[ORAL ARGUMENT NOT SCHEDULED]
CASE NO. 13-5250

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD H. HODGE, JR.,
Plaintiff-Appellee,

v.

PAMELA TALKIN, *ET AL.*,
Defendants-Appellants

BRIEF OF PLAINTIFF-APPELLEE HAROLD H. HODGE, JR.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Dated: January 15, 2014

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

All parties, intervenors, and *amici* appearing before the district court and this Court are listed in the Brief for Appellants.

References to the rulings at issue appear in the Brief for Appellants.

Counsel is unaware of any related cases pending before this or any other court.

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SUMMARY OF ARGUMENT

"Where First Amendment freedoms are at stake [the Supreme Court has] repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Erznoznik v. Jacksonville*, 422 U.S. 205, 217-18 (1975). The statute at issue here, 40 USC § 6135, cannot be fairly characterized as either precisely drafted or clear in its purpose. As the court in *Jeannette Rankin Brigade*[1] observed, with regard to identical language contained in § 193g, the statute "fairly bristles with difficulties when it is sought to be enforced," *id.* at 586, and is a "curiously inept and ill-conceived Congressional enactment," *id.* at 587. The "slim legislative history 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[.]" *Grace v. Burger*, 665 F.2d 1193, 1206 (D.C. Cir. 1981)(hereinafter "*Grace I*"), *aff'd in part and rev'd in part, United States v. Grace*, 461 U.S. 171 (1983) (hereinafter "*Grace II*").

[1] *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.D.C. 1972)(three-judge panel), *aff'd*, 409 U.S. 972 (1972).

The district court correctly analyzed both the Assemblages Clause and the Display Clause and found the literal language of both to be overbroad and incapable of being saved through a narrowing instruction. Thus, the district court properly struck down 40 USC § 6135 as overbroad and in violation of the First Amendment.

Appellants, having conceded in the district court that the literal language of the statute was overbroad, now change course and argue that the statute prohibits little, if any, protected conduct. The Court should not entertain Appellants' argument because of their concession below. However, if the Court does reach the merits of Appeallants' argument, it should reject their construction as unreasonable and contrary to case law. Appellants misunderstand the holding of Grace II and therefore their analysis in support of a narrowing construction is flawed from the start. Even if the Court adopts Appellants' construction, however, the statute must still be struck down because its absolute prohibition on expressive conduct is unreasonable and prohibits a substantial amount of protected activity.

In the event that this Court disagrees with the rationale of the district court's opinion, affirmance on alternative ground would still be required. Expressive activity is not incompatible with the design and function of the Supreme Court plaza, which should be deemed a public forum. Finally, even if the statute survives scrutiny under the First Amendment, it still must be struck down on vagueness

grounds. The statute vests unbridled discretion in law enforcement and fails to put ordinary citizens on notice of what conduct it prohibits. Accordingly, this Court should affirm the grant of summary judgment to Appellee.

ARGUMENT

I. THE DISTRICT COURT'S THOROUGH AND WELL-REASONED OPINION CORRECTLY CONCLUDED THAT 40 USC § 6135 VIOLATES THE FIRST AMENDMENT AND IS OVERBROAD.

A. Overview

The district court held, and Appellee agrees, that regardless of the forum classification, 40 U.S.C. § 6135 ("the statute") is both unreasonable and substantially overbroad, and therefore unconstitutional under the First Amendment. SJ Op. 67 [JA 242]. As to the Assemblages Clause, the district court correctly held that the statute "could apply to, and provide criminal penalties for, any group parading or assembling for any conceivable purpose." *Id*. at 52 [JA 227]. As to the Display clause, the district court properly found that the statute can apply broadly to any individual or group whether or not that individual or group runs afoul of the government's interest in avoiding "'the appearance of political influence' or in any way disturbs the decorum and order of the Supreme Court." *Id*. at 54 [JA 229]. A

limiting instruction is not fairly possible to save the statute from being struck down as unconstitutional. *Id.* at 66-67 [JA 241-42].

B. The district court was correct in holding that the statute is unconstitutional even if the Supreme Court building and grounds are a non-public forum.

Appellee's proposed expressive conduct was properly characterized by the district court as being protected by the First Amendment because the Supreme Court has held that peaceful picketing is an expressive activity. *Id*. at 40 [JA 215] (*citing Grace II*, 461 U.S. at 176). Further, because Appellee's proposed expressive activity concerns a matter of public interest, it "'occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.' S*nyder*, 131 S. Ct. at 1215." SJ Op. 40 [JA 215]. Although Appellee contends that Supreme Court plaza is a public forum, as explained *supra*, Section III, the district court was correct when it held that regardless of the status of the forum, the statute is unconstitutional because the restrictions imposed by the statute are unreasonable. *Id*. at 43-44 [JA 218-19].

The reasonableness of the government's restrictions must be viewed, as the district court observed, with an eye towards the "'purpose of the forum and the surrounding circumstances.' *Cornelius*, 473 U.S. at 809." *Id*. at 44 [JA 219]. In its brief to the district court, Appellants asserted that the statute protected two

interests: "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." *Id*. at 45 [JA 220]. The district court held, and Appellee agrees, that the statute is unreasonable in that it is "untethered to any legitimate government interest or purpose." *Id*. at 48 [JA 223].

The government's first stated interest of unimpeded ingress and egress is insufficient to justify an absolute prohibition on expressive activity in the Supreme Court Plaza ("the plaza"), *id*. at 45 [JA 220], as the scope of the statute bans a host of "unobtrusive actions" ranging from a single person standing in the plaza holding a sign to groups standing in the plaza wearing coordinated t-shirts. *Id*. at 45-46 [JA 220-21]. Scrutiny of a regulation in even a non-public forum is not toothless: "[w]hile 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." *Id*. at 46 [JA 221].

The statute also extends its proscription far beyond the government's second stated interest of "'preserving the appearance of the Court as a body not swayed by external influence.' Defs.' Mem. at 18." *Id*. at 46 [JA 221]; *see also* (Br. of United States in *Grace II* at 25 n.9) [JA 61] ("We recognize, of course, that a single leafleter or demonstrator – or, for that matter, most small crowds or a well-behaved large crowd – will usually not create an actual danger of real or perceived

intimidation of the judiciary.") As the district court pointed out, the statute is so broad as to cover not only people congregating to engage in expressive activity, but also those people congregating for any other reason. SJ Op. at 46 [JA 221]. The statute does not, for example, protect the decorum of the court by prohibiting tourists in coordinated t-shirts from assembling on the plaza. *Id*.

C. **The district court correctly concluded that the statute is overbroad.**

The district court examined both the Assemblages Clause and the Display Clause and correctly determined that each clause "'criminalizes a substantial amount of protected expressive activity.' *Williams*, 553 U.S. at 297." *Id.* at 52 [JA 227]. Such a conclusion is consistent with prior decisions from both the Supreme Court and the District of Columbia Court of Appeals. *Id*. at 54-56 [JA 229-31].

When determining whether a statute is overbroad, a court has to ensure that enforcement of the statute will not "deter or 'chill' constitutionally protected speech — especially when the overbroad statute imposes criminal sanctions. *Virginia*, 539 U.S. at 119." *Id*. at 50 [JA 225]. In analyzing the Assemblages Clause, the district court determined that the clause "could apply to, and provide criminal penalties for, any group parading or assembling for any conceivable purpose." *Id*. at 52 [JA 227]. The district court observed that the Assemblages Clause could apply to pre-school children gathering for their first field trip,

tourists, attorneys, or court employees gathering for lunch. *Id*. These examples demonstrate that the statute extends far beyond the stated interests of the government. *Id*. at 52-53 [JA 227-28]. Without a limiting construction, the Assemblage Clause "prohibits and criminalizes" an inordinate amount of expressive activity and would therefore be substantially overbroad. *Id*. at 53 [JA 228].

As to the Display Clause, the district court determined that it applies to the distribution of pamphlets, a prohibition that this Court held "'is unconstitutional even [in] nonpublic forums.' 417 F.3d at 1315." *Id*. at 53 [JA 228] (alteration in original). The government "essentially conceded" that the Display Clause would prohibit tourists from assembling on the plaza in coordinated t-shirts "'in order to bring into public notice their particular organization, church group, . . . [or] school group[.]' Tr. at 24-27." *Id*. Neither the district court nor appellee are able to discern, and the government was unable to provide, an explanation for how either a pamphleteer or a group of tourists could "create[] 'the appearance of political influence'" or "disturb[] the decorum and order of the Supreme Court." *Id*. at 54 [JA 229]; (Br. of United States in *Grace II* at 25 n.9) [JA 61](conceding that a single leafleter will usually not create the danger of appearing to influence the judiciary). Because the trial court found both clauses of the statute to be

substantially overbroad, it ruled that the statute was unconstitutional. SJ Op. at 54 [JA 229].

D. The conclusion that the literal language of the statute is overbroad is consistent with the decisions of both the Supreme Court and the District of Columbia Court of Appeals.

The Supreme Court decision in *Grace II*, 461 U.S. at 175 found the Display Clause of the predecessor to 40 USC § 6135 unconstitutional as applied to the sidewalks surrounding the Court,[2] but the decision did not consider the application of the statute to the remainder of the Supreme Court grounds. *Id*. at 18 [JA 193]. The decision in *Grace II* affirmed-in-part and vacated-in-part a decision of this Court which had found the entire statute unconstitutional, but to the extent the Supreme Court reversed this Court's decision, it did so only because the constitutional issue could be decided on narrower grounds, specifically limiting the decision to the Display Clause as applied to the public sidewalks. *Id*.

Turning to the D.C. Court of Appeals cases regarding the Assemblages Clause, the district court noted that the appellate court had "recognized the overbreadth of the clause." *Id*. at 56 [JA 231]. The only difference between those cases and this case is that the D.C. Court of Appeals was willing to apply a limiting construction

[2] The District Court analyzed the predecessor statute because 40 U.S.C. § 6135 was "enacted in 1949 and originally codified at 40 U.S.C. § 13k." SJ Op. 5 [JA 180].

to the statute, whereas here, the trial court felt a limiting construction was inappropriate. *Id*.

E. The statute cannot be saved by a limiting construction.

Appellants asked the district court to adopt the D.C. Court of Appeals' limiting construction, calling it the "definitive judicial construction of the statute." *Id*. at 58 [JA 233]. Although the preferred solution to remedying an overbroad statute is to excise the unconstitutional portions and allow the inoffensive portions to remain, the district court found, and Appellee agrees, that a limiting construction is inappropriate here. *Id*. at 56-57 [JA 231-32].

The limiting construction proposed by Appellants and adopted by the D.C. Court of Appeals was improper because it "was not rooted in the plain language of the statute." *Id*. The D.C. Court of Appeals made only a modest and erroneous effort to root its theory of statutory construction in precedent,[3] and the district court

[3] In *Pearson v. United States*, 581 A.2d 347, 351 (D.C. 1990), the D.C. Court of Appeals incorrectly supported its position by analogy to *Boos v. Barry*, 485 U.S. 312 (1988) and *Frisby v. Schultz*, 487 U.S. 474 (1988). In *Boos*, the Supreme Court adopted the D.C. Circuit's narrowing construction without discussing whether it was susceptible to such a construction, apparently because none of the parties before the Supreme Court took the position that the lower court's construction of that provision was not supported by the statutory text. *See Boos* Br. of Pet.; Br. of Resp.; Br. of *amici curiae*, 1986 U.S. Briefs 803. Accordingly, the opinion in *Boos* should not be read as having overruled, *sub silentio*, the explicit holding in *Houston*, one year earlier, that a law "is not susceptible to a limiting construction" where "its language is plain and its meaning unambiguous."

here justifiably found that a limiting construction needs a stronger connection to the text of legislation itself than what was proposed by Appellants. *Id*. at 59 [JA 234].

The district court's conclusion finds ample support in the case law. The Supreme Court has made clear that an unconstitutional statute is not susceptible to a narrowing construction unless the words in the statute are ambiguous. In *Houston v. Hill*, 482 U.S. 451, 468 (1987), the Court explained, a law "is not susceptible to a limiting construction" where "its language is plain and its meaning unambiguous." *Accord Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d. 195, 211 (D.D.C. 2013)(refusing "to adopt limiting constructions that have no basis in the statutory text.") Similarly, the Supreme Court has explained:

> The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting. The situation here is different from that in cases such as *United States*

The Supreme Court in *Frisby* found that it could "easily answer[]" the question of whether the ordinance left open ample alternative channels of communication by construing the ordinance "to prohibit only picketing focused on, and taking place in front of, a particular residence." 487 U.S. at 482. In reaching its narrowing construction, the Court examined the dictionary definition of the word "picketing" and the use of the singular forms of the words "residence" and "dwelling." *Id*. Rejecting the lower courts' "broad reading of the ordinance" as violating "the well-established principle that statutes will be interpreted to avoid constitutional difficulties," the Supreme Court found that the lower courts' reading of the ordinance as prohibiting "all picketing in residential areas" was a "general description [that] do[es] not address the exact scope of the ordinance and [is] in no way inconsistent with our reading of its text." *Id.* at 482-83. Thus, the D.C. Court of Appeals improperly relied on *Frisby* as supporting its assertion that a limiting construction need not be derived from the text of the statute.

> *v. National Dairy Products Corp.*, 372 U.S. 29, where the Court is called upon to consider the content of allegedly vague statutory language. Here, in contrast, an attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.

Aptheker v. Secretary of State, 378 U.S. 500, 515-16 (1964). Once a court determines that a statute is not subject to a narrowing construction, the unconstitutional portion is to be severed from the remainder of the statute, if possible. *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982)("if [a] federal statute is not subject to a narrowing construction and is impermissibly overbroad, . . . only the unconstitutional portion is to be invalidated); *Houston*, 482 U.S. at 468 (entire law must be struck down if it cannot "be limited by severing discrete unconstitutional subsections from the rest.")

A federal court's "obligation to avoid judicial legislation," however, prohibits imposing a limiting construction where the court "cannot be sure that [its] attempt to redraft the statute" would correctly identify the limit Congress would have imposed. *United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454, 479 (1995). Further, a court should avoid limiting constructions which "would likely raise independent constitutional concerns whose adjudication is unnecessary to decide th[e] case." *Id.* Thus, while it may be proper to draw a "line between a building and sidewalks . . . based on settled First Amendment principles," it would

be improper and "involve[] a far more serious invasion of the legislative domain" if the court were to "draw[] one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn[.]" *Nat'l Treasury Emples. Union*, 513 U.S. at 479 n.26. Thus, the district court was rightly concerned that adopting Appellants' proposed construction, which essentially rewrote the statute, would have the effect of "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." *Id*. at 64-65 [JA 239-40].

In reaching its conclusion that a limiting construction was not possible, the district court thoroughly reviewed the legislative history of both the present statute and its predecessor, and observed that the history was far too sparse to "provide a sufficient basis for the limiting construction" proposed by Appellants. *Id*. at 60 [JA 235]. The legislative history suggested that the statute was enacted to emulate an earlier statute prohibiting all assemblages and displays on the U.S. Capitol grounds. *Id*. However, a three-judge panel has since ruled that statute, which applied to the U.S. Capitol grounds, is unconstitutional. *Id*. (*citing Jeannette Rankin Brigade*, 342 F. Supp. at 587).

The district court was also mindful of the Supreme Court's decision involving a Louisiana statute designed to "'protect [] [a] judicial system from pressures which

picketing near a courthouse might create.' *Cox II*, 379 U.S. at 562." *Id*. at 60 [JA 235]. The district court noted, however, that the difference between the Louisiana statute and this statute was that the Louisiana statute included an intent requirement, and was both precise and narrowly drawn. *Id*. at 60-61 [JA 235-36] (*citing Cox v. Louisiana*, 379 U.S. 559, 562 (1965)("*Cox II*")). The district court also properly rejected Appellants' comparison of the present case to *Oberwetter v. Hillard*, 639 F.3d 545 (D.C. Cir. 2011). The district court found the analogy to be not only unconvincing, but also to be illustrative of § 6135's overbreadth. SJ Op. 61 [JA 236]. The statute prohibiting demonstrations in *Oberwetter* included a clear definition for "demonstration" and a requirement that the activity have "'the effect, intent or propensity to draw a crowd or onlookers.'" *Id*. at 62 [JA 237]. The court found that the D.C. Court of Appeal's limiting construction did not include anything as clear as the statute at issue in *Oberwetter* and § 6135 was easily distinguishable. *Id*.

Finally, the district court commendably took account of the importance of being careful to avoid allowing an overbroad statute, especially one with criminal sanctions, to chill speech despite a limiting construction. *Id*. at 63 [JA 238]. In a situation where, as here, there are regulations and statutes in place that may serve the two stated government interests in place of § 6135, there is no concern that striking down the law would have the effect of "creating a statutory vacuum." *Id*.

at 63-64 [JA 238-39]. *See* D.C. Code § 22-1307 (prohibiting blocking the entrance to a public building); 18 USC § 1507 (prohibiting pickets and parades in or near federal courts with the intent to influence the administration of justice). If Appellant Talkin believes that these laws are not sufficient to protect the asserted government interests, she may, under authority of 40 USC § 6102, prescribe additional regulations, as she did recently.[4]

II. APPELLANTS' OVERBREADTH ANALYSIS IS FLAWED AND THEY SHOULD NOT BE HEARD TO MAKE ARGUMENTS THAT THEY CONCEDED IN THE DISTRICT COURT.

Appellants essentially conceded in the district court that the statute as written is overbroad, but urged the court to adopt a limiting construction to save it from being held unconstitutional. Their argument having failed to persuade the district court, Appellants have now reversed course and argue that the statute is not overbroad in the first place. Appellants should not be permitted to undo their

[4] On June 13, 2013, the Supreme Court adopted Regulation 7, which provides: "No person shall engage in a demonstration within the Supreme Court building and grounds. The term 'demonstration' includes demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other like forms of conduct that involve the communication or expression of views or grievances, engaged in by one or more persons, the conduct of which is reasonably likely to draw a crowd or onlookers. The term does not include casual use by visitors or tourists that is not reasonably likely to attract a crowd or onlookers." The validity of this regulation is not before the Court in the present case.

concession, but if this Court entertains their argument, it should be rejected on the merits.

A. Appellants' present interpretation of the scope of 40 USC § 6135, as written, is contrary to their argument to the district court and therefore should not be accepted.

Appellants devote a substantial portion of their brief to arguing, for the first time on appeal, that the literal language of the Assemblages Clause is not substantially overbroad. (Appellants Br. at 35-40.) As the district court correctly pointed out, however:

> [D]efendants essentially concede that the [Assemblages] 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.

SJ Op. 52 [JA 227].

Appellants now argue that the language of the Assemblages Clause "provides no basis for the district court's conclusion that the statute applies to 'preschool students from federal agency daycare centers' or 'employees . . . assembling for lunch.' SJ Op. 52 [JA 227]." However, the Appellants acknowledged to the district court 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)." SJ Op. 52 [JA 227].

Similarly, Appellants argue for the first time on appeal that the Display Clause, as written, is not substantially overbroad. (Appellant Br. at 31-33.) Again, the district court properly relied on the government's concession on this point:

> 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 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.').

SJ Op. 53-54 [JA 228-229].

Appellants may not now advance a position that they conceded to the district court on the breadth of the statute. *See Jones v. Air Line Pilots Ass'n, Int'l*, 642 F.3d 1100 (D.C. Cir. 2011)(party's concession to the district court fatal to claim on appeal). Further, it would be improper for this Court to reach the merits of an argument not presented to the district court. *Id.* Accordingly, this Court should adopt the broad interpretation of the Display and Assemblages Clauses advanced

by Appellee, conceded as proper by the Appellants, and adopted by the district court.

B. If the Court reached the merits of Appellants' argument, it should reject their construction of the statute as unreasonable.

The Supreme Court has instructed that "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). Appellants fail to properly construe 40 USC § 6135 and as a result, their analysis of whether the statute goes too far is erroneous.

The text of 40 USC § 6135 sweeps broadly, its prohibitions applying to the courthouse and plaza as well as the perimeter sidewalks, up to the curb. 40 USC § 6101(b). Appellants contend, however, that "[a]fter *Grace*, the statute does not prohibit any category of expressive activity, but merely directs people to the public sidewalk." (Appellee Br. at 15.) According to Appellants, the "statute at issue here" was "narrowed by *Grace*" and therefore "[t]he overbreadth analysis in this case must take account of the partial invalidation of the statute." (Appellants Br. at 16-17.) In support of their position, Appellants cite to *Virginia v. Hicks*, 539 U.S. 113, 119 (2003), in which the Supreme Court noted, in *dicta*, that partial invalidation may save a statute from an overbreadth challenge.

The problem with Appellants' argument is that it confuses the concepts of narrowing, partial invalidation, and as-applied challenges. As explained *supra*, the Supreme Court in *Grace II* ruled on an as-applied challenge and did not narrow or partially invalidate the statute at issue here. Thus, this Court must construe the statute as written.

i. "Narrowing" or "limiting" construction, partial invalidation, and an as-applied challenge are three distinct concepts.

Federal courts engage in "narrowing" when they adopt a "fairly possible" construction of a statute to avoid constitutional difficulties. *Boos v. Barry*, 485 U.S. 312, 331 (1988). Thus, a court's decision to narrow a statute is an application of the "avoidance doctrine," with the result that the court does not ultimately decide the constitutional question. The application of the narrowing doctrine is limited by the principle that courts must not strain to construe language to the point of judicially rewriting it, even if Congress might have enacted a valid statute. *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964). A "narrowing" or "limiting" construction involves "a choice between one or several alternative meanings," and has no application where a statute's "language is plain and its meaning unambiguous." *Houston*, 482 U.S. at 468; *Apetheker*, 378 U.S. at 515 ("The clarity and preciseness of the provision in question make it impossible to narrow.")

When no narrowing application is possible, a federal court may partially invalidate a federal statute challenged as overbroad if the unconstitutional provision of the statute is capable of being severed. *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982)("[I]f the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated.") Because partial invalidation is based on the concept of severance, it is a remedy used by courts only after a determination that some applications of the statute would be constitutional while others would not. *See Regan v. Time, Inc.*, 468 U.S. 641, 652-55 (1984) (plurality opinion); *accord id.* at 677 (Brennan, J., concurring in part and dissenting in part); *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (per curiam); *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990). Further, partial invalidation is not proper where it would be "contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid." *Brockett v. Spokane Arcades*, 472 U.S. 491, 506 (1985).

An as-applied challenge involves a determination of the constitutionality of a law with respect to the particular factual context involving the litigants before the court. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 (1984) (holding that because "appellees' attack on the ordinance is basically a

challenge to the ordinance as applied to their activities," the Court would "limit [its] analysis of the constitutionality of the ordinance to the concrete case before [it.]") An as-applied challenge is thus conceptually different from partial invalidation, in that the former seeks to enjoin a particular application of the statute with respect to the challenger's factual situation, whereas the latter seeks to reach beyond the challenger's particular situation and invalidate a provision of the statute in all of its applications. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006) (distinguishing between enjoining only the unconstitutional applications of a statute while leaving other applications in force, *citing United States v. Raines*, 362 U.S. 17, 20-22 (1960), and severing its problematic portions while leaving the remainder intact, *citing United States v. Booker*, 543 U.S. 220, 227-229 (2005)). While a challenge to a statute in less than all of its applications may be described as an "as-applied" challenge in a sense, a claim is not properly analyzed as an "as-applied" challenge if it seeks to "reach beyond the particular circumstances of these plaintiffs." *Doe v. Reed*, __ U.S. __, 130 S. Ct. 2811, 2817 (2010).

ii. The Supreme Court's decision in *Grace II* involved an as-applied challenge, not a narrowing interpretation or partial invalidation of the law.

The Supreme Court in *Grace II* explicitly described its decision as considering an as-applied challenge to the constitutionality of the Display Clause with respect to only the appellees' own proposed conduct. 461 U.S. at 175 ("[T]he controversy

presented by appellees concerned *their* right to use the public sidewalks surrounding the Court building for the communicative activities *they* sought to carry out, and we shall address only whether the proscriptions of § 13k are constitutional *as applied* to the public sidewalks")(emphasis added); *id.* at 183 ("We hold that under the First Amendment the section is unconstitutional *as applied* to those sidewalks")(emphasis added).

The Supreme Court did not and could not have adopted a narrowing construction of the statute that excluded the sidewalk from the scope of the statute. The Court noted its duty to construe statutes, where fairly possible, to avoid deciding constitutional issues, but determined that it could not do so and proceeded to directly confront the constitutionality of the statute as applied to the sidewalk. Given that the challenged statute explicitly includes the sidewalk, the Court could not reasonably have adopted a narrowing construction that excluded the sidewalk. *Grace II*, 461 U.S. at 179, n.9 ("Because the prohibitions of § 13k are expressly made applicable to the entire grounds under § 13p, the statute cannot be construed to exclude the sidewalks.")

Although not as explicit, it is also clear that the Court did not partially invalidate the statute. First, because *Grace II* was not an overbreadth case, the remedy of partial invalidity would not have been available. The Court never used the term overbreadth and never considered any application of the statute beyond

the factual context before the Court. Had it been conducting an overbreadth analysis, the Court would have examined the sweep of the statute beyond the appellees' own conduct and inquired into whether the number of illegitimate applications of the statute was substantial. *See Broadrick v. Okla.*, 413 U.S. 601, 615 (1973).

Second, partial invalidation of the statute would have entailed a determination that a portion of the statute was severable from the remainder. *See Ferber*, 458 U.S. at 769 n.24. The Court would have had to determine whether severance would have been contrary to the intent of Congress, meaning whether Congress would have passed an inseverable statute or would not have passed it had it known the sidewalk provision was invalid. *See Brockett*, 472 U.S. at 506. Nothing in the Court's opinion in *Grace II* suggests that the Court engaged in this analysis.

Finally, the remedy of partial invalidity is only used by courts only after a determination that some applications of the statute would be constitutional while others would not. In *Grace II*, the Court explicitly declined to analyze whether other applications of the statute would be constitutional. By limiting its examination of the statute to only its application to the appellees' own activities, the Court adhered to a traditional as-applied challenge and did not partially invalidate the statute.

iii. Because the Supreme Court in *Grace II* ruled only on an as-applied challenge to the Display Clause, the Court must conduct its overbreadth analysis by construing the statute as it was written.

Following its usual practice, the Supreme Court in *Grace II* declined to reach the facial overbreadth challenge to the Display Clause because an as-applied challenge was successful. *See Bd. of Trs. v. Fox*, 492 U.S. 469, 484-85 (1989)(explaining that it is not the "usual judicial practice" to reach an overbreadth challenge until it is determined that the statute would be valid as-applied). Thus, *Grace II* cannot be fairly read as having rendered any decision on whether the Display Clause was overbroad on its face because its prohibitions included the sidewalk. Accordingly, the Supreme Court's decision in *Grace II* was not a "limiting construction or partial invalidation" which "so narrows [the statute] as to remove the seeming threat or deterrence to constitutionally protected expression[.]" Enforcement of the Assemblages Clause should therefore be "totally forbidden[.]" *Broadrick*, 413 U.S. at 613.

Moreover, the Supreme Court in *Grace II*, while holding that the Display Clause was unconstitutional as applied, said nothing about the Assemblages Clause. *See Grace II*, 461 U.S. at 175 ("our review is limited to the latter portion of the statute [the Display Clause]"). This Court must therefore conduct its overbreadth analysis of the Assemblages Clause as it is written, without excluding the perimeter sidewalks.

iv. Appellants' interpretation of the statute is incompatible with case law.

Appellants argue that the statute, as "narrowed by *Grace*, does not ban any category of speech." (Appellants Br. at 30.) Even if the Supreme Court's decision in *Grace II* could properly be considered as "narrowing" the Display Clause to exempt the public sidewalk, the Supreme Court did not limit the types of conduct or speech that were within the reach of the statute. Appellants are incorrect in asserting that the Display clause "does not ban any category of speech"; the Display Clause actually bans *every* category of speech. In *Grace II*, the Supreme Court adopted an expansive reading of the Display Clause, holding that "almost any sign or leaflet carrying a communication . . . would be 'designed or adapted to bring into public notice [a] party, organization or movement.' Such a construction brings some certainty to the reach of the statute and hence avoids what might be other challenges to its validity." *Grace II*, 461 U.S. at 176 (alteration in original); *see Potts v. United States*, 919 A.2d 1127, 1130 (D.C. 2007)(construing the Display Clause to be coextensive in scope with the Supreme Court's definition of "expressive conduct"); *Grace I*, 665 F.2d at 1206 (describing the statute as containing "all-encompassing terms" and noting the government's concession that the statute "is a total ban of all expressive conduct on the grounds surrounding the Supreme Court.")

As to the Assemblages Clause, Appellants contend that it is "most naturally read to apply only to gatherings likely to attract attention," and that principles of statutory construction counsel against a broader reading. (Appellants Br. at 35-37.) This narrowed interpretation of the Assemblages Clause is necessary, according to Appellants, to avoid "ascrib[ing] to Congress an implausible intent to criminalize lunch gatherings and school groups." (Appellants Br. at 37-38.)

A nearly identical argument, however, was rejected by the court in *Jeannette Rankin Brigade*, 342 F. Supp. 575. Examining the same statutory language at issue here (albeit in the context of a challenge to 40 USC § 193g), a three-judge panel rejected the government's contention that the statutory provision should "not be read literally as forbidding all assemblages" because "the present language of the statute is open to absurdities which Congress cannot be taken to have intended" *Id.* at 586. In construing the language of the statute, the court observed that "[t]here is no ambiguity about the language," of the statute, which "flatly prohibit *all* assemblages[.]" *Id.* at 583, 585 (emphasis added). In view of the legislative history indicating that the statute at issue in this case was designed to be an extension of § 193g, it is not reasonable to assign different meanings to the identical language in the two statutes. *Communications Workers of Am. v. Beck*, 487 U.S. 735, 761 (1988)(giving same meaning to virtually identical language in two statutes based on legislative history).

C. Even if it construes the statute as Appellants urge, the Court must hold that the statute burdens a substantial amount of protected conduct.

Appellants contend that the statute is not overbroad because it "operates not as a ban on any type of protected speech, but as a regulation of the location of expressive activity." (Appellants Br. at 12.) Even if the statute is construed to have no application to the perimeter sidewalks, its scope far exceeds that which is reasonably necessary to serve legitimate governmental interests. The statute "totally bans the specified communicative activity," *Grace II*, 461 U.S. at 181, on the Supreme Court plaza and grounds. Assuming *arguendo* that the government has a proper interest in avoiding even the appearance that the Supreme Court is subject to outside influence, the legitimate sweep of the statute extends only so far as it advances that interest. Activities with "the appearance of seeking to subject the Supreme Court to influences apart from the presentation of briefing and argument," (Appellants Br. at 29) however, comprise only a small fraction of the reach of the statute, which extends to all expressive conduct (except oral expression). The district court provided a few examples of the type of expressive conduct prohibited by the statute which would be unrelated to Supreme Court's non-judicial functions. SJ Op. 52 [JA 227] (employees protesting labor practices or animal rights advocates protesting the offering of meat in the Court's cafeteria). These examples are merely illustrative, however, and it is readily apparent that

there are innumerable ways in which the statute curtails expressive conduct which is entirely unrelated to the Court's judicial function. Absent a precise and narrowly drawn statute, the government cannot restrict such expressive conduct. *Cox II*, 379 U.S. at 567 (upholding statute prohibiting demonstrations near courthouses with intent to influence administration of justice, but holding that "[a]bsent an appropriately drawn and applicable statute, entirely different considerations would apply if, for example, the demonstrators were picketing to protest the actions of a mayor or other official of a city completely unrelated to any judicial proceedings, who just happened to have an office located in the courthouse building.")

Just as they do here,[5] the appellants in *Grace II* argued[6] that the statute has only a minimal effect on constitutionally protected conduct because individuals wishing to picket or leaflet can simply move to a nearby area. The Supreme Court rejected this argument, however, concluding that as a purported regulation of "place," there was "an insufficient nexus with any of the public interests that may be thought to

[5] Appellants argue that the statute is only a "limited intrusion on speech that arises from shifting expressive activities down eight steps to the sidewalk." (Appellants. Br. at 13.)

[6] The appellants in *Grace II* argued in their brief: "Section 13k leaves them such abundant alternative means of expression that it is likely to have no significant effect on their speech. Section 13k regulates expression only in one square block; it leaves demonstrators free to go anywhere else in the vicinity of the Court, including the sidewalk directly across the street and the streets themselves in front of the Court." [JA 43-44]

undergird § 13k." *Grace II*, 461 U.S. at 181. The Supreme Court expressed "serious[] doubt 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. It is just as doubtful 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 a few steps away on the plaza, simply because the plaza is made of a different material and is set off from the sidewalk by eight steps.

III. IF THIS COURT DISAGREES WITH THE DISTRICT COURT'S OPINION, IT MAY AFFIRM ON ALTERNATIVE GROUNDS.

A. Because the public forum analysis is of limited utility in this case, the Court may affirm on the grounds that expressive activity is not basically incompatible with the design and purpose of the Supreme Court plaza.

The First Amendment protects an individual's right to engage in "appropriate types of action" in places where the individual has a right to be. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)(plurality opinion). Thus, the government cannot prohibit a brief, silent protest in the reading room of a public library, *id.* at 141, although a loud oration there presumably could be proscribed. Even on government property that may be subjected to extensive regulation, such as a school, an individual has the right to engage in expressive activity "if he does so without materially and substantially interfering with" the operation of the property

"and without colliding with the rights of others." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). When considering the validity of a restriction on expressive activity in a public place, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Constitutional protection of expressive activity should, and rightly does, turn on the compatibility of the proposed activity with the normal operation of the property, rather than on a mere label describing the physical place.

While it is true that the Supreme Court has often applied different standards to review restrictions on expressive activity depending on the type of government property involved (the so-called "forum analysis"), it has never suggested that forum analysis should be adhered to in a rigid fashion that precludes an evaluation of the legitimacy of the interest served by the restriction. Specifically, the Court has cautioned that it may be "of limited utility" in certain cases to "focus on whether the tangible property itself should be deemed a public forum." *Taxpayers for Vincent*, 466 U.S. at 815 n.32. As the Court explained,

> Generally an analysis of whether property is a public forum provides a workable analytical tool. However, the analytical line between a regulation of the time, place, and manner in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a public forum may blur at the edges, and this is particularly true in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those

> clearly held in trust, either by tradition or recent convention, for the use of citizens at large.

Id.

In other words, where government property does not fit neatly into the category of public or nonpublic fora, it may be difficult to determine whether a restriction on expressive activity is appropriately considered as a reason for defining the property as a nonpublic forum, or whether the restriction is better viewed as a time, place, and manner regulation of a public forum. To the extent that a statutory ban on expressive activity would constitute a reason in itself for determining that a forum is nonpublic, the Court should reject such circular logic. The Court has an obligation to protect citizens' First Amendment rights by engaging in a careful weighing of the government's asserted interests against the public's right to engage in expressive activity:

> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

Schneider v. State, 308 U.S. 147, 161 (1939).

The Court should therefore 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.

It is particularly inappropriate for 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. In *Grace II*, 461 U.S. at 177, the Supreme Court contrasted "time, place and manner restrictions" with those "[a]dditional restrictions such as an absolute prohibition on a particular type of expression," and held that the latter "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." This heightened scrutiny derives, not from the nature of the property, but from a suspicion of "[b]road prophylactic rules in the area of free expression." *Schad v. Mt. Ephraim*, 452 U.S. 61, 69 (1981)(requiring a showing that municipal zoning regulation which prohibited live entertainment to be narrowly drawn and to further a sufficiently substantial government interest).

The Supreme Court is a significant tourist attraction and received more than 340,000 visitors last year. (Dolan Decl. ¶ 2) [JA 16]. The Supreme Court plaza is a large, oval-shaped area which is approximately 98 feet by 252 feet at its largest part. (Dolan Decl. ¶ 6) [JA 17-18]. In light of the large size of the plaza and the

huge number of visitors it receives, it cannot reasonably be expected that the presence of a small, peaceful, orderly group of demonstrators, such as proposed by Appellee, would impede ingress or egress of visitors to the Court. If anything, a group demonstration is *more* compatible with the normal use of the plaza than the normal use of the sidewalk, because the plaza is wider and routinely accommodates groups of individuals standing in assemblages.[7]

The presence of demonstrators on the plaza would also be compatible with the operation of the Supreme Court and its appearance as a body not swayed by outside influence. Any concerns about improper influence-picketing or its appearance have already been fully addressed by a separate statute, 18 U.S.C. § 1507, which prohibits, *inter alia*, picketing or parading in or near a building housing a court of the United States with the intent to interfere with, obstruct, or impede the administration of justice. The statute at issue in this case goes further, however, and prohibits all expressive activity, regardless of its intent or effect. Far from preserving the integrity and dignity of the Court, the statute does the opposite. "[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and

[7]"Visiting the Court – Frequently Asked Questions" *available at* http://www.supremecourt.gov/faq_visiting.aspx (noting that visitors wishing to attend oral arguments may begin lining up on the plaza well before the building opens) [JA 22].

contempt much more than it would enhance respect." *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

Further, despite the government's concerns in *Grace II* about the *appearance* of improper political influence which would result from expressive conduct anywhere on the Supreme Court grounds,[8] there is no record evidence in this case that in the nearly thirty years since *Grace II* was decided, allowing demonstrations on the sidewalk has resulted in the harms predicted by the government. The government's nearly identical prediction of harm here[9] is similarly unfounded.

B. To the extent that the Court applies the public forum analysis, it should hold that courthouse plazas, including the Supreme Court plaza, are public fora, and that the blanket ban on expressive activity imposed by 40 USC § 6135 is not a reasonable restriction.

If this Court decides to engage in forum analysis, it must conclude that the Supreme Court plaza is a public forum. Public parks, the Supreme Court's perimeter sidewalks,[10] the United States Capitol grounds,[11] and state capitol

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[8] Br. United States in *Grace II* at 25 [JA 61] ("Plainly, by preventing demonstrators from closely approaching the Court, Section 13k directly protects against the appearance that political pressure can influence a judicial decision.")

[9] Appellants Br. at 25 ("Here, similarly, the government has a substantial interest in preventing protestors from filling the plaza directly outside the Supreme Court, which would create the appearance that such protests can influence the Court[.]")

[10] *Grace II*, 461 U.S. 171.

[11] *Jeannette Rankin Brigade*, 342 F. Supp. at 584.

grounds[12] are all public fora. In contrast, airport terminals[13], residential mailboxes,[14] military installations,[15] and jailhouse grounds[16] are nonpublic fora. Based on its history, uses, status, and characteristics, the Supreme Court plaza fits in much more comfortably with the class of government properties that have been found to be public fora.

The Supreme Court building was completed in 1935, but the prohibition on demonstrations in the building and grounds was not enacted until 1949. During this interim period, there were pickets in and around the Supreme Court building.[17] Since 1949, there have been numerous demonstrations on the Supreme Court plaza relating to controversial decisions of the high court and other social and political issues.[18] Courthouse plazas as a "type" of forum are a common location for demonstrations around the country.[19]

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[12] *Lehman v. Shaker Heights*, 418 U.S. 298, 313 (1974) (Brennan, J., dissenting)("the Court has added state capitol grounds to the list of public forums compatible with free speech, free assembly, and the freedom to petition for redress of grievances, *Edwards v. South Carolina*, 372 U.S. 229 (1963).")

[13] *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 683 (1992).

[14] *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128 (1981).

[15] *Greer v. Spock*, 424 U.S. 828, 838 (1976).

[16] *Adderley v. Florida*, 385 U.S. 39, 41 (1966).

[17] 95 Cong. Rec. H7958 (June 20, 1949) (statement of Rep. Bryson)("Since I have been in Congress I remember seeing pickets marching in and around the Supreme Court Building.")

[18] *United States v. Mark*, 2011 CMD 23560 (D.C. Super. Ct. 2012)(demonstration relating to *Citizens United v. FEC*, 130 S. Ct. 876 (2010)); *Bonowitz v. United States*, 741 A.2d 18, 19 (D.C. 1999)(demonstration against execution); *Pearson v.*

The Supreme Court plaza is a large, open area, much like a park, and on either side of the plaza are benches and fountains.[20] Members of the public are permitted to freely enter and leave the grounds at practically all times. *Grace II*, 461 U.S. 171. Individuals on the Supreme Court grounds may also engage in oral expression on any subject. *Id.* at 181 n.10. Reporters mill around, interviewing advocates about cases before the Court.[21] On some days, attorneys and parties in cases that have been argued can be heard giving press conferences on the plaza. (Dolan Decl. at ¶ 9) [JA 18-19]. During high profile cases, the Supreme Court plaza is indistinguishable from a town square.[22]

The Supreme Court is also, significantly, the apex of one of the three branches of the national government, and the protections of the First Amendment apply with

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United States, 581 A.2d 347, 349 (D.C. 1990)(demonstration against *Roe v. Wade*, 410 U.S. 113 (1973)).

[19] *See e.g.*, "Couples stage protest in support of gay marriage," *The Herald-Sun* at C-1 (May 10, 2012)(protest at North Carolina courthouse plaza) [JA24-26]; "Protesters required to obtain permit for use of courthouse plaza," *U.S. State News* (Dec. 7, 2011)(noting that Boulder County Courthouse plaza has been a venue for protests for over one hundred years) [JA 27-28]; "Hoping against hope for peace," *Spokane Spokesman-Review* at B8 (Mar. 25, 2007)(vigil at federal courthouse plaza in Spokane, WA) [JA 29-30].

[20] "The Court Building," *available at* http://www.supremecourt.gov/about/courtbuilding.aspx [JA 31-32].

[21] "U.S. abortion decision not simple or neat," *Winnipeg Free Press* at A14 (May 3, 2007) [JA 33-34].

[22] "'Obamacare' Protests Expand to Abortion Coverage," CBN News (noting that "[t]he Supreme Court plaza has become the public square as justices weigh in on the constitutionality of President Barack Obama's health care law"), *available at* http://www.cbn.com/cbnnews/politics/2012/March/Washingtons-Obamacare-Protests-Expand-to-Abortion/ [JA 35-36].

equal force to it. Although James Madison's original draft of the First Amendment guaranteed citizens only the right to petition "the Legislature" for redress of their grievances,[23] the final version guarantees the right to petition "the Government," including all three branches. "[T]he law gives judges as persons, or courts as institutions no greater immunity from criticism than other persons or institutions. The operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications v. Va.*, 435 U.S. 829, 838-39 (1978) (internal citations and marks omitted). The Supreme Court grounds accordingly should be treated no differently than the grounds of a national or state legislature, which have been considered public fora.

Appellants rely on cosmetic features of the Supreme Court plaza, such as the fact that it is made of a different material and is a different shape, in order to distinguish it from the perimeter sidewalk. (Appellants Br. at 22.) However, "cosmetic differences, such as distinctive pavement and landscaping, are insufficient to distinguish an area from surrounding public forums." *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1102 (9th Cir. 1993). Cosmetic differences, unlike the situation of a forum in an isolated location, do not suggest to ordinary citizens that the Supreme Court plaza is a special enclave. *See id.* Indeed, the public's lack of perception of the difference between the sidewalk and plaza is

[23] 1 Annals of Congress 434 (J. Gales ed. 1789).

demonstrated by the fact that the Supreme Court police typically give multiple warnings to individuals engaging in demonstrations or other types of expressive activity that violate the statute, in order "to ensure that the individuals understand that their conduct is illegal." (Dolan Decl. at ¶ 7) [JA 18].

C. Even if it is not overbroad, 40 USC § 6135 is void for vagueness.[24]

i. The Assemblages Clause is impermissibly vague.

A criminal statute is void for vagueness unless it "define[s] the criminal offense with sufficient definiteness that [(1)] ordinary people can understand what conduct is prohibited and [(2)] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983)(citations omitted). Further, "standards of permissible statutory vagueness are strict in the area of free expression," and a court must not presume that an ambiguous line between permitted and prohibited activity will minimally impact protected expression. *NAACP v. Button*, 371 U.S. 415, 432 (1963). In the First Amendment context, a statute is unconstitutionally vague if its "deterrent effect on legitimate expression is ... both real and substantial, and if the statute is [not]

[24] The doctrines of overbreadth and vagueness are related. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 88 n.10 (1973)(Douglas, J., dissenting)(observing that "the problems of vagueness and overbreadth are, plainly, closely intertwined.") Appellee has separated the sections on overbreadth and vagueness for convenience, and does not thereby intend to suggest that the arguments made in one section are inapplicable to the other.

readily subject to a narrowing construction." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (internal quotation marks omitted).

The Assemblages Clause as written is impossible to apply even-handedly without leading to absurd results. For example, 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.[25] Congress obviously would not have intended that Supreme Court justices be arrested for marching in an assemblage or procession on the plaza, but the lack of textual support or legislative history to support a workable narrowing construction leaves complete discretion to law enforcement to determine which assemblages and processions to allow and which to prohibit. *See Houston*, 482 U.S. at 466-67 ("Houston's ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, yet only some individuals – those chosen by the police in their unguided discretion – are arrested. Far from providing the breathing space that First Amendment freedoms need to survive, the ordinance is susceptible of regular application to protected expression")(internal quotation marks and citations omitted).

[25] *See* Lodging Exhibits F171 (Newsweek photograph) and G173 (Time magazine photograph), *Grace II*, 461 U.S. 171.

As a result, the Supreme Court police have conflicting policies on enforcement. On the one hand, they inform would-be demonstrators that *all* demonstrations on the plaza are prohibited (Dolan Decl. at ¶ 5) [JA 17], while on the other hand they adhere to a policy of disallowing only "demonstrations . . . that violate the statute on the plaza[,] . . . utilizing the narrowing construction of the Assemblage Clause that has been adopted by the District of Columbia courts" (Dolan Decl. at ¶ 7) [JA 18]. They further allow media to assemble on the plaza, but only if they have press credentials; attorneys and parties in cases that have been argued to address the media immediately following argument are allowed to assemble, apparently without the need to obtain permission; and commercial or professional filming is allowed only when approved, subject to content-based restrictions. (Dolan Decl. at ¶ 9) [JA 18-19].

The relaxation of the statute in these situations is arbitrary – why should litigants be allowed to assemble on the plaza directly after oral arguments to hold a press conference while their case is pending, but not after the case is decided? Surely the reverse would make more sense if the Supreme Court police were enforcing the statute in a manner that was designed to avoid the appearance of the Court being swayed by influences outside the formal submissions and arguments in a case.

Further, the appearance of the Court as a body not swayed by outside influence would be the same to most passersby observing an assemblage which is permitted, as compared to one which is not permitted. A passerby would be unlikely to tell by observation, for example, whether members of the media assembled on the plaza have press credentials; whether attorneys gathered to give a press conference had participated in oral arguments that morning; whether a camera crew assembled to engage in commercial or professional filming had obtained a permit from the Court's Public Information Office; or whether filmmakers' final product would relate to the Court.

The same considerations which cause the Assemblage Clause's vague, subjective terms to vest excessive discretion in law enforcement also leave citizens without adequate notice as to what conduct is prohibited. Even a constitutional scholar, let alone an ordinary citizen, would be unable to determine what types of assemblages are sufficiently like parades or processions to fall within the reach of the statute as construed by Appellants. Protests are common outside many federal courthouses,[26] and if this Court adopts Appellants' construction, a citizen would be left to wonder what other types of assemblages which commonly take place outside federal courthouses are prohibited by the Assemblages Clause.

[26] "Protesting at the Courts," *available at* http://movetoamend.org/protesting-courts (noting protests at 110 federal courthouses) [JA 108-09].

ii. The Display Clause is impermissibly vague.

Different judges, government attorneys, and the Supreme Court police all have a different understanding of what is meant by the phrase "flag, banner, or device." This illustrates just how vague the term is. Judge MacKinnon, dissenting in *Grace I*, acknowledged the vagueness of the term "device," stating that "[a]lthough 'flag' and 'banner' may describe a readily identifiable group of objects, the inclusion of the word 'device' makes difficult the task of limiting these three terms to a particular class of objects." 665 F.2d at 1207. He ultimately concluded that "it would appear that the reach of 'device' would include any object that is capable of display." *Id.* The Supreme Court held that the phrase "flag, banner, or device" would include a picket sign or leaflet, but did not specifically define the term "device." *Grace II*, 461 U.S. at 176.

In *Jeannette Rankin Brigade*, the government argued that the phrase "flag, banner, or device," as used in the similarly worded statute which applied to the U.S. Capitol, 40 USC § 193g, included picket signs, placards, and billboards, but not lapel buttons, name cards, insignias, or armbands. 342 F. Supp. at 586 n. 13. At oral argument in *Grace II*, the government stated that it had "some question whether the wearing of a campaign button would actually come within the strictures of the statute itself. If it simply happens to be something that is a matter

of the individual's apparel and is not done in a demonstrating kind of fashion, then it might not come within the... within the... within the scope of the statute."[27]

In *United States v. Ebner*, No. M-12487-79 (D.C. Super.Ct. Jan. 22, 1980), the government stated that the Display Clause would forbid the carrying of the American flag on the Supreme Court plaza. However, in *United States v. Mark*, 2011 CMD 23560 (D.C. Super. Ct. 2012), Supreme Court police officer Justen Freeman stated to the best of his knowledge, it is not illegal to hold an American flag on the Supreme Court's steps.

At oral argument in *Grace I*, the government admitted that it was "not sure" whether T-shirts with insignias or mottos were banned by the Display Clause. An individual wearing a jacket with the motto "Occupy Everywhere" was arrested by the Supreme Court police,[28] whereas individuals carrying items such as shopping bags with corporate slogans are not arrested. Appellants now argue that a t-shirt may or may not be prohibited depending on whether it had the "purpose or effect of promoting a position being advocated in Court" or instead had "no apparent connection to the Supreme Court". (Appellants Br. at 32.) However, Appellants

[27] Audio and transcript of oral argument are available at http://www.oyez.org/cases/1980-1989/1982/1982_81_1863 (last visited Jan. 15, 2014).

[28] "Occupy Jacket-wearer Arrested at Supreme Court Building," Constitutional Law Prof Blog, *available at* http://lawprofessors.typepad.com/conlaw/2012/01/occupy-jacket-wearer-arrested-at-supreme-court-building.html [JA 110-13].

fail to explain how the text of the Display Clause can be read to include a "purpose or effect" test or an "apparent connection" test.

Additionally, the phrase "bring into public notice a party, organization, or movement" is vague in that it has been interpreted to apply to any expression of views, regardless of whether the message is associated with an identifiable party, organization, or movement. In *Grace II*, 461 U.S. at 176, for example, the Supreme Court found the Display Clause to be applicable to Mary Grace, who wore a sign with the verbatim text of the First Amendment. No citizen of ordinary intelligence would expect that the plain language of the statute extends to expressive conduct unrelated to an identifiable party, organization, or movement, and thus the statute may trap innocent citizens. *See Grace II*, 461 U.S. at 188 (Stevens, J., concurring in part and dissenting in part)("I do not agree that her device was 'designed or adapted to bring into public notice any party, organization, or movement.' A typical passerby could not, merely by observing her sign, confidently link her with any specific party, organization, or 'movement' as that term was understood when this statute was drafted.")

CONCLUSION

Appellee respectfully requests that the judgment of the district court be affirmed.

Respectfully Submitted,

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 9,584 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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_/s/ Jeffrey Light_____
Jeffrey Light

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

_/s/ Jeffrey Light_____
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