[ORAL ARGUMENT NOT SCHEDULED]

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.

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

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

The appellants in this Court, who were defendants in the district court, are Pamela Talkin in her official capacity as Marshal of the United States Supreme Court and Ronald C. Machen Jr. in his official capacity as United States Attorney for the District of Columbia. The appellee in this Court, who was plaintiff in the district court, is Harold H. Hodge, Jr. There were no amici in the district court. The American Civil Liberties Union of the National Capital Area has indicated its intention to file an amicus brief in support of plaintiff in this Court.

Plaintiff's original complaint also named as defendants the District of Columbia and Cathy L. Lanier in her official capacity as Chief of Police of the Metropolitan Police of the District of Columbia, but the amended complaint did not name them as defendants and they are no longer parties in this matter.

B. Rulings Under Review.

The ruling under review is the Memorandum Opinion and accompanying Order issued on June 11, 2013, by Judge Beryl A. Howell, docket numbers 25 and 26 [JA 175–243]. The opinion is not yet published.

C. Related Cases.

This matter has not previously been before this Court or any other court. We are unaware of any related cases pending in this Court or any other court. We note, however, that in an appeal that is currently pending in this Court involving a tort claim against the United States for false arrest brought by a different party, the statute at issue here was discussed by the district court. *See Scott v. United States*, No. 13-5206 (D.C. Cir.). A Supreme Court regulation, promulgated after the district court's ruling, that addresses some of the same conduct covered by the statute at issue here is currently being challenged by the plaintiff here (and others) in *Miska v. Talkin*, No. 13-1735 (D.D.C.).

s/ Daniel Tenny
Daniel Tenny

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on June 11, 2013. The government timely appealed on August 9, 2013. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether a federal statute that makes it unlawful to "parade, stand, or move in processions or assemblages . . . , or to display . . . a flag, banner, or

device designed or adapted to bring into public notice a party, organization, or movement" on the grounds of the Supreme Court, 40 U.S.C. § 6135, is facially invalid under the First Amendment.

PERTINENT STATUTES AND REGULATIONS

The pertinent statute is reproduced in an Addendum to this brief.

STATEMENT

A. Statutory Background.

The statute at issue in this case, 40 U.S.C. § 6135, reads as follows:

> 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.

A separate provision defines the "grounds" of the Supreme Court to include the single block on which the Supreme Court building stands, between First Street Northeast and Second Street Northeast and between Maryland Avenue Northeast and East Capitol Street. 40 U.S.C. § 6101(b).

In *United States v. Grace*, 461 U.S. 171 (1983), the Supreme Court held that a materially identical predecessor to this statute was unconstitutional insofar as it prohibited "carrying signs, banners or devices on the public sidewalks surrounding the building." *Id.* at 183. The *Grace* decision did

not consider the constitutionality of the statute as applied to portions of the Supreme Court grounds other than the public sidewalks. *Id.* The Supreme Court expressly vacated this Court's judgment, which had struck down the entire statute. *See id.* at 184.

Since the *Grace* decision, the Supreme Court police have not enforced the statute on the public sidewalks surrounding the building, but have continued to enforce the statute throughout the rest of Supreme Court grounds. Dolan Decl. ¶ 5 [JA 17]. The police enforce the statute consistent with the way it has been construed by the District of Columbia Court of Appeals. *Id.* ¶ 7 [JA 18]. That court has interpreted the phrase "parade, stand, or move in processions or assemblages" to apply only insofar as necessary for "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 v. United States*, 581 A.2d 347, 356–57 (D.C. 1990) (internal quotation marks omitted). So construed, the D.C. Court of Appeals has repeatedly upheld the constitutionality of the statute. *See, e.g.*, *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, 24 (D.C. 1999).

Congress has authorized the Marshal of the Supreme Court, with the approval of the Chief Justice of the United States, to issue such regulations as "are necessary for—(1) the adequate protection of the Supreme Court Building and grounds and of individuals and property in the Building and grounds; and (2) the maintenance of suitable order and decorum within the Building and grounds." 40 U.S.C. § 6102(a). The Marshal has issued a regulation to maintain order and safety on the perimeter sidewalks, where demonstrations are now permitted, by regulating matters like the size and composition of signs. *See* Supreme Court of the United States, Building Regulations, Regulation Six.[1] That regulation is not at issue here. After the district court's decision in this case, the Marshal also issued a regulation limiting demonstrations throughout the Supreme Court building and

[1] http://www.supremecourt.gov/publicinfo/buildingregulations.aspx

grounds. *See* Building Regulations, Regulation Seven. That regulation is also not at issue in this case.[2]

B. Facts and Prior Proceedings.

This litigation concerns the application of 40 U.S.C. § 6135 on the "plaza" of the Supreme Court. The plaza is an oval-shaped marble area, approximately 252 feet long and 98 feet wide. Dolan Decl. ¶ 6 [JA 17–18]. The width of the plaza covers the space between eight steps leading up from the public sidewalk on First Street Northeast and the large set of steps that lead up to the main entrance of the Court. *Id.* At either end of the long axis of the plaza, marble walls set off the plaza from the surrounding space. *Id.*

According to the amended complaint, plaintiff visited the Supreme Court plaza wearing a sign that was three feet by two feet and read "The U.S. Gov. Allows Police To Illegally Murder and Brutalize African Americans And Hispanic People." Am. Compl. ¶ 18 [JA 10]. The Supreme Court police asked plaintiff to leave the plaza. *Id.* ¶ 21 [JA 10]. When he

[2] Regulation Seven is currently being challenged by several individuals, including the plaintiff in this case, in *Miska v. Talkin*, No. 13-1735 (D.D.C.).

refused, the police gave him three warnings, and then arrested him for violating 40 U.S.C. § 6135. *Id.* ¶¶ 22–23 [JA 10–11]. The prosecutors ultimately agreed to drop the charges if plaintiff agreed to stay away from the Supreme Court building and grounds for six months. *Id.* ¶ 26 [JA 11]. Plaintiff complied with the agreement, and the charges were dropped. *Id.* ¶ 27 [JA 11].

Plaintiff subsequently filed this lawsuit challenging the constitutionality of 40 U.S.C. § 6135. According to the complaint, plaintiff "desires to return to the plaza area . . . and engage in peaceful, non-disruptive political speech and expression in a similar manner to" the prior visit for which he was arrested. Am. Compl. ¶ 28 [JA 12]. In addition, plaintiff "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." *Id.* ¶ 29 [JA 12].

The government filed a motion to dismiss or, in the alternative, for summary judgment, and submitted a declaration from the Deputy Chief of the Supreme Court of the United States Police. *See* Dolan Decl. [JA 16].

Plaintiff opposed the motion, but did not cross-move for summary judgment.

In evaluating the government's motion, the district court noted that the conduct for which plaintiff had been arrested clearly violated the "Display Clause" of the statute ("display . . . a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement"), but that there was some uncertainty about whether plaintiff could also challenge the "Assemblages Clause" ("parade, stand, or move in processions or assemblages"). SJ Op. 34–35 [JA 209–10]. The court ultimately concluded that because plaintiff had been "formally charged . . . with violation of the statute as a whole" and had expressed in his complaint a desire to return "either by himself or with a group of like-minded individuals," plaintiff had standing to challenge the entire statute. *Id.* at 35 [JA 210].

On the merits, the district court concluded that summary judgment in plaintiff's favor was warranted even though plaintiff had not sought summary judgment. *See* SJ Op. 2 & n.1 [JA 177 & n.1] (citing Fed. R. Civ. P. 56(f)). The court "assume[d], without deciding, that the Supreme Court plaza is a nonpublic forum." *Id.* at 43 [JA 218]. In a nonpublic forum,

speech restrictions must be upheld if they are "reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The district court held that the statute did not satisfy this standard, and that it was impermissibly overbroad.

The court held that the statute was unreasonable because it was not adequately tailored to the government interests identified in support of the statute. The court concluded that the statute could not be sustained on the ground that it advanced the government's interest in preventing improper attempts to influence the Court, and in preserving the appearance of the Court as a body not swayed by external influence. According to the district court, the statute was invalid because it was not limited to people who could be seen as trying to sway the Supreme Court's rulings: "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." SJ Op. 46 [JA 221]. The district court similarly concluded that the statute was too broad to be justified on the basis of facilitating ingress and egress to the Supreme

Court, as the statute is not limited to individuals who would themselves block access to the Court. *Id.* at 45–46 [JA 220–21].

The district court endorsed the reasoning in this Court's decision in the *Grace* case, which was issued at a time when the statute was applied both on the plaza of the Supreme Court and on the surrounding sidewalk and, as noted above, was partially affirmed and partially vacated by the Supreme Court. The district court acknowledged that it was not bound by the vacated D.C. Circuit decision in *Grace*, but considered the opinion "persuasive and instructive." *Id.* at 49 [JA 224]. In that decision, this Court had observed that "'a more narrowly drawn statute, 18 U.S.C. § 1507, . . . is fully applicable to the Supreme Court grounds.'" *Id.* at 47 [JA 222] (citing *Grace v. Burger*, 665 F.2d 1193, 1194 (D.C. Cir. 1981)). The cited statute, 18 U.S.C. § 1507, prohibits picketing or parading near a federal 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, in the discharge of his duty."[3]

[3] A state analogue to 18 U.S.C. § 1507 was upheld against a First Amendment challenge in *Cox v. Louisiana*, 379 U.S. 559 (1965).

The district court went on to conclude that the statute at issue here was facially overbroad. The district court stated that the statute's Display Clause was overbroad based on its application to various activities other than the display of signs or banners. The court concluded that the statute "applies, for example, to the distribution of pamphlets," and "prohibits the wearing of t-shirts bearing school and organizational logos." SJ Op. 53–54 [JA 228–29].

As to the Assemblages Clause, the district court rejected the decisions of the D.C. Court of Appeals that had limited the statute's application to activities that would interfere with the statute's purposes of protecting the Court building and grounds, maintaining proper order and decorum, and upholding the appearance of the Court as a body not swayed by external influence. *See Pearson*, 581 A.2d at 358. Instead, the district court rejected any effort to limit the statute to demonstrations, protests, and similar activities, ultimately concluding that the statute applies "to employees both assembling for lunch or protesting a labor practice or the menu in the Supreme Court cafeteria." SJ Op. 52 [JA 227]. The court indicated that these applications of the statute were unnecessary to serve the government's stated objectives, but made no effort to compare the number

of legitimate applications to the number of applications the court considered impermissible.

In an order accompanying its opinion, the district court declared the statute "unconstitutional and void under the First Amendment." *See* SJ Order [JA 175].

SUMMARY OF ARGUMENT

It is well established that the government has a legitimate interest in limiting picketing or demonstrating near courthouses. Unlike other parts of government, courts do not make decisions by reference to public opinion. Congress may reasonably enact measures to protect both actual and apparent efforts to influence courts through means other than the orderly presentation of briefing and argument. And Congress may likewise enact measures to protect the order and decorum of the Supreme Court, and to facilitate ingress and egress of employees and visitors to the Court in a manner that comports with that order and decorum.

The statute at issue in this case serves these purposes in a manner fully consistent with the First Amendment. As narrowed in *United States v. Grace*, 461 U.S. 171 (1983), the statute applies only to require protests and other displays to take place on the public sidewalk surrounding the

Supreme Court—the perimeter of the very block on which the Court is situated—rather than on the interior of the Supreme Court grounds. The statute thus operates not as a ban on any type of protected speech, but as a regulation of the location of expressive activity. Moreover, the statute now operates only on portions of the Supreme Court grounds that are part of the core of Court property, not a public thoroughfare or a forum for the expression of ideas. There is no indication in the complaint, the record, or the district court opinion that the statute, as narrowed, materially inhibits any category of protected speech.

Instead of focusing on the statute's legitimate applications, the district court invalidated the statute on its face based on a series of hypotheticals that are not presented in this case. This mode of analysis failed to apply the proper framework for overbreadth challenges, which can succeed only if the number of impermissible applications is substantial as compared to the statute's plainly legitimate sweep.

The district court compounded its error by presuming that the statute would apply to any number of mundane activities that do not fall within the statute's language and purpose, and by treating applications of the statute to nonexpressive activities as raising insurmountable First

Amendment concerns. Properly construed, the statute has no application to most of the everyday activities on which the district court focused, and instead serves primarily to prevent individuals from attracting attention as plaintiff in this case wished to do. The government interests served by the statute as applied to such activities amply justify the limited intrusion on speech that arises from shifting expressive activities down eight steps to the sidewalk.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's order granting summary judgment. *See Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 329 (D.C. Cir. 2011).

ARGUMENT

THE STATUTE, AS NARROWED BY THE SUPREME COURT'S DECISION IN *GRACE*, IS CONSISTENT WITH THE FIRST AMENDMENT

A. The government has a legitimate interest in limiting picketing or demonstrating on the Supreme Court grounds.

It is well established that the government has a legitimate interest in limiting picketing or demonstrating near courthouses. In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court upheld a state statute that prohibited picketing or parading that was intended to influence or obstruct

the judicial system. There is "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, and "the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial," *id.* at 565. A "State may also properly protect the judicial process from being misjudged in the minds of the public" by avoiding the appearance of influence by demonstration. *Id.*

The same principles were reiterated in *United States v. Grace*, 461 U.S. 171 (1983), in the context of a materially identical predecessor to the statute at issue in this case. Courts "do not and should not respond to parades, picketing or pressure groups," and 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." *Id.* at 183 (emphasis in original). The *Grace* decision "d[id] not discount the importance of this proffered purpose" for the statute. *Id.*

B. The challenged statute advances the government interest with a minimal intrusion on expressive activity.

1. After *Grace*, the statute does not prohibit any category of expressive activity, but merely directs people to the public sidewalk.

The ultimate holding of *Grace* was that the legitimate justifications for the statute were insufficient to sustain the statute's "validity insofar as the public sidewalks on the perimeter of the grounds are concerned." *Grace*, 461 U.S. at 183. This Court had invalidated the statute in its entirety. But the Supreme Court vacated this Court's judgment except insofar as it applied to the sidewalks, *see id.* at 184, and repeatedly made clear that its analysis applied only to the public sidewalks surrounding the Court, and not to the interior portions of the Court's grounds. *See, e.g.*, *id.* at 181 (discussing statute "insofar as its prohibitions reach to the public sidewalks"); *id.* at 183 ("[A]gain, we are unconvinced that the prohibitions of [the statute] that are at issue here sufficiently serve [a legitimate] purpose to sustain its validity *insofar as the public sidewalks on the perimeter of the grounds are concerned*." (emphasis added)).

After the Supreme Court's decision in *Grace*, the statute operates only to require that people who wish to engage in the activities specified in the

statute do so on the sidewalk immediately surrounding the Supreme Court, rather than in the building, on the plaza, or on other parts of the Court grounds. "Various forms of demonstrations and protest regularly occur on the perimeter sidewalk directly in front of the Court," and individuals planning protests at the Court "are typically informed that they have the right to demonstrate on the sidewalk, but not elsewhere at the Court." Dolan Decl. ¶ 5 [JA 17]. The overbreadth analysis in this case must take account of the partial invalidation of the statute. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting that partial invalidation may save a statute from an overbreadth challenge).

The statute as currently applied operates simply to direct people to the sidewalk as opposed to other parts of the Supreme Court grounds. The statute, as narrowed by *Grace*, thus falls at the intersection of two doctrines that limit the degree of applicable First Amendment scrutiny: it operates not as a ban but instead merely as a restriction on the location of expressive activity, and that restriction applies only in portions of the Supreme Court grounds that are not in any event proper locations for expressive activity by the general public.

Although the statute at issue here, as narrowed by *Grace*, has no effect in any public forum, even the more rigorous First Amendment scrutiny that applies to speech regulations in public fora leaves considerable room for regulations that merely affect the location of expressive activity. In the context of a public forum, a time, place, or manner restriction "must be narrowly tailored to serve the government's legitimate, content-neutral interests," and may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Such a restriction "need not," however, "be the least restrictive or least intrusive means of" serving the government's interests. *Id.* "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

The statute at issue here qualifies for an even more relaxed standard of review, however, because it no longer has any application to the public sidewalks surrounding the Court, which have been held to constitute a public forum. Outside of a public forum, as the district court recognized,

"'[l]imitations on expressive activity . . . must survive only a much more limited review' than would be the case for public or designated public fora." SJ Op. 39 [JA 214] (quoting *Int'l Soc'y of Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)) (alterations in original). A statute applicable only to the portions of the Supreme Court grounds other than the public sidewalks is thus susceptible, at most, to review under the standard applicable to a nonpublic forum, under which the "challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to a disagreement with the speaker's view." *Int'l Soc'y of Krishna Consciousness v. Lee*, 505 U.S. at 679. As discussed below, the statute readily satisfies any plausibly relevant standard.

2. The statute advances the government's interest without impermissibly burdening expressive activity.

There can be no dispute that the statute at issue here serves substantial government interests. As discussed above, both *Cox* and *Grace* highlight the importance of avoiding actual or apparent efforts to influence the Court through public opinion and demonstrations, rather than through the orderly presentation of briefing and argument. In addition, the statute

prevents the Supreme Court plaza from being filled with protestors, which could interfere with the orderly ingress and egress of persons visiting or doing business before the Court, in a manner consonant with the decorum called for in that setting.

The district court acknowledged that the statute has repeatedly been applied to people attempting to engage in large demonstrations on controversial issues on the plaza located directly in front of the Supreme Court. *See* SJ Op. 63 n.33 [JA 238 n.33] (describing D.C. Court of Appeals cases). And those cases reflect only protestors who were willing to proceed in the face of a criminal prohibition. But for the statute at issue here, these and other demonstrators could protest on the Supreme Court grounds, and protestors who regularly appear on the sidewalk could move their activities to the Supreme Court plaza.

Conversely, neither the complaint nor the district court's opinion explained why protesting on the sidewalk, rather than on the plaza, would be less effective to convey plaintiff's message or any other message. As discussed above, numerous protests take place on the sidewalk in front of the Supreme Court. Such protests are readily seen by the public and regularly covered by the press, and provide an adequate avenue for

speech. Thus, the statute, as narrowed by the *Grace* decision, "leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (upholding ban on picketing a residence because the statute was construed to be limited to picketing focused on a single residence, and not to prohibit "[g]eneral marching through residential neighborhoods," and the statute thus permitted "more general dissemination of a message").

The challenged statute serves to supplement 18 U.S.C. § 1507, which prohibits overt attempts to influence the Court. *See Initiative & Referendum Institute v. U.S. Postal Service*, 685 F.3d 1066, 1073 (D.C. Cir. 2012) ("[C]ertainly the Postal Service is free to adopt multiple means to ensure that customers visiting the post office can transact their business unimpeded."). The interests served by the statute at issue here—"protection of the Court building and grounds, and persons and property within, and maintenance of proper order and decorum—are broader than those served by 18 U.S.C. § 1507 (which makes it illegal to demonstrate on public property near a courthouse with the intent to influence court, judges, employees, witnesses), and thus other provisions of law do not

serve as an adequate alternative." *Pearson v. United States*, 581 A.2d 347, 358 (D.C. 1990). For example, plaintiff in this case avers that his "political message . . . 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." Am. Compl. ¶ 29 [JA 12]. Whether or not this message or a similar one would violate 18 U.S.C. § 1507—whose application would depend on the context—it could be construed as an attempt to put political pressure on the Court. Congress reasonably acted to avoid such an appearance.

3. Congress reasonably declined to convert the Supreme Court grounds into a forum for public expression.

The nature of the Supreme Court grounds underscores the reasonableness of the restriction at issue here. The *Grace* decision relied heavily on the distinction between the perimeter sidewalks—which are public fora—and the plaza. *See Grace*, 461 U.S. at 180 ("The public sidewalks forming the perimeter of the Supreme Court grounds, in our view, are public forums and should be treated as such for First Amendment purposes."). The public sidewalks in front of the Supreme

Court "are indistinguishable from other public sidewalks in the city that are normally open to the conduct" that the statute forbids. *Id.* at 182. Unlike the plaza, the public sidewalks "are used by the public like other public sidewalks," and "[t]here is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city." *Id.* at 183. For that reason, the purpose of preventing apparent efforts to influence the Court was not appropriately served by the statute's application to the sidewalk: "We seriously 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.*

The plaza, by contrast, is plainly part of the Supreme Court grounds and readily distinguishable from sidewalks in the city. "The plaza is set off from the front sidewalk by a set 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 [JA 18]. "While the perimeter sidewalks are made of concrete that is similar to other sidewalks in the area, the plaza is made of marble." *Id.* These features distinguish the plaza from public sidewalks, and connect it visually, spatially, and structurally to the Supreme Court building itself.

This Court has concluded that the interior sidewalks connecting a postal facility's parking lot to the door of the facility are nonpublic fora, even though the surrounding neighborhood sidewalks, which this Court referred to as "*Grace* sidewalks," are public fora. *Initiative & Referendum Institute*, 685 F.3d at 1071, 1068 n.1. The Court relied on the "physical separation from ordinary sidewalks" and the fact that interior sidewalks "are neither public thoroughfares nor gathering places." *Id.* at 1071. *Accord United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion) (concluding that interior sidewalks of postal facilities are nonpublic fora).

The Supreme Court plaza is similarly not a public thoroughfare or gathering place, and it is physically separated from the surrounding sidewalk by a staircase, and made of a different material. Its form and function are even less amenable to use as a forum for public expression than the interior sidewalks of a postal facility, where members of the public must regularly go to transact their day-to-day business. Rather, the Supreme Court plaza provides access to the Supreme Court building, where highly specialized government business is transacted which presents a particular need for order, decorum, and freedom from improper outside influence. *See Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring in

the judgment) (concluding that in First Amendment analysis "it is proper to weigh the need to maintain the dignity and purpose of a public building," citing *Grace*).

Moreover, it is settled law that the government may prohibit demonstrations "with the intent of influencing any [Justice]." 18 U.S.C. § 1507; *see Cox*, 379 U.S. at 562. Given that the demonstrations that would most logically take advantage of the plaza's location may be legitimately banned, the plaza is not naturally described as any sort of forum for expressive activity, much less a public forum that would give rise to heightened First Amendment scrutiny.

As narrowed by the *Grace* decision, the statute at issue here is analogous to the regulation this Court upheld in *Oberwetter v. Hilliard*, 639 F.3d 545 (D.C. Cir. 2011). The regulation at issue there, issued by the National Park Service, prohibited visitors at the Jefferson Memorial from engaging in "'conduct . . . involv[ing] 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.'" *Id.* at 550 (quoting 36 C.F.R. § 7.96(g)(1)(i)). This Court had "little trouble concluding that the Park Service Regulations are viewpoint neutral and

reasonable in light of the purpose of the forum." *Id.* at 553 (internal quotation marks and brackets omitted). The Court observed that the "Park Service has a substantial interest in promoting a tranquil environment at our national memorials," and had "reasonably advanced its interest in tranquility because . . . the restriction on expressive activity does not sweep beyond the actual Memorial space." *Id.* at 554.

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, would force people seeking to access the Supreme Court building to dodge large groups of protestors on their way in and out, and would disrupt the order and decorum called for in the area of ingress and egress to the Court itself. And the statute does not sweep beyond the actual Supreme Court grounds, and permits expressive activity on the immediately adjacent public sidewalk.

C. The district court's analysis does not withstand scrutiny.

1. The Supreme Court grounds are fundamentally different from the Capitol Grounds.

The government's legitimate interest in preventing actual or apparent attempts to influence the Supreme Court by demonstration highlights the differences between the statute at issue in this case and the one at issue in *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972), *aff'd*, 409 U.S. 972 (1972), on which the district court heavily relied. *See, e.g.*, SJ Op. 21 [JA 196] (describing statutes as "closely analogous").

Jeannette Rankin Brigade concerned a statute worded similarly to the one at issue here, but applicable to the Capitol Grounds, a several-block area surrounding the Capitol Building. *See Jeannette Rankin Brigade*, 342 F. Supp. at 577 n.1. The district court initially dismissed a First Amendment challenge, deeming the constitutional question insubstantial, but this Court remanded the case for consideration by a three-judge district court. *See Jeannette Rankin Brigade v. Chief of the Capitol Police*, 421 F.2d 1090 (D.C. Cir. 1969).

Judge Bazelon would have invalidated the statute on its face without remanding to the district court. *See id.* at 1096 (Bazelon, J., dissenting). On

remand, the three-judge district court took that step. The court explicitly recognized that the nature of the area to which the statute applied would affect the constitutional analysis. The court stated that "[j]ails, for instance, may be put off limits to parades and other political demonstrations," and, most relevant here, that "[t]he area surrounding a courthouse may be similarly immunized." *Jeannette Rankin Brigade*, 342 F. Supp. at 583. The court also noted that "'the judiciary does not decide cases by reference to [public] opinion,'" while "the fundamental function of a legislature in a democratic society assumes accessibility to such opinion." *Id.* at 584 (quoting *Jeannette Rankin Brigade*, 421 F.2d at 1109 (Bazelon, J., dissenting)).

Driving the point home, the constitutional argument in that case was premised not on the right to free speech, but rather on "the First Amendment 'right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'" *Jeannette Rankin Brigade*, 421 F.2d at 1091 (quoting U.S. Const. amend. I). Plaintiff does not and could not urge here that he has a right to petition the Supreme Court by picketing outside. "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.[4]

2. The district court failed to apply the proper standard for overbreadth challenges and misunderstood the statute's scope and effect.

The district court's opinion did not question the legitimacy of the government's objective or identify any constitutional infirmity in the statute's application to large demonstrations or banners. The district court's conclusion that the statute must nonetheless be invalidated on its face reflects a misapplication of the legal framework applicable to overbreadth challenges and a misunderstanding of the statute's scope and effect.

"Invalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (internal quotation marks omitted). A statute may be struck down as

[4] In addition, the Capitol Grounds include "'all squares, reservations, streets, roadways, walks, and other areas'" in "a large area extending north to Union Station, east to Third Street, S.E. and N.E., south to Virginia Ave., S.E., and west to Third Street, N.W. and S.W." *Jeannette Rankin Brigade*, 342 F. Supp. at 577 n.1 (quoting 40 U.S.C. § 193a (1964)). The statute at issue here covers only a portion of a single block, and now allows expressive activity on the surrounding sidewalk.

facially overbroad only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted).

Here, the statute's plainly legitimate sweep includes the types of activities at which it was aimed: those with the appearance of seeking to subject the Supreme Court to influences apart from the presentation of briefing and argument, such as those that draw a crowd or onlookers. For example, plaintiff was arrested for wearing a sign that was, by plaintiff's own account, "directed both at the Supreme Court and the general public," and designed to "explain how decisions of the Supreme Court have allowed police misconduct and discrimination against racial minorities to continue." Am. Compl. ¶ 29 [JA 12]. As discussed above, avoiding the display of signs in the immediate vicinity of the Court that are or appear to be designed to advocate different outcomes in the Supreme Court is a principal and legitimate goal of the statute. The statute is plainly constitutional as applied to such conduct.

The district court gave little weight to the legitimate purposes served by the statute, referring to its application to "displaying a single

unobtrusive sign" as if that would be the consequence of invalidating the statute on its face. SJ Op. 54 [JA 229]. The relevant question is not whether the statute would be valid if it served only to prevent a single protestor from carrying a single unobtrusive sign. If everyone could display a single sign, the plaza could be covered with them. The proper inquiry thus concerns whether the statute addresses activities which, in the aggregate, would disturb the proper functioning and perception of the Supreme Court. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981) ("The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to [the plaintiff]."). The statute serves that legitimate purpose.

On the other side of the ledger, the district court overstated the statute's scope and effect with regard to activities protected by the First Amendment. The district court invalidated the statute on its face largely due to the court's view that the statute "bans a variety of . . . unobtrusive actions." *See* SJ Op. 45 [JA 220]. That characterization misstates the statute's reach in two critical respects.

First, as discussed above, the statute as narrowed by *Grace* does not "ban" any category of speech. The statute now has no application to the

sidewalk immediately adjacent to the Supreme Court plaza, where protestors can and regularly do engage in all types of speech including displaying signs, assembling significant numbers of people, and handing out leaflets. Particularly given the absence of any evidence that the sidewalk presents an inadequate alternate avenue for speech, as noted above, the statute may not properly be characterized as a "ban." *See, e.g.*, *Heffron*, 452 U.S. at 655 (upholding regulation as place and manner restriction and noting that "the Rule has not been shown to deny access within the forum in question").

There is no basis for concluding that a substantial number of expressive activities, especially as compared to the statute's legitimate sweep, are materially and unreasonably inhibited simply because they must be located on the sidewalk rather than on the Supreme Court plaza. To the extent that a hypothetical future plaintiff might see the statute as problematic as applied to some particular (as yet unidentified) form of expression, he or she can raise that argument in an as-applied challenge.

Second, the district court gave the statute an implausibly broad construction, and on that basis struck it down as overbroad. The district court separately addressed the "Display Clause," which makes it unlawful

to "display . . . a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement," and the "Assemblages Clause," which makes it unlawful to "parade, stand, or move in processions or assemblages." 40 U.S.C. § 6135. The court's analysis as to each clause was mistaken.

With respect to the Display Clause, the district court's overbreadth analysis focused on hypothetical application of the statute to t-shirts with logos. *See* SJ Op. 53–54 [JA 228–29]. Depending upon the context and content, such t-shirts could raise the very concerns the statute was legitimately designed to address—say, a t-shirt with the purpose or effect of promoting a position being advocated in Court. Other, more common, t-shirts—such as one with a university logo with no apparent connection to the Supreme Court—would not be "designed or adapted to bring into public notice a party, organization, or movement." 40 U.S.C. § 6135. Neither category would raise constitutional concerns, as the statute would be permissibly applied to the first category, and would not be applied to the second category at all.

Because this case primarily concerned a sign, the district court was in no position to assess the boundaries of the statute as applied to t-shirts or

other matters. Nor does this case present an occasion to resolve all questions surrounding the statute's application to various types of t-shirts. Plaintiff's facial overbreadth challenge must fail because the substantial bulk—perhaps the entirety—of the conduct actually addressed by the statute was plainly the proper subject of congressional attention. The appropriate statutory and constitutional analysis of other matters could properly be assessed in an as-applied challenge in which a court could consider the relevant context.

The district court's analysis of the statute's Assemblages Clause was similarly flawed. As a threshold matter, plaintiff has not even alleged—much less introduced evidence sufficient for summary-judgment purposes—that he wishes to violate the Assemblages Clause. The only statement in plaintiff's complaint that suggests that the Assemblages Clause might be implicated in this case states that plaintiff wishes to engage in certain activities "either by himself or with a group of like-minded individuals." Am. Compl. ¶ 29 [JA 12]. This allegation amounts, at most, to a statement that plaintiff *might* some day wish to participate in an assemblage on the Supreme Court plaza. Such an imprecise and speculative allegation is inadequate to demonstrate plaintiff's standing to

challenge the Assemblages Clause. *See, e.g.*, *Am. Library Ass'n v. FCC*, 401 F.3d 489, 496 (D.C. Cir. 2005) ("[G]eneral averments, conclusory allegations, and speculative 'some day' intentions are inadequate to demonstrate injury in fact." (internal quotation marks omitted)); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 ("[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." (internal quotation marks and brackets omitted; emphasis in original)).

Plaintiff's desire to violate the Display Clause does not give him license to challenge the Assemblages Clause as overbroad. The statute is properly applied to the conduct in which plaintiff wishes to engage, and plaintiff has offered no basis for applying the strong medicine of overbreadth to a portion of the statute that is not implicated in this case.

In *Grace*, the plaintiffs wished to violate the Display Clause; the decision in that case was accordingly limited to that clause and did not discuss the Assemblages Clause. *See Grace*, 461 U.S. at 175. And even as to the Display Clause, as noted above, the *Grace* decision concerned only the sidewalks surrounding the Court on which the plaintiffs had sought to

engage in acts covered by the statute. That carefully tailored approach stands in stark contrast to the district court's analysis here, which focused on hypotheticals that bear no relationship to plaintiff's past or intended future conduct, and as to which the statute's application is, at best, uncertain.

The district court's analysis of the Assemblages Clause was also substantively flawed. The statute refers to individuals who "parade, stand, or move in processions or assemblages." 40 U.S.C. § 6135. This statutory language 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]. The statutory terms "parade" and "procession[]" connote something far more purposefully expressive. *See* Webster's Third New Int'l Dictionary 1635 (first definition of "parade": "a pompous show: formal display: exhibition" (capitalization altered); third definition of "parade": "an informal march or procession," "a formal public procession," or "a showy array or procession"); *id.* at 1808 (definition 1(a) of "procession": "the action of moving along on a particular course esp. in a continuous orderly regulated often formal or ceremonial way").

The other statutory terms must be read in concert with the more specific terms "parade" and "procession[]." The additional terms "stand," "move," and "assemblage[]" add to the statute's scope by making clear that the statute covers groups standing still or moving along something other than a prescribed route. But there is no basis for suggesting that they eliminate the requirement, inherent in the terms "parade" and "procession[]," that individuals be engaged in a purposeful exhibition rather than in everyday activities not designed to attract any attention. Courts should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to Acts of Congress." *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (internal quotation marks omitted).

In addition, the Assemblages Clause appears in the same statutory provision as the Display Clause, which on its face is targeted at matters designed to attract public notice. The words of the Assemblages Clause should be construed in keeping with the thrust of the provision in which they appear. *See* 40 U.S.C. § 6135 (referring to items "designed or adapted to bring into public notice a party, organization, or movement").

The Assemblages Clause is thus most naturally read to apply only to gatherings likely to attract attention. But even if the statute were susceptible of a broader reading that might raise constitutional concerns, the proper approach would be to construe the statute in a manner that would preserve its constitutionality. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." (internal quotation marks omitted)).

Applying these principles, the D.C. Court of Appeals has repeatedly upheld the statute after construing it to apply only in the circumstances for which it was plainly designed. *See Bonowitz v. United States*, 741 A.2d 18, 24 (D.C. 1999); *Pearson*, 581 A.2d at 356–57; *United States v. Wall*, 521 A.2d 1140, 1145 (D.C. 1987). In this facial overbreadth challenge, the district court erred in failing to "consider the actual text of the statute as well as any limiting constructions that have been developed." *Boos v. Barry*, 485 U.S. 312, 329 (1988). The district court's suggestion that the statute's plain language requires the broadest possible reading, *see, e.g.*, SJ Op. 58 [JA 233], ignores generally applicable principles of statutory construction, and

ascribes to Congress an implausible intent to criminalize lunch gatherings and school groups.

The district court's focus on circumstances far removed from this case also distracted from the core issue of whether the statute impermissibly intrudes on First Amendment activity. The district court provided no explanation for treating lunch gatherings and tour groups as expressive activity protected by the First Amendment. Although, as noted above, there is no basis for attributing to Congress an intent to prohibit such activities, it is unclear why such a prohibition would implicate the First Amendment in any event.

The overbroad reading of the Assemblages Clause was the linchpin of the district court's analysis. *See, e.g.*, SJ Op. 53 [JA 228] ("the Assemblages Clause prohibits and criminalizes such a broad range of plainly benign expressive activity"). Among other things, the court relied on its erroneous interpretation of the statute to distinguish this Court's decision in *Oberwetter*, discussed above, which concerned a provision applicable to the Jefferson Memorial. The district court here purported to distinguish *Oberwetter* on the ground that the regulation at issue there was limited to conduct that had "'the effect, intent or propensity to draw a

crowd or onlookers'" and expressly excluded "'casual park use by visitors or tourists that is not reasonably likely to attract a crowd or onlookers.'" SJ Op. 62 [JA 237] (quoting 36 C.F.R. § 7.96(g)(1)(i)). That limitation did not, however, preclude application of the regulation in circumstances that did not actually attract a crowd. This Court specifically upheld the National Park Service's determination that the regulation applied to a silent expressive dance carried out by one person close to midnight: although "expressive dancing might not draw an audience when nobody is around," the Court held that "the conduct is nonetheless prohibited because it stands out as a type of performance, creating its own center of attention and distracting from the atmosphere of solemn commemoration that the Regulations are designed to preserve." *Oberwetter*, 639 F.3d at 550. Properly understood, the statute at issue here has a similar scope.

Once attention is turned to the actual scope of the Assemblages Clause, it survives constitutional scrutiny for substantially the same reasons as the Display Clause. Congress legitimately acted to prevent actual or apparent attempts to subject the Court to influences other than the orderly presentation of legal argument. The statute, as narrowed by *Grace*, reasonably and substantially advances that goal, and nothing in the

record indicates that the statute meaningfully curtails First Amendment activity merely by directing it to the sidewalk.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 7,856 words.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, 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/ Daniel Tenny
Daniel Tenny

ADDENDUM

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§ 6135. Parades, assemblages, and display of flags in the Supreme Court Building and grounds

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.