No. 15-863

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

REPLY BRIEF FOR PETITIONER

JEFFREY L. LIGHT
Law Office of Jeffrey L. Light
1712 Eye Street, N.W., Suite 915
Washington, DC 20006
(202) 277-6213
Jeffrey@LawOfficeOfJeffreyLight.com
Counsel of Record for Petitioner
Participating Attorney for The Rutherford Institute

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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SUMMARY OF THE ARGUMENT

Respondents' opposition to the Petition seeks to support the D.C. Circuit's decision construing and upholding 40 U.S.C. § 6135 as a limited and reasonable restriction on First Amendment rights on the Supreme Court building plaza. But the plain and broad terms of the statute make clear that it is an attempt to surround the Court with a "cordon of silence." *Grace v. Burger*, 665 F.2d 1193, 1206 (D.C. Cir. 1981), *aff'd in part and rev'd in part*, *United States v. Grace*, 461 U.S. 171 (1983). Section 6135 imposes a zone of censorship around the Supreme Court that is wholly at odds with the First Amendment and this Court's role as the nation's defender of liberty and fundamental rights.

Moreover, in straining to uphold § 6135, the D.C. Circuit Court has created a conflict with precedent from the D.C. Court of Appeals, which had previously been primarily responsible for construing and applying § 6135. While Respondents dismiss this conflict, it is unmistakable and will cause confusion over what expression is allowed on the plaza and unequal enforcement of the statute. This Court must step in to resolve this conflict and vindicate the principle that the First Amendment does not authorize the government to impose absolute bans on expression.

ARGUMENT IN REPLY

I. The Construction of the Assemblages and Display Clauses by the D.C. Circuit is in Conflict With the Construction of Those Clauses by the D.C. Court of Appeals

The Respondents' Brief in Opposition fails to address in any substantial or convincing manner the conflict created by the D.C. Circuit's decision in this case and the confusion it will create for citizens, enforcement officers and courts regarding application of 40 U.S.C. § 6135. Respondents argue that the D.C. Circuit's decision and the line of decisions from the District of Columbia Court of Appeals do not conflict simply because (1) each court upheld the statute's provisions against constitutional challenges and (2) each court interpreted the statute in light of the purpose of the statute. Brief in Opp. 14. But each court read into the statute vastly different elements that must exist in order for expression on the Supreme Court plaza to violate either the Assemblages or Display Clauses, differences which will result in confusion and inconsistency in how restrictions on First Amendment freedom are imposed on the plaza.

As to the Assemblages Clause, it is now unclear whether expression is forbidden on the plaza if it is "directed at the Court" and "compromise[s] the dignity and decorum of the Court," as the D.C. Court of Appeals held in *Pearson v. United States*, 581 A.2d

347, 358 (D.C. 1990), or may simply be "expressive in nature" and "aimed to draw attention," as the D.C. Circuit ruled below. Pet. App. 48a. These are vastly different glosses that the courts have placed on § 6135 and create a clear danger of inconsistent and discriminatory application. Indeed, while his solo conduct was not covered under the D.C. Circuit's construction, the *message* the Petitioner communicated that resulted in his being charged under both the Assemblages and Display Clauses of § 6135, Pet. App. 65a, *i.e.*,[1] "The U.S. Gov. Allows Police To Illegally Murder and Brutalize African Americans And Hispanic People," also *would not* have violated the Assemblages Clause under D.C. Court of Appeals precedent because this speech was not directed at the U.S. Supreme Court. Yet it falls within the parameters of the Assemblages Clause as construed by the D.C. Circuit in this case.

A similar conflict now exists on the Display Clause as a result of the D.C. Circuit's decision in this case. The opinion of the D.C. Circuit, in order to avoid the plain overbreadth of the statutory language, declared that conduct violates the Display Clause only if it "conspicuous" with a "propensity to draw onlookers," but excluding the display of words or logos on clothing. Pet. App. 50a. In stark contrast, the D.C. Court of Appeals precedent

[1] Although the Petitioner would like to be able to direct expression to the Supreme Court, his arrest resulted from expression that was meant to raise public awareness about the adverse treatment of minorities by law enforcement. Pet. App. 64a.

extends the reach of the Display Clause to *any* expressive display so long as there is "an intent to convey a particularized message" and there is a likelihood that the message would be understood by viewers. *Potts v. United States*, 919 A.2d 1127, 1130 (D.C. 2007). And, in direct conflict with the D.C. Circuit's ruling here, the Display Clause's coverage under D.C. Court of Appeals precedent includes a prohibition on expression "such as picketing, leafletting, *and wearing t-shirts with protest slogans*[.]" *Kinane v. United States*, 12 A.3d 23, 27 (D.C. 2011) (emphasis added).

The Respondents' brief offers no convincing argument resolving the patent conflict created by the D.C. Circuit's construction of § 6135 here, and they instead resort to the conclusory claim that "[n]o such conflict exists." Brief in Opp. 14. Respondents' point that both the D.C. Circuit and the D.C. Court of Appeals attempt to construe § 6135 in a manner that comports with its purposes is not surprising, *see Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve"), but is not a basis for Respondents' assertion that the courts' precedent is consistent when there is a plain and obvious difference in the elements required for a § 6135 violation in the decisions of each of the courts. That the courts started with the same purpose cannot conceal or distract from the fact that the results reached by the

D.C. Circuit and D.C. Court of Appeals are in conflict.

Nor can it be said, as the Respondents attempt to do, that the constructions of § 6135's clauses by the D.C. Circuit and D.C. Court of Appeals are "harmonious." The suggestion that conduct which compromises the "dignity and decorum" of the Court (the D.C. Court of Appeals' Assemblages Clause standard) is the same as conduct that is "purposely expressive" and "designed to attract notice" (the D.C. Circuit's standard) improperly assumes that all assemblages that attract notice would compromise the dignity of the Court. Additionally, Respondents ignore the fact that the D.C. Court of Appeals also requires that a demonstration be "directed at the Court," an additional element that is in no way embodied in the standard established by the D.C. Circuit.

Similarly, the courts' rulings on the Display Clause cannot be deemed substantially similar as contended by Respondents. The D.C. Court of Appeals requires only that expressive conduct be intended to convey a message that is understood by viewers, *Potts*, 919 A.2d at 1130, which that court noted covers virtually any expression, passive or otherwise. *Kinane*, 12 A.3d at 27. The D.C. Circuit's decision imposes the distinct requirement that the conduct be "conspicuous" and tend to draw onlookers. Pet. App. 50a. The standard established in the D.C. Court of Appeals cases is clearly broader and effectively bans all expression on the plaza.

Thus, there are irreconcilable differences between the D.C. Circuit's ruling in this case and the outstanding D.C. Court of Appeals' precedent on the application of both clauses of § 6135, a conflict which demands this Court's attention, particularly when fundamental First Amendment rights are at issue. Contrary to Respondents' claim, there is every reason to believe that this inconsistency in the governing law will lead to unpredictable and uneven applications of § 6135. As discussed above concerning Petitioner's conduct that led to this case, expressive conduct that speaks out generally against the government or about a social issue but is not targeted at the Court or related to a case before the Court would be banned under the D.C. Circuit's construction of the Assemblages Clause, but not under the D.C. Court of Appeals precedent. There are myriad issues of public concern unrelated to the Court or its business that could be the subject of expression on the plaza and which might or might not be banned depending upon which § 6135 precedent enforcement officials or courts decide to follow.

And although Respondents attempt to minimize the conflict over the applicability of the Display Clause to message-bearing apparel, the inconsistency is clear and obvious. The D.C. Circuit has now held that "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" Display Clause of § 6135. Yet the D.C. Court of Appeals in *Kinane*, 12 A.3d at 27, held that the Display Clause "prohibits expression such as picketing, leafletting, *and wearing t-shirts* with protest slogans because such expression is 'designed ... to bring into public notice [a] party, organization or movement,' *Potts,* 919 A.2d at 1130, for the purpose of swaying the opinion of the Supreme Court." Despite Respondents' claim that *Kinane*'s ruling on t-shirts is limited and applies only in the factual context of a larger demonstration, there can be no doubt that the D.C. Court of Appeals broadly endorsed the application of the Display Clause to message-bearing apparel. Indeed, the Respondents' point that *Kinane*'s holding only covers t-shirts worn in connection with a larger demonstration is negated by the fact that just prior to its ruling on t-shirts the D.C. Court of Appeals wrote that "[t]he disruptiveness of a particular form of expression is not the primary harm the statute seeks to avoid," but it is particular modes of expression, including t-shirts with protest slogans, that the statute forbids. *Id*. at 27.

Respondents' efforts to minimize and rationalize the difference between the standards established by the D.C. Circuit in this case and those established by the line of D.C. Court of Appeals cases construing 40 U.S.C. § 6135 must be rejected. It is imperative that visitors to this Court, those charged with enforcing the law and lower courts be given clear guidance on what First Amendment activity is

allowed on the Court's plaza. The petition should be granted to resolve this conflict and assure that the right to free speech is respected in the place established for the protection of that and other fundamental rights.

II. The D.C. Circuit's Decision is Wrong and Conflicts With This Court's Jurisprudence

A. Assemblages Clause

In defending the construction given to the Assemblages Clause of § 6135 by the D.C. Circuit limiting its reach to joint conduct that is expressive, the Respondents refuse to confront the central point of the District Court's decision[2] and the Petition, Pet. at 10-11—the terms of the Assemblages Clause are plain, unambiguous and do not admit to any saving construction. There is no need to resort to legislative history regarding the purpose of a statute or principles of statutory construction when the text of a statute is clear. As this Court has said: "'It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 167 (2004) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79

[2] "[A]s 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." Pet. App. 157a.

(1998)). *See also C.I.R. v. Gordon*, 391 U.S. 83, 93 (1968) (a court is not free to disregard the provisions of a statute simply because it considers them redundant or unsuited to achieving the general purpose in a particular case).

Indeed, this was the point of the decision in *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), *aff'd*, 409 U.S. 972 (1972), which declared unconstitutionally overbroad a statutory provision identical to the Assemblages Clause that was applicable to the U.S. Capitol grounds, refusing to adopt a limiting construction pressed upon it by the government because there was no ambiguity in the statute. Although the fact that *Jeannette Rankin Brigade* was summarily affirmed by this Court shows strongly that the D.C. Circuit erred in imposing a gloss upon the Assemblages in order to save it, Respondents dismiss this Court's action in that case suggesting that nothing should be read into the affirmance. However, "[s]ummary affirmances … without doubt…leave undisturbed the judgment appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). While a summary affirmance should not be read as a wholesale adoption of the lower court's reasoning, one may read into this Court's action that which was "essential to sustain that judgment." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-3 (1979). Essential to the judgment in *Jeannette Rankin Brigade* was (1) the determination that a law forbidding citizens to parade, stand, or

move in processions or assemblages on United States Capitol grounds was unconstitutional and (2) the conclusion that such a law could not be saved by a judicially-created limiting construction.

Central to the lower court's judgment in *Jeanette Rankin Brigade* was the recognition that it is beyond the scope of the judicial function to rewrite the law. *Jeanette Rankin Brigade*, 342 F. Supp. at 587 ("Although we are 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."). Accordingly, the court refused to adopt the Government's suggestion that the statute be read to apply only to groups of 15 or more. However, the judgment in no way turned upon the atextual nature of the Government's proposal, as suggested by Respondents in their Brief in Opposition. The court explicitly refused to entertain *any* limiting construction that might have saved the statute from being struck down as unconstitutional, finding that "[t]here is no ambiguity about the language of" the Capitol Grounds' Assemblages Clause. *Id*. at 583.

Thus, the *Jeanette Rankin Brigade* decision and its affirmance by this Court are strong grounds for reversing the D.C. Circuit's decision in this case to engage in judicial manipulation of the Assemblages Clause so as to avoid striking it down as unconstitutional on its face.

B. Display Clause

In defense of the D.C. Circuit's construction of the Display Clause implying a missing requirement that any display must be with the intent to "attract attention," the Respondents argue that this effort to avoid the obvious constitutional overbreadth of the clause is "firmly rooted" in the statutory text. However, this apparent clarity that the Display Clause includes the element of an intent to attract attention was lost on the district court, Pet. App. 153a[3], and the D.C. Court of Appeals in *Kinane*, 12 A.3d at 27. This limitation also was apparently lost on the government; as pointed out in the Petition, the government has on previous occasions asserted that the passive display of apparel with political slogans on the Supreme Court plaza is grounds for arrest. Pet. 16.

[3] The D.C. Circuit relied on its decision in *Oberwetter v. Hilliard*, 639 F.3d 545 (D.C. Cir. 2011), for adopting the limiting construction of the Display Clause, but as the district court pointed out in its decision, § 6135 "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*." Pet. App. 153a.

CONCLUSION

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

Respectfully submitted,

JEFFREY LIGHT
Law Office of Jeffrey Light
1712 Eye Street, N.W.
Suite 915
Washington, DC 20006
(202) 277-6213
Jeffrey@LawOfficeOfJeffreyLight.com
Participating Attorney for The Rutherford Institute