadth and whether it is an unreasonable restriction even if the plaza were a nonpublic forum, require examination of the overbreadth of the statute. "Before applying the 'strong medicine' of overbreadth invalidation," *id.*, the facial overbreadth analysis further requires an assessment of whether that overbreadth is "real" and "substantial," and whether the challenged statute may be subject to a limiting construction. The Court now proceeds with that analysis.

Here, the plaintiff seeks a judgment that, *inter alia*, both clauses of the statute are unconstitutional on their face as overbroad under the First Amendment. *See* Am. Compl., Count II. [31] The

[31] The plaintiff also, as noted, challenges the statute for overbreadth under the Fifth Amendment in Count II ("First & Fifth Amendment (Overbreadth)"). The overbreadth doctrine is a "First Amendment . . . doctrine," however, in contrast to the

defendants argue to the contrary in their motion, asserting that "[t]here is no colorable argument that either clause of the statute is overly broad, irrespective of the plaza's status under the public forum analysis" and that the plaintiff's arguments are "meritless and should be rejected." Defs.' Mem. at 20-21. The Court disagrees. As discussed below, in this case, the Court finds that the overbreadth of the challenged statute is both real and substantial, and that judicial creation of a limiting construction is inappropriate.

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related vagueness doctrine, which "is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008). Since the plaintiff has not explained any rationale for construing his overbreadth claim under the Fifth Amendment, the Court construes the plaintiff's overbreadth claim solely under the First Amendment overbreadth doctrine. The government apparently construed the plaintiff's claim this way as well. *See, e.g.*, Defs.' Mem. at 19 (referring to the plaintiff's overbreadth claims under the "First Amendment overbreadth doctrine" in contrast to the plaintiff's vagueness claims "under the First and Fifth Amendments"); *see also* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1355 (2000) (noting that "[i]n considering the circumstances under which facial challenges should be permitted, both commentators and Supreme Court Justices have often framed the question as whether overbreadth doctrine should extend beyond the First Amendment" (footnotes omitted)); *Jeannette Rankin Brigade I*, 421 F.2d at 1107 (Bazelon, C.J., dissenting from granting of three- judge panel) (noting that "the overbreadth analysis has found its most fertile soil in the area of First Amendment freedoms").

1. Overbreadth of Challenged Statute is Both Real and Substantial

The Court's "'first step in overbreadth analysis is to construe the challenged statute'" for "'it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.'" *Stevens*, 130 S. Ct. at 1587 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). The Court then considers "whether the statute, as [the Court has] construed it, criminalizes a substantial amount of protected expressive activity." *Williams*, 553 U.S. at 297. Proceeding in this manner, the Court examines the Assemblages Clause and the Display Clause in turn and, as explained below, "read[s] [the statute] to create criminal prohibition of alarming breadth." *Stevens*, 130 S.Ct. at 1588. The Court then explains how this analysis is consistent with the Supreme Court's decision in *Grace II* as well as decisions of the D.C. Court of Appeals.

a. Real and Substantial Overbreadth of the Assemblages Clause

First, with respect to the Assemblages Clause, the defendants essentially concede that the clause, without a limiting construction, is substantially overbroad, explaining that the District of Columbia courts "adopted a narrowing construction of the Assemblages Clause precisely in order to avoid possible overbreadth concerns that would arise from the application of the literal language of the statute." Defs.' Mem. at 20. Since the Court, for reasons

explained in detail below, does not adopt the limiting construction used by the D.C. Court of Appeals, the Court agrees with the District of Columbia courts that the Assemblages Clause, without a limiting construction, is overbroad in applying an absolute ban on parades, processions, and assembling. This clause could apply to, and provide criminal penalties for, any group parading or assembling for any conceivable purpose, even, for example, the familiar line of preschool students from federal agency daycare centers, holding hands with chaperones, parading on the plaza on their first field trip to the Supreme Court. Moreover, as the *Pearson* court recognized, this clause could apply not only to tourists and attorneys, but to Court employees. *Pearso*n, 581 A.2d at 356. Thus, the statute would apply to employees both assembling for lunch or protesting a labor practice or the menu in the Supreme Court cafeteria. This Court agrees that "[s]uch an absolute ban on any group activity is not supported by the government's legitimate and important interests[,]" for example, "in protecting the integrity of the Court, preventing the appearance of judicial bias, and safeguarding the Court grounds and personnel." *Pearson*, 581 A.2d at 356-57 (footnotes omitted); *see also Boos v. Barry*, 485 U.S. 312, 332 (1988) (finding that a narrowing construction saved the congregation clause in that case from overbreadth scrutiny where the congregation clause "does not prohibit peaceful congregations[,]" and "its reach is limited to groups posing a security threat"). Where the Assemblages Clause prohibits and criminalizes such

a broad range of plainly benign expressive activity, the Court finds the clause substantially overbroad.

b. **Real and Substantial Overbreadth of the Display Clause**

Similarly, with respect to the Display Clause, the Court finds the clause substantially overbroad. This clause applies, for example, to the distribution of pamphlets, a ban the D.C. Circuit emphatically concluded in *Initiative & Referendum Institute I* "is unconstitutional even [in] nonpublic forums." 417 F.3d at 1315; *see also id.* (noting that the U.S. Postal Service "does not even attempt to defend the regulation if it is construed as applying to pure solicitation"). The defendants argue with respect to the Display Clause that there is "no risk that the Display Clause will punish activity which is not 'contrary to the government's legitimate interests' in 'sheltering and insulating the judiciary from the appearance of political influence.'" Defs.' Mem. at 20.

Yet, the government essentially conceded at oral argument that the challenged statute would prohibit, for example, a group of tourists assembling on the Supreme Court plaza, who are all wearing t-shirts "in order to bring into public notice their particular organization, church group, whatever group it may be, [or] school group[.]" Tr. at 24-27 (government counsel responding affirmatively to this Court's hypothetical about whether the challenged statute would cover a group of tourists wearing t-shirts on the Supreme Court plaza, and acknowledging that the Supreme

Court police "might approach the kind of group you described in general terms and ask them to move along" but urging the Court not to entertain such hypotheticals in this lawsuit); *see also Grace I*, 665 F.2d at 1194 n.2 ("Indeed, at oral argument before this panel, Government counsel virtually conceded that even expressive T-shirts or buttons worn on the Supreme Court grounds would be prohibited by § 13k."). While the government has tried to dissuade the Court from contemplating hypothetical scenarios covered by the challenged statute, the government provides no satisfying explanation for how an individual or group calling attention to a perceived injustice by distributing pamphlets or merely displaying a single unobtrusive sign or wearing t-shirts displaying their school, church, or organization logo, in front of an iconic government building – flanked with carvings of Justice, holding sword and scales, and The Three Fates, weaving the thread of life, no less – necessarily creates "the appearance of political influence" or in any way disturbs the decorum and order of the Supreme Court. Furthermore, it is simply not true, as the government asserts, that there is "no risk that the Display Clause will punish activity which is not 'contrary to the government's legitimate interests' in 'sheltering and insulating the judiciary from the appearance of political influence[,]'" Defs.' Mem. at 20, when the Display Clause prohibits the wearing of t-shirts bearing school and organizational logos, and the government concedes that the challenged statute may be enforced against those wearing such t- shirts. *See*

Tr. at 24-27. Accordingly, this Court finds the Display Clause, and thus the statute as a whole, with no limiting construction, unconstitutional on its face as substantially overbroad.

c. **Finding of Real and Substantial Overbreadth is Consistent With the Supreme Court's Decision in *Grace II* and Many of the Decisions of the D.C. Court of Appeals**

This Court's finding that the statute is substantially overbroad is consistent both with the Supreme Court's decision in *Grace II* and the Assemblages Clause cases from the D.C. Court of Appeals. While the *Grace II* Court limited its analysis to the question before the Court, namely the right of the appellees to use the public sidewalks surrounding the Court for expressive activities prohibited under the Display Clause, the Court's decision in no way precludes a finding that the statute is unconstitutional on its face. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-30 (2006) (explaining that the *Grace II* Court "crafted a narrow remedy . . . striking down a statute banning expressive displays only as it applied to public sidewalks near the Supreme Court but not as it applied to the Supreme Court Building itself"). Indeed, while the Supreme Court only made a holding on a narrow issue, the majority opinion suggested a broader skepticism about the Display Clause. The Court noted, for example, that "[b]ased on its provisions and legislative history, it is fair to say that the purpose of

the Act was to provide for the protection of the building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum." *Grace II*, 461 U.S. at 182. While the Court did not "denigrate" those purposes, the Court "question[ed] whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes." *Id.* The Court noted, for example, that there was "no suggestion . . . that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." *Id.* The same can be said for the analogous facts before this Court, with the significant difference being only that the plaintiff's activities took place eight steps up from the sidewalk on the plaza.

Furthermore, Justice Marshall's partial concurrence and dissent in *Grace II*, concluding that "40 U.S.C. § 13k is plainly unconstitutional on its face[,]" *id.* at 185, was prescient in observing that "[s]ince the continuing existence of the statute will inevitably have a chilling effect on freedom of expression, there is no virtue in deciding its constitutionality on a piecemeal basis[,]" *id.* at 184 (Marshall, J.) (concurring in part and dissenting in part); *see id.* (explaining that "[w]hen a citizen is in a place where he has every right to be, he cannot be denied the opportunity to express his views simply because the Government has not chosen to designate the area as a forum for public discussion" (internal

citation and quotation marks omitted)). Where the chilling of speech has persisted over many years, just as Justice Marshall feared, this Court is compelled to rule this overbroad statute facially unconstitutional, as the D.C. Circuit plainly intended to do over thirty years ago in *Grace I*. *See Grace I*, 665 F.2d at 1194 (finding 40 U.S.C. § 13k "repugnant to the First Amendment").

This Court's decision is also consistent with the decisions of the D.C. Court of Appeals regarding the Assemblages Clause. In those cases, as noted, the D.C. Court of Appeals recognized the overbreadth of the clause and relied on a limiting construction in order to "save" the statute from constitutional challenge. Defs.' Mem. at 7. Indeed, tellingly, the *Pearson* court observed that "[s]uch an absolute ban on any group activity is not supported by the government's legitimate and important interests in protecting the integrity of the Court, preventing the appearance of judicial bias, and safeguarding the Court grounds and personnel." *Pearson*, 581 A.2d at 356-57 (footnotes omitted). This Court agrees.

2. **Judicial Creation of a Limiting Construction is Inappropriate**

The Court next turns to the defendants' argument that any overbreadth concerns about the statute may be cured by adopting the limiting construction imposed on the Assemblages Clause by the District of Columbia courts. The Court is cognizant that "making distinctions in a murky constitutional context, or

where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake[,]" *Ayotte*, 546 U.S. at 330, and that "[f]acial challenges are disfavored[,]" *Wash. State Grange*, 552 U.S. at 450. Nevertheless, for the reasons explained below, the Court finds that the statute is not susceptible to a limiting construction.

The Supreme Court has counseled that "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact[.]" *Ayotte*, 546 U.S. at 328-29 (citations omitted). "When a federal court is dealing with a federal statute challenged as overbroad, it should . . . construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). Indeed, "[a] limiting construction that is 'fairly' possible can save a regulation from facial invalidation." *Initiative & Referendum Inst. I*, 417 F.3d at 1316 (quoting *Bd. of Airport Comm'rs*, 482 U.S. at 575). There are limits, however, to the judicial power to provide a narrowing interpretation of statutory language in order to cure its otherwise constitutional invalidity. Thus, a "statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score . . . . [But] avoidance of a difficulty will not be pressed to the point of

disingenuous evasion." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933).

The defendants concede that the D.C. Court of Appeals "recognized" that "the literal language of section 6135 may be read to prohibit any type of group activity on the Court grounds, including congregation on the plaza by groups of tourists, or even by Court employees." Defs.' Mem. at 7. Thus, in order to "save" the clause "from any possible constitutional challenge," *id*., the D.C. Court of Appeals held that the statute was "susceptible to a narrowing construction, confining the scope of the clause to protection of 'the [Supreme Court] building and grounds and of persons and property within, as well as the maintenance of proper order and decorum,' and 'to preserve the appearance of the Court as a body not swayed by external influence.'" *Pearson*, 581 A.2d at 357 (internal citation omitted) (quoting *Grace II*, 461 U.S. at 182-83 and *Wall*, 521 A.2d at 1144); *see also Bonowitz v. United States*, 741 A.2d 18, 22- 23 (D.C. 1999) (finding section 13k restrictions reasonable "in light of the plaza's two primary purposes: 'to permit the unimpeded access and egress of litigants and visitors to the Court, and to preserve the appearance of the Court as a body not swayed by external influence'" (quoting *Wall*, 521 A.2d at 1144)); Defs.' Mem. at 20 (noting that "the District of Columbia courts have adopted a narrowing construction of the Assemblages Clause precisely in order to avoid possible overbreadth concerns that would arise from application of the literal language of the statute").

In prodding this Court to adopt this limiting construction, which the defendants emphasize is "for all practical purposes, the definitive judicial construction of the statute,"[32] the defendants assert that the D.C. Court of Appeals' limiting construction "allows application of the Assemblages Clause only for the protection of the Court Building and grounds and persons and property therein, the maintenance of order and decorum therein, and to preserve the appearance of the Court as a body not swayed by external influence." Defs.' Mem. at 20-21.

The Court does not find the defendants' arguments in support of adopting a limiting construction convincing for several reasons. First, the limiting construction imposed by the D.C. Court of Appeals is not rooted in the plain language of the statute. Again, the statute reads in full:

> It is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.

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[32] As noted, all prosecutions under the statute have occurred in the local D.C. courts, and the Deputy Chief of the Supreme Court Police asserts that in enforcing violations of the statute the police "look to the language of the statute, utilizing the narrowing construction of the Assemblages Clause that has been adopted by the District of Columbia courts." Dolan Decl. ¶¶ 7-8.

40 U.S.C. § 6135. The *Pearson* court reached out to slim legislative history and beyond the actual words of the statute to narrow the meaning of the statute to "protection of 'the [Supreme Court] building and grounds and of persons and property within, as well as the maintenance of proper order and decorum' and 'to preserve the appearance of the Court as a body not swayed by external influence.'" *Pearson*, 581 A.2d at 357 (internal citation omitted) (quoting *Wall*, 521 A.2d at 1144 and *Grace II*, 461 U.S. at 182-83). Indeed, the *Pearson* court rejected the idea that there was any "requirement that a limiting construction must be derived from the express language of the statute," and emphasized that what was required was "that the statute itself be susceptible to the narrowing construction." *Id.* at 358.[33] At the same time, the

[33] To find the statute susceptible to a narrowing construction, the *Pearson* court drew from the language in *Wall* and *Grace* regarding the purposes gleaned for the statute. *See Pearson*, 581 A.2d at 357; *Wall*, 521 A.2d at 1144 (noting that the court was "satisfied" that the government's proffered purposes for the statute – "to permit the unimpeded access and egress of litigants and visitors to the Court and to preserve the appearance of the Court as a body not swayed by external influence" – were "'significant' governmental interests that can support a time, place or manner restriction" (citing *Cameron v. Johnson*, 390 U.S. 611 (1968) and *Cox II*, 379 U.S. at 562)); *Grace II*, 461 U.S. at 182 (concluding that "[b]ased on its provisions and legislative history, it is fair to say that the purpose of the Act was to provide for the protection of the building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum" and noting that 40 U.S.C. § 13k "was one of the provisions apparently designed for these purposes" and that "[a]t least, no special reason was stated for [40 U.S.C. § 13k's] enactment"); *Grace II*, 461 U.S. at 183 (not "discount[ing]" the

Pearson court rejected in short order the appellants' contention that the Supreme Court's summary affirmance of *Jeannette Rankin Brigade II* "necessarily leads to the conclusion that the Supreme Court is also a public forum" and did not dwell on any larger discussion of the panel's decision in that case, dealing with a nearly identical statute, and its conclusion that no limiting construction was possible. *Pearson*, 581 A.2d at 352 n.12. While the Court appreciates the D.C. Court of Appeals' efforts to draw from its own precedent as well as the Supreme Court's language in order to save a statute originally drafted as the Capitol Grounds statute over 100 years ago, the Court is reluctant to, and ultimately cannot, accept a limiting construction that is not more directly rooted in the text of the statute itself. *See, e.g.*, *Houston v. Hill*, 482 U.S. 451, 468 (1987) (explaining that an ordinance is "not susceptible to a limiting construction because . . . its language is plain and its meaning unambiguous"); *Akiachak Native Cmty. v. Salazar*, No. 06- 969, 2013 U.S. Dist. LEXIS 45968, at *44 (D.D.C. Mar. 31, 2013) (declining to "adopt limiting constructions that have no basis in the statutory text").

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government's proffered justification that it should not "appear to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court" but rejecting that justification with respect to the application of the Display Clause on the sidewalks surrounding the Supreme Court).

Second, the limited legislative history of the challenged statute, including that of its predecessor statute (40 U.S.C. § 13k) and the Capitol Grounds statute (40 U.S.C. § 193g), simply does not provide a sufficient basis for the limiting construction imposed by the D.C. Court of Appeals. When Congress promulgated 40 U.S.C § 13k it was primarily focused on extending the blanket prohibitions on assemblages and displays that had long been in place at the United States Capitol. *See, e.g.*, 95 Cong. Rec. 8962 (1949) (statement of Rep. Celler) (noting that "all this [House] bill does . . . is to apply the same rules to the Supreme Court building and its adjoining grounds as are now applicable to the Capitol itself – no more and no less."). That statute governing the U.S. Capitol Building and grounds has since been found unconstitutional. *See, e.g., Jeannette Rankin Brigade II*, 342 F. Supp. at 587 (characterizing the U.S. Capitol statute as "a curiously inept and ill-conceived Congressional enactment"). Furthermore, while the legislative history reveals that section 13k was enacted as part of a broader package of security measures for the Supreme Court Building and grounds, nothing in the legislative history suggests the absolute ban on expressive activity in section 13k was to be limited in any way.

Indeed, a ban on expressive activity in front of the Supreme Court could be seen as consistent with, for example, a state's interest in "protecting its judicial system from the pressures which picketing near a courthouse might create." *Cox II*, 379 U.S. at 562. While the Supreme Court in *Cox II* upheld a Louisiana

statute modeled after 18 U.S.C. § 1507, and intended to enshrine that interest, the statute there is easily distinguishable from the overbroad statute here, in part, because it included a clear intent requirement. *See* LA. REV. STAT. ANN. § 14:401 (Cum. Supp. 1962) ("[w]hoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty . . .") (cited in *Cox II*, 379 U.S. at 560); *see also United States v. Carter*, 717 F.2d 1216, 1218 n.4 (8th Cir. 1983) (noting that the "crucial difference between [40 U.S.C. § 13k] and 18 U.S.C. § 1507 [on which the Louisiana statute was based] is precisely the element of intent" and that 40 U.S.C. § 13k "did not require, as an element of the crime there defined, that the defendant intend to interfere with the administration of justice or to influence any judge or juror" and that, instead, "[i]t attempted to make criminal the simple display of a flag, banner, or device of a certain type, whether or not the defendant wished to influence the courts or obstruct the administration of justice"). Furthermore, the Supreme Court in *Cox II* repeatedly emphasized that the statute it upheld was "a precise, narrowly drawn regulatory statute which proscribes certain specific behavior." *Cox II*, 379 U.S. at 562 (noting that "[a] State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence" and that "[a] narrowly drawn statute such as the one under review is obviously a safeguard both necessary and appropriate

to vindicate the State's interest in assuring justice under law"); *see also id*. at 567 (explaining that "[a]bsent an appropriately drawn and applicable statute, entirely different considerations would apply"). The narrowness of that Louisiana statute and 18 U.S.C. § 1507 on which it was based are in sharp contrast to the challenged statute here.

Third, the Court finds unavailing the defendants' assertion that the conclusion that the "limiting construction is not overly broad follows directly from *Oberwetter*." Defs.' Supplemental Br. at 6. That argument is not only unavailing, but also itself underscores the overbreadth of the challenged statute. At issue in *Oberwetter*, a case involving expressive dancing at night at the Jefferson Memorial, was a National Park Service regulation prohibiting demonstrations without a permit. As the defendants explain, the term "demonstrations" in that regulation included the following:

> picketing, speechmaking, marching, holding vigils or religious services and all other like forms of conduct which involve the communication or expression of views or grievances, engaged in by one or more persons, the conduct of which has the effect, intent or propensity to draw a crowd or onlookers.

Oberwetter v. Hilliard, 639 F.3d 545, 550 (D.C. Cir. 2011) (quoting 36 C.F.R. § 7.96(g)(1)(i) (2010)) (cited in Defs.' Supplemental Br. at 6-7). The definition also

expressly *excludes* "casual park use by visitors or tourists that is not reasonably likely to attract a crowd or onlookers." 36 C.F.R. § 7.96(g)(1)(i).

The defendants analogize that regulation to section 6135 and posit that the D.C. Circuit in that case had "'little trouble' determining that the prohibition on demonstrations was both viewpoint neutral and reasonable, and was therefore consistent with the First Amendment." Defs.' Supplemental Br. at 7 (quoting *Oberwetter*, 639 F.3d at 553). The defendants then argue that "[i]f the Assemblages Clause of section 6135 is similarly construed to prohibit demonstrations, picketing and other forms of group expressive activity," pursuant to the *Pearson* limiting construction, "then *Oberwetter* dictates that the limitation is consistent with the First Amendment." *Id*. Plainly, however, the statute here, with or without the D.C. Court of Appeals' limiting construction, does not include a requirement that the prohibited conduct have "the effect, intent or propensity to draw a crowd or onlookers" as did the regulation at issue in *Oberwetter*. Instead, the challenged statute contains no intent requirement, no requirement that the conduct produce a particular result, and no suggestion that the prohibited conduct must be of a nature that would "draw a crowd or onlookers." The challenged statute is thus easily distinguishable from the regulation reviewed in *Oberwetter*.

Fourth, First Amendment restrictions that carry criminal penalties also carry a heightened risk of

chilling speech. Indeed, the Supreme Court has emphasized that "the 'severity of criminal sanctions may well cause speakers to remain silent rather than communicate *even arguably* unlawful words, ideas, and images.'" *Initiative & Referendum Inst. I*, 417 F.3d at 1318 (emphasis in original) (quoting *Reno v. ACLU*, 521 U.S. 844, 872 (1997)). In balancing these tensions, this Court is especially wary of adopting a limiting construction that allows an overbroad statute carrying criminal penalties to remain enforceable with the concomitant risk of chilling expressive activity, particularly when more narrowly drawn statutes, including statutes and regulations already in place, may serve the purposes of protecting the safety of the Justices, Court personnel and the public, and avoiding obstructed access to the Supreme Court. The defendants point out that the Supreme Court police enforce the challenged statute only within the limits of the D.C. Court of Appeals' construction, *see* Defs.' Statement of Material Facts Not in Dispute ("Defs.' Facts"), ECF No. 23, at 6; Dolan Decl. ¶ 7, but this point is weak support for their argument that this Court should adopt the D.C. Court of Appeals' narrowing construction. While the Court does not doubt the good faith efforts of the Court police to exercise their discretion within constitutional boundaries, "[w]e would not uphold an unconstitutional statute merely because the

Government promised to use it responsibly." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).[34]

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[34] The procedural posture of the cases in which the challenges to 40 U.S.C. § 6135 have been reviewed by the District of Columbia courts cannot be overlooked. The D.C. Court of Appeals has examined the challenged statute in the context of appeals of criminal prosecutions and convictions, in which the conduct at issue had raised sufficient concerns on the part of law enforcement officers about public safety and impeding access to the Supreme Court to result in arrests and initiation of criminal proceedings. In *Pearson*, for example, the defendants were among approximately *fifty thousand people* participating in a march to the Supreme Court. *Pearson v. United States*, 581 A.2d 347, 349 (D.C. 1990). The sheer magnitude of the assembly at issue may have prompted the court to find a possible construction to uphold the constitutionality of the Assemblages Clause, and, indeed, the limiting construction adopted by the court speaks to concerns regarding group demonstrations. *See id.* at 357-58 ("Therefore, when limited to group demonstrations directed at the Court which compromise the dignity and decorum of the Court or threaten the Court grounds or its property or personnel, section 13k can withstand an overbreadth challenge because the statute only prohibits group activity which is contrary to the government's legitimate interests."). Indeed, the concrete concerns that animated the limiting construction are consistent with the facts of other criminal proceedings reviewed by the D.C. Court of Appeals, which have all involved groups protesting contentious issues. *See, e.g.*, *United States v. Wall*, 521 A.2d 1140, 1141-42 (D.C. 1987) (an individual who was arrested along with forty other protestors, all part of a group of approximately 50,000 demonstrators, for carrying a coffin-shaped box on to the plaza); *Bonowitz v. United States*, 741 A.2d 18, 19 (D.C. 1999) (a group that "unfurled [at the main entrance of the Supreme Court] a banner thirty feet long by four feet wide which read 'STOP EXECUTIONS'" while singing and chanting); *Potts v. United States*, 919 A.2d 1127, 1129 (D.C. 2007) (a group protesting mistreatment of prisoners at the Abu Ghraib and

Finally, the Court does not believe that it is possible in this instance to create a limiting construction without essentially rewriting the statute. As Chief Judge Bazelon commented regarding the Capitol Grounds statute, "there are limits" to the process of applying a narrowing construction and "[t]here is no indication . . . that surgery would be appropriate to conform Section 193g to any presumed intention of Congress." *Jeannette Rankin Brigade I*, 421 F.2d at 1101 (Bazelon, C.J., dissenting from granting of three-judge panel). Since Congress did not revise that section when it revised the statutory framework related to the Capitol Grounds, Judge Bazelon stated that he "must conclude that Congress preserved Section 193g under a belief that its blanket prohibition extended to situations beyond the reach of these provisions" and that, "[c]onsequently, a narrower construction finds no support in this recent manifestation of legislative will." *Id*. at 1102. While recognizing that "[w]here Congress has been elliptic in mapping its intention

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Guantanamo prisons, with individuals wearing orange jumpsuits and black hoods, with one individual holding a sign over his head reading "no taxes for war or torture"); *Lawler v. United States*, 10 A.3d 122, 124 (D.C. 2010) (a group standing with a line of people waiting to enter the Supreme Court to hear oral arguments that stepped out of line to "unfurl a large banner that read 'STOP EXECUTIONS'" and chant, "What do we want? Abolition. When do we want it? Now."); *Kinane v. United States*, 12 A.3d 23, 25 (D.C. 2011) ("a large group of people gathered" on the plaza to protest on behalf of prisoners held in Guantanamo prison, who kneeled with their hands behind their backs at the "second set of steps leading to the main doors of the Supreme Court").

onto the statute books, courts may supply an element of the offense which the legislature presumptively wished to require but neglected to state[,]" Judge Bazelon found "no indication . . . that surgery would be appropriate to conform Section 193g to any presumed intention of Congress." *Id.* at 1101. Nor would such surgery be appropriate here for several reasons. First, as with the Capitol Grounds statute, there is simply no indication that Congress intended or has attempted to limit the broad prohibition set forth in the challenged statute. "Consequently, a narrower construction finds no support in . . . legislative will." *Id.* at 1102.

Second, no narrowing construction is necessary here, "as sometimes is the case in constitutional adjudication, to prevent the creation of a statutory vacuum in an area where appropriately narrow regulations may be necessary to protect legitimate state interests." *Id.* In this case, 18 U.S.C. § 1507 as well as D.C. Code § 22-1307, which requires compliance with law enforcement authorities to avoid blocking use of streets or buildings' entrances, [35] satisfy the defendants' interests of ensuring ingress and egress into the Supreme Court building,

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[35] Specifically, D.C. Code § 22-1307 makes it unlawful "for a person, alone or in concert with others, to crowd, obstruct, or incommode the use of any street, avenue, alley, road, highway, or sidewalk, or the entrance of any public or private building or enclosure or the use of or passage through any public conveyance, and to continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease the crowding, obstructing, or incommoding."

maintaining proper order and decorum, and preserving the appearance of the Supreme Court as a body not swayed by external influence. Furthermore, the Marshal of the Supreme Court, as noted, has the authority to prescribe necessary regulations to govern the plaza. *See* 40 U.S.C. § 6102.

Third, and relatedly, if the Court were to rewrite this statute – for example, to impose on it an "intent" requirement that does not currently exist, or to limit the statute's reach to activity that actually impedes on ingress and egress, or to impose on the statute a definition of the kind of activity that gives the appearance of a judiciary swayed by external influence – the Court would be encroaching significantly on Congress's role and creating purposes for a statute that are not self-evident from the history or the plain language of the statute. The Supreme Court has cautioned against judicially-drafted limiting constructions that amount to a re-write of the law since "doing so would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *Stevens*, 130 S. Ct. at 1591-92 (internal quotation marks and citations omitted). The defendants cite *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986), for the proposition that "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." Defs.' Reply at 1 (internal quotation marks omitted). Yet, the

defendants are essentially asking that this Court accept the District of Columbia courts' judicial rewriting of the statute, or create its own.[36]

The defendants also posit that, to the extent that the Court considers developing its own limiting construction, a "possible solution would be to *make explicit* what is *surely* the core intention of *Pearson*: that the statute reaches only demonstrations, picketing and other similar forms of group expressive activity." Defs.' Supplemental Br. at 7 n.2 (emphasis added).[37] Yet, that construction has no basis in the

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[36] Indeed, for decades the government has consistently and creatively attempted to save the language of this statute from constitutional challenge. With respect to the Capitol Grounds statute, in *Jeannette Rankin Brigade II*, the panel noted the defendants' "apparent recognition that the statute in its literal terms presents serious, not to say insuperable, constitutional problems" and that the defendants "pressed upon us for [the statute's] salvation a rigorously limiting construction." *Jeannette Rankin Brigade II*, 342 F. Supp. at 578. The government, for example, urged the court to "construe the statutory phrase 'flag, banner, or device' to include picket signs, placards, and billboards, but not lapel buttons, name cards, insignias, or armbands." *Id.* at 586 n.13. The panel rejected that invitation, however, noting that "[w]hile . . . this view may suit the Government's purpose, it finds no support in either the legislative history or other sections of the statute." *Id.* Similarly, this Court will not craft or adopt a limiting construction with no foundation in the legislative history or the statutory text itself.

[37] The defendants assume that this construction of the statute would be constitutional if the Court accepts the defendants' position that the Supreme Court plaza is a nonpublic forum, in which restrictions on speech are permissible so long as they are viewpoint neutral and reasonable. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188-89 (2007). Since the Court finds that this

plain – and far broader – language of the statute or the legislative history. Thus, it would require this Court essentially to rewrite an overbroad statute and impose on it limitations not evidently intended by Congress. This Court concurs with the conclusion reached by the D.C. Circuit in *Grace I*, 665 F.2d at 1206, with respect to 40 U.S.C. § 13k, the virtually identical precursor to the challenged statute: "a validating construction is simply impossible here." As the Supreme Court has made clear, "a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling." *Citizens United v. FEC*, 558 U.S. 310, 329 (2010). Accordingly, the Court rejects the defendants' invitation to accept the D.C. Court of Appeals' limiting construction and leaves any future iterations of this overbroad statute to Congress rather than allow the statute to continue chilling speech.[38]

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proposed limiting construction also has no basis in the plain language of the statute or the legislative history and is not tied to any significant government purpose, it remains arguable whether this construction would be reasonable, even if viewpoint neutral.

[38] Since the Court finds the statute facially unconstitutional as overbroad, it need not address in detail the plaintiff's claim that the statute is also void for vagueness. The Court notes, however, that it construes the statute as providing reasonable notice of an overly broad prohibition on expressive activity on the Supreme Court plaza. *See, e.g.,* Defs.' Mem. at 18 (noting that "section 6135 effectively prohibits all types of demonstrations and expressive activity on the Court grounds"); *Grace II*, 461 U.S. at 176 (with respect to the Display Clause, "accept[ing] the Government's contention, not contested by appellees, that almost any sign or

As the D.C. Circuit found over thirty years ago in *Grace I*, and as a three-judge panel of this court, affirmed by the Supreme Court, found with respect to the nearly identical statute governing the policing of the U.S. Capitol in *Jeannette Rankin Brigade II*, the challenged statute is "repugnant to the First Amendment." *Grace I*, 665 F.2d at 1194; *Jeannette Rankin Brigade II*, 342 F. Supp. at 587, *aff'd*, 409 U.S. 972 (1972) (characterizing the statute governing the U.S. Capitol grounds as "a curiously inept and ill-conceived Congressional enactment," declining to accept a limiting construction, and asserting that the necessary "rewrit[ing]" of the statute "is a function more appropriately to be performed by Congress itself"). Regardless of whether this statute prohibits expressive activity in a public or nonpublic forum, the absolute prohibition on expressive activity in the

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leaflet carrying a communication, including Grace's picket sign and Zywicki's leaflets, would be 'designed or adapted to bring into public notice [a] party, organization or movement[,]'" and noting that "[s]uch a construction brings some certainty to the reach of the statute"). Furthermore, the plaintiff, as the defendants point out, appears to confuse overbreadth for vagueness. *See, e.g.*, Pl.'s Opp'n at 24-25 (arguing in a section of the brief dedicated to a discussion of the purported *vagueness* of the statute that "[t]he Assemblages Clause as written is so *broad* that even-handed enforcement, if possible would lead to absurd results[,]" for example, that "the late Chief Justice Rehnquist and former Justice O'Connor would have been subject to arrest and prosecution when they marched in an assemblage or procession across the Supreme Court plaza" (emphasis added)). Nor does the Court need to reach the plaintiff's Equal Protection clause claim regarding the Display Clause since the Court decides the plaintiff's facial challenge in his favor.

statute is unreasonable, substantially overbroad, and irreconcilable with the First Amendment. The Court therefore must find the statute unconstitutional and void as applied to the Supreme Court plaza.[39]

IV. CONCLUSION

For the reasons discussed above, the defendants' motion for summary judgment is denied. The challenged statute – 40 U.S.C. § 6135 – is unconstitutional and void under the First Amendment, and, therefore, summary judgment is granted to the plaintiff on that basis. An appropriate Order will accompany this opinion.

Date: June 11, 2013

/s/ *Beryl A. Howell*
BERYL A. HOWELL
United States District Judge

[39] The Court emphasizes that this decision does not leave the Supreme Court plaza unprotected. *See* discussion at *supra* note 34 and accompanying text; 18 U.S.C. § 1507; D.C. Code § 22-1307; 40 U.S.C. § 6102.