No. 15-863

In the Supreme Court of the United States

HAROLD H. HODGE, PETITIONER

v.

PAMELA TALKIN, MARSHAL,
SUPREME COURT OF THE UNITED STATES, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MICHAEL S. RAAB
DANIEL TENNY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 40 U.S.C. 6135, which makes it "unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement," is facially unconstitutional under the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-61a) is reported at 799 F.3d 1145. The opinion of the district court (Pet. App. 62a-162a) is reported at 949 F. Supp. 2d 152.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2015. A petition for rehearing was denied on November 3, 2015 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on January 4, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1949, Congress enacted a statute "[r]elating to the policing of the building and grounds of the Supreme Court of the United States." Act of Aug. 18, 1949, ch. 479, 63 Stat. 616. One provision of that stat-

ute is at issue in this case: 40 U.S.C. 6135, which provides (as amended in 2002 to reflect non-substantive, stylistic changes, see Act of Aug. 21, 2002, Pub. L. No. 107-217, § 1, Subtit. II, Pt. C, ch. 61, Subch. IV, 116 Stat. 1183) that "[i]t is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement." 40 U.S.C. 6135. The "grounds" of the Court are the single block on which the 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), this Court held that the 1949 enactment was unconstitutional insofar as it prohibited "carrying signs, banners or devices on the public sidewalks surrounding the building," which the Court held "are public forums and should be treated as such for First Amendment purposes." *Id.* at 180, 183. *Grace* did not analyze the constitutionality of Section 6135 as applied to portions of the grounds other than the public sidewalks. See *ibid.*; see also *id.* at 184 (vacating the D.C. Circuit's judgment, which had struck down the entire prohibition, except as it related to those sidewalks). In the wake of *Grace*, the Court police have not enforced the provision on the public sidewalks surrounding the building, but have continued to enforce it throughout the rest of the grounds. Pet. App. 14a.

2. a. This case arises from application of Section 6135 to activities on the plaza in front of the Court building. "Eight marble steps, flanked on either side

by marble candelabra, ascend from the concrete sidewalk along First Street Northeast to the Court's elevated marble plaza: an oval terrace that is 252 feet long (at the largest part of the oval) and 98 feet wide (inclusive of the front eight steps)." Pet. App. 8a. Another 36 steps lead from the plaza to the Court building itself. *Id.* at 8a-9a. "A low marble wall surrounds the plaza and also encircles the rest of the building," and "the plaza's white marble matches the marble that makes up the low wall, the two staircases, * * * and the building's façade and columns." *Id.* at 9a.

On January 28, 2011, petitioner stood in the plaza wearing a large sign that read: "The U.S. Gov Allows Police To Illegally Murder And Brutalize African Americans And Hispanic People." Pet. App. 14a (citation omitted). A Court police officer warned petitioner several times that he was violating the law. *Id.* at 15a. When he disregarded those warnings, he was arrested and charged with violating 40 U.S.C. 6135. The government ultimately dismissed the charges in exchange for petitioner's agreement to stay away from the Court grounds for six months. Pet. App. 15a.

In 2012, petitioner filed this suit in the U.S. District Court for the District of Columbia challenging the constitutionality of Section 6135. Pet. App. 15a-16a. As relevant here, petitioner asserted that the statute should be facially invalidated because it violates the First Amendment. Petitioner asserted that he wished to return to the plaza, by himself or with others, to engage in conduct similar to the conduct that gave rise to his arrest, but was "deterred and chilled" from doing so by "the terms of" Section 6135. *Id.* at 15a (citations omitted); see *ibid.* (allegations

that petitioner desired to return to the plaza to wear a sign, "picket, hand out leaflets, sing, chant, and make speeches" that would "convey" a "political message * * * directed both at the Supreme Court and the general public") (citations omitted).

b. The district court ruled on summary judgment that Section 6135 is unconstitutional on its face. Pet. App. 62a-162a. Assuming without deciding that the plaza is a nonpublic forum, *id.* at 120a, 124a, the court concluded that the statute is nonetheless unconstitutional because it is "not reasonable," *id.* at 127a. The court rejected the government's reliance on its 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, on the ground that the provision is not limited to people who could readily be perceived to be trying to sway the Court's rulings. *Id.* at 130a ("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."); see *id.* at 132a.

The district court went on to conclude that Section 6135 is facially overbroad. The court stated that the provision applies to "employees * * * assembling for lunch" and to "the familiar line of preschool students from federal agency daycare centers, holding hands with chaperones, parading on the plaza on their first field trip to the Supreme Court." Pet. App. 139a. The court also stated that the provision "applies * * * to the distribution of pamphlets" and "prohibits the wearing of t-shirts bearing school and organizational logos." *Id.* at 140a-141a.

c. The court of appeals reversed. Pet. App. 3a-61a.

The court of appeals began by determining that the Court plaza is a nonpublic forum. Pet. App. 24a. The court stated that "[t]he plaza's appearance and design vividly manifest its architectural integration with the Supreme Court building," giving the public every reason to believe that—unlike the perimeter sidewalks—"the plaza is an integral part" of the Court's grounds. *Id.* at 25a-26a; see *id.* at 26a-34a (expalining that categorizing the plaza as a nonpublic forum is consistent with the decision in *Grace* as well as with decisions addressing "courthouses more generally").

The court of appeals then ruled that Section 6135 is valid under the "limited review governing speech restrictions" in a nonpublic forum, which requires only that the restrictions be "reasonable" and viewpoint-neutral. Pet. App. 34a (citations and internal quotation marks omitted); see *id.* at 34a-35a, 40a. The court concluded that Section 6135 does not discriminate on the basis of viewpoint and that it reasonably serves two legitimate government interests: the interest in "maintain[ing] the decorum and order befitting courthouses generally and the nation's highest court in particular," and the interest in "promot[ing] the appearance and actuality of a Court whose deliberations are immune to public opinion and invulnerable to public pressure." *Id.* at 35a; see, *e.g.*, *Grace*, 461 U.S. at 182-183 (discussing both interests). As to decorum and order, the court stated, "Congress could reasonably conclude that demonstrations and parades in the plaza, or the display of signs and banners, would compromise the sense of dignity and decorum befitting an entryway to the nation's highest court." Pet. App. 41a; see *id.* at 36a. And as to "the interest in preserv-

ing the appearance of a judiciary immune to public pressure," *id.* at 37a, the court reasoned, "[a]llowing demonstrations directed at the Court, on the Court's own front terrace, would tend to yield the * * * impression * * * of a Court engaged with—and potentially vulnerable to—outside entreaties by the public," *id.* at 41a-42a; see *id.* at 38a-40a (citing *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656 (2015), and *Cox* v. *Louisiana*, 379 U.S. 559 (1965)).

The court of appeals also noted that "it is a mark in favor of the statute's reasonableness that the barred activity can be undertaken in an adjacent forum—the sidewalk running along First Street Northeast." Pet. App. 51a. The court noted that demonstrations, protests, and similar forms of expression can and regularly do occur on that sidewalk, which "is over fifty feet deep." *Ibid.* And the court reasoned that protests on the plaza and on the sidewalk, although offering an equal opportunity to express a message, "present markedly different appearances to the public." *Id.* at 52a (quoting *Williams-Yulee*, 135 S. Ct. at 1669); see *id.* at 53a (stating that, "unless demonstrations are to be freely allowed inside the Supreme Court building itself, a line must be drawn somewhere along the route from the street to the Court's front entrance," and it is "fully reasonable for that line to be fixed at the point one leaves the concrete public sidewalk and enters the marble steps to the Court's plaza").

In deeming Section 6135 reasonable, the court of appeals rejected petitioner's argument that the provision is impermissibly overbroad. Pet. App. 44a-51a, 55a-56a. The court emphasized that "restrictions of expressive activity in a nonpublic forum need not satisfy any least-restrictive-means threshold"; rather,

"Congress may prophylactically frame prohibitions at a level of generality as long as the lines it draws are reasonable, even if particular applications within those lines would implicate the government's interests to a greater extent than others." *Id.* at 45a; see *id.* at 46a (explaining that the principle is especially true when addressing the "intangible" government interests in "public confidence in the integrity of the judiciary" and "maintaining decorum and order") (citation omitted). It was sufficient here, the court concluded, that "the heartland of [the] law's applications furthers the government's interests." *Id.* at 47a.

The court of appeals nevertheless considered "the district court's (and [petitioner's]) concerns with certain hypothetical applications of § 6135 in the Supreme Court plaza." Pet. App. 47a. As to the contention that the portion of the provision regarding "assemblages" might apply to persons "congregating for reasons other than expressive activity," the court noted that "those applications to *non*-expressive conduct would raise no First Amendment concern in the first place." *Id.* at 48a (citations omitted). In any event, however, the court construed the provision to encompass only "actions that are purposefully expressive and designed to attract notice." *Ibid.* Because Section 6135 uses the words "parade" and "procession" in close proximity to "assemblage," and because the prohibition on displaying flags, signs, or banners contains the "modifying phrase 'designed or adapted to bring into public notice,'" the court reasoned that the prohibition on assemblages should be understood in light of the "statutory focus on conduct meant to attract attention." *Id.* at 48a-49a. The court thus declined to read Section 6135 to prohibit "the line of

people assembled in the plaza to enter the Court for an oral argument session"—a construction that would "preclude use of the plaza" for "its intended purposes." *Id.* at 49a.

As to the contention that the portion of the provision regarding displays of banners or devices might sweep in an individual wearing a shirt displaying a school or organization logo, the court of appeals concluded—without "attempt[ing] to canvass the various forms of conduct involving clothing that may come within the compass" of Section 6135—that the "display" of a "device" would "ordinarily require something more than merely wearing apparel that happens to contain words or symbols." Pet. App. 50a; see *id.* at 49a-51a. The court explained that the provision, with its use of the "affirmative" term "displaying" and its reference to "flag[s]" and "banner[s]," contemplates "an act of display akin to brandishing an object" and does not cover a "passive" act that "normally would not cause the public to pause and take notice." *Id.* at 50a.

Finally, the court of appeals rejected petitioner's claim that Section 6135 is impermissibly vague. Pet. App. 56a-61a. The court explained that petitioner did not argue "that the statute is vague with respect to its coverage of his *own* conduct" and that he was therefore not entitled to complain "of the vagueness of the law as applied to the conduct of others." *Id.* at 57a (quoting *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 20 (2010)); see *id.* at 59a. In any event, the court rejected the notion that Section 6135—as the court had interpreted it—fails to provide fair notice of what is prohibited or calls for "wholly subjective judgments." *Id.* at 59a-60a (citation omitted).

ARGUMENT

The court of appeals correctly upheld Section 6135 in the face of a facial challenge to its constitutionality. That decision does not conflict with any decision of this Court or of any federal court of appeals or state court of last resort. Further review is not warranted.

1. The court of appeals correctly concluded that the plaza is a nonpublic forum, that the restrictions that Section 6135 places on activities in the plaza reasonably serve legitimate government interests, and that the provision is not facially overbroad. See Pet. App. 22a-56a. Petitioner asserts (Pet. 10-17) that the court's rejection of his overbreadth challenge is premised on an impermissibly narrow construction of the provision and conflicts with this Court's summary affirmance of a decision regarding another statute. Petitioner is incorrect. The court of appeals' interpretation of Section 6135 appropriately reads the provision's text in context and in light of its purposes, and that interpretation does not conflict with any decision of this Court.

a. The first portion of Section 6135 makes it "unlawful to parade, stand, or move in procession or assemblages in the Supreme Court Building or grounds." 40 U.S.C. 6135. The court of appeals reasonably interpreted that language to prohibit "joint conduct that is expressive in nature and aimed to draw attention." Pet. App. 48a. The court's interpretation was informed by Section 6135's use of the words "parade" and "procession," both of which connote "purposefully expressive" actions that are "designed to attract notice," *ibid.*, as well as the provision's use of the phrase "adapted to bring into public notice" in

connection with its restriction on the display of flags, banners, and devices, *id.* at 49a.

Petitioner appears to assert that Section 6135 should instead be interpreted "to prohibit literally all assemblages," regardless of their nature, Pet. 14, including "the line of people assembled in the plaza to enter the Court for an oral argument session," Pet. 11 (quoting Pet. App. 49a). The court of appeals was not compelled to adopt that absurd reading of the statute. See, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892). Nor (as petitioner claims, see Pet. 10) was the court barred from reading the word "assemblage" in context and with an eye to the overarching purposes of Section 6135. See generally *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Rather, hewing closely to the provision's text, the court was correct to reject a construction that would sweep so expansively as to "preclude use of the plaza" for its "intended purposes." Pet. App. 49a; cf. *United States* v. *Grace*, 461 U.S. 171, 180-183 (1983); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 505 (1985).[1]

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[1] The court of appeals' interpretation of the assemblage language also avoids any possible vagueness concerns. See Pet. App. 58a-59a (explaining that petitioner's "vagueness argument * * * necessarily fails" because its premise that "the Assemblages Clause pertains to *any* cxircumstance in which multiple persons stand or participate in some sort of procession in the plaza" is incorrect); see also *id.* at 57a-58a (ruling that petitioner's vagueness claim "runs up against the rule that [a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the

Petitioner asserts (Pet. 10-12 & n.1) that the D.C. Circuit's ruling on the assemblage language conflicts with this Court's summary affirmance of the decision of a three-judge court in *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), aff'd, 409 U.S. 972 (1972), which struck down a provision similar to Section 6135 that applies to the grounds of the U.S. Capitol. But a summary affirmance has limited precedential value; it "affirms only the judgment of the court below, * * * and no more may be read into [this Court's] action than was essential to sustain that judgment." *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182-183 (1979). Moreover, "the rationale of the affirmance may not be gleaned solely from the opinion below." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Because *Jeanette Rankin Brigade* presented constitutional issues other than overbreadth, see, *e.g.*, 342 F. Supp. at 584-585, this Court may have sustained the judgment in that case on a basis that has no relevance to the issue that petitioner now presses.

Nor does the reasoning of the three-judge court itself suggest that the D.C. Circuit has failed to give adequate regard to that court's (non-binding) construction of a similar statute. See Pet. 13, 15. The three-judge court ruled that the area around the Capitol is a public forum and that, under the test applicable to such a forum, the statute at issue was not narrowly tailored to the relevant government interests. *Jeanette Rankin Brigade*, 342 F. Supp. at 582-585. In so ruling, the court recognized that the area around a

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vagueness of the law as applied to the conduct of others") (citations and internal quotation marks omitted; brackets in original); Pet. 17 (adverting briefly to the court's discussion of vagueness).

courthouse has a distinct character. *Id.* at 583 (stating that "[t]he area surrounding a courthouse" may be treated differently under the First Amendment than the area surrounding a legislative seat). Moreover, while the court's interpretation of the assemblage language in the provision before it was driven in large part by its rejection of the government's atextual suggestion that only groups of 15 people or more were covered, see *id.* at 586, the court also plainly understood that language to refer to "*demonstrative* assemblages"—that is, "demonstrations" reflecting an exercise of "the right to assemble and to petition for the redress of grievances," *id.* at 585, 587 (emphasis added). Accordingly, nothing in the district court's decision in *Jeanette Rankin Brigade* casts any doubt on the reasoning of the D.C. Circuit in this case.

Finally, even if petitioner's reading of Section 6135 were correct, it would not provide a basis for overturning the judgment of the court of appeals. As that court explained, "insofar as the [provision] covers congregating for reasons other than expressive activity, those applications to *non*-expressive conduct would raise no First Amendment concern in the first place." Pet. App. 48a. In addition, "[w]hen the heartland of a law's applications furthers the government's interests, the existence of hypothetical applications bearing a lesser connection to those interests does not invalidate the law." *Id.* at 47a; see, *e.g.*, *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (statute is facially overbroad only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep") (citations and internal quotation marks omitted). The provision at issue here is

legitimate in its ordinary application to parades, processions, and assemblages in the Court building or grounds.

b. The second portion of Section 6135 makes it unlawful to "display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement." 40 U.S.C. 6135. The court of appeals correctly construed that language to apply only to the display of devices designed to attract attention. See Pet. App. 50a-51a. Under that construction, the court noted, "a single person's mere wearing of a t-shirt containing words or symbols on the plaza—if there are no attendant circumstances indicating her intention to draw onlookers—generally would not be enough to violate the statute." *Id.* at 51a; see *id.* at 50a-51a (declining to "attempt to canvass the various forms of conduct involving clothing that may come within the compass" of the provision).

Like its reading of the assemblage language, the court of appeals' interpretation of this portion of the provision is firmly rooted in the statutory text, which (among other things) refers expressly to items "designed or adapted" to bring a cause "into public notice." 40 U.S.C. 6135; see Pet. App. 50a-51a. That interpretation also leads to reasonable results consistent with the provision's evident purpose. Although petitioner baldly asserts in a single sentence that the court's reasoning in this regard is faulty, see Pet. 16, he fails to engage with, let alone undermine, the court's careful exegesis of the text.[2]

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[2] On June 13, 2013, the Marshal of the Court issued a regulation limiting demonstrations that applies to all portions of the Court building and grounds other than the perimeter sidewalks. See

2. Petitioner also contends (Pet. 7) that the decision below "squarely conflicts" with a "line of precedent from the District of Columbia Court of Appeals" addressing Section 6135. No such conflict exists.

Like the court below, the District of Columbia Court of Appeals has upheld Section 6135 against constitutional challenge, including the contention that the provision is unconstitutionally overbroad. See, *e.g.*, *Pearson* v. *United States*, 581 A.2d 347, 355-357 (D.C. 1990), cert. denied, 502 U.S. 808 (1991). In doing so, that court has emphasized that the provision should be read in light of its purposes: "protection of the * * * building and grounds and of persons and property within, as well as the maintenance of proper order and decorum," and preservation of "the appearance of the Court as a body not swayed by external influence." *Id.* at 357 (citations and internal quotation marks omitted); see *Potts* v. *United States*, 919 A.2d

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Sup. Ct. Bldg. Reg. 7, http://www.supremecourt.gov/publicinfo/buildingregulations.pdf (last visited Apr. 7, 2016) (defining "demonstration" to include "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," but excluding "casual use by visitors or tourists that is not reasonably likely to attract a crowd or onlookers"); see also 40 U.S.C. 6102(a) (authorizing the Marshal of the 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"); *Miska* v. *Talkin*, No. 13-cv-1735 (D.D.C.) (challenge by petitioner and others to constitutionality of Regulation Seven). The Marshal's regulation is not at issue in this case.

1127, 1130 (D.C. 2007) (interpreting the prohibition on display of flags, banners, or devices as covering expressive conduct, *i.e.*, conduct involving "intent to convey a particularized message was present" where "the likelihood was great that the message would be understood by those who viewed it") (citation omitted).

The D.C. Circuit has likewise read Section 6135 in light of its purposes. See, *e.g.*, Pet. App. 49a (rejecting construction that would "preclude use of the plaza" for "its intended purposes"); see also, *e.g.*, *id.* at 35a-42a, 46a, 48a-49a. That court has expressed its interpretation of the provision not merely in terms of purposes, however, but also in terms of what conduct the text places within the scope of those purposes. See *id.* at 48a, 50a (understanding the prohibition on assemblages to "connote actions that are purposefully expressive and designed to attract notice," and the prohibition on displays generally not to cover "passive" acts that "normally would not cause the public to pause and take notice"); see generally *Grace*, 461 U.S. at 176.

Those approaches are not in conflict with each other; they are harmonious. There is little if any difference between an assemblage that threatens "proper order and decorum" or suggests that the Court might be swayed by public pleas, *Pearson*, 581 A.2d at 357 (citation omitted), and an assemblage that involves "purposely expressive" actions that are "designed to attract notice," Pet. App. 48a. Nor is there any meaningful difference between a display of a flag or device made with "intent to convey a particularized message" very likely to be "understood by those who view[] it," *Potts*, 919 A.2d at 1130 (citation omitted), and a dis-

play involving some active conduct that is likely to "cause the public to pause and take notice," Pet. App. 50a.

In any event, there is no reason to believe that any differences in approach that do exist would lead to conflicting results in cases involving similar facts. The District of Columbia cases to which petitioner points (Pet. 8-9) involved clusters of demonstrators on the plaza kneeling, wearing orange jumpsuits, and carrying signs and a banner reading "Shut Down Guantanamo," *Kinane* v. *United States*, 12 A.3d 23, 25-30 (D.C.), cert. denied, 132 S. Ct. 88 (2011); a group of approximately 30 protestors who entered the plaza during a large anti-abortion march and knelt down in prayer (one of whom carried a pro-life sign), see *Pearson*, 581 A.2d at 349-350; and a small gathering of protestors who "dramatize[d] their cause" by standing on the plaza wearing an orange jumpsuit, a black hood, and holding a sign that read "no taxes for war or torture," *Potts*, 919 A.2d at 1129. All of that conduct would violate Section 6135 under the D.C. Circuit's interpretation of that provision, because all of the defendants in those cases engaged in "actions that are purposefully expressive and designed to attract notice." Pet. App. 48a. Similarly, the actions that petitioner says he would like to undertake—returning to the plaza to wear a sign, "picket, hand out leaflets, sing, chant, and make speeches" that would "convey" a "political message * * * directed both at the Supreme Court and the general public," *id.* at 15a (citations omitted)—would violate Section 6135 under *Kinane*, *Pearson*, and *Potts*, because those actions would suggest that the Court might be swayed by public pleas or would "compromise the dignity and

decorum of the Court" by attracting notice to the conduct. *Pearson*, 581 A.2d at 357-358; see, *e.g.*, *Potts*, 919 A.2d at 1130.

Petitioner offers (Pet. 9) only one example of a circumstance in which (he claims) the two courts would certainly reach different results: a person entering the plaza while "passively wearing a shirt with a political slogan" on the plaza. Petitioner is mistaken. The D.C. Circuit, while concluding that the "display" of a "device" would "ordinarily require something more than merely wearing apparel that happens to contain words or symbols," specifically stated that it was not "attempt[ing] to canvass the various forms of conduct involving clothing that may come within the compass" of Section 6135. Pet. App. 50a. And the District of Columbia Court of Appeals has not—despite petitioner's suggestion (Pet. 9, 16)—ruled that wearing a shirt with a political slogan always constitutes a violation of Section 6135. The court did state that the statute "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,' * * * for the purpose of swaying the opinion of the Supreme Court," *Kinane*, 12 A.3d at 27 (brackets in original) (quoting *Potts,* 919 A.2d at 1130)—but it did so in the context of a case that involved 45 protestors, gathered in the Upper Great Hall of the Court, who were chanting, singing, kneeling with their arms interlocked, and "wearing orange t-shirts that stated, 'Shut Down Guantanamo'" (or "were in the process of putting the t-shirts on over their regular clothing" or "removing a layer of outer clothing revealing the orange t-shirts"), *id.* at 26; see *id.* at 25-26 (noting that some protestors

also gathered on the plaza). That statement therefore cannot be read as a general pronouncement about how Section 6135 would apply to clothing choices under other factual circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MICHAEL S. RAAB
DANIEL TENNY
Attorneys0

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