No. _____

In the
Supreme Court of the United States

ABRAHAM J. BONOWITZ, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the open-air, public space surrounding the Supreme Court a traditional public forum, despite a flawed, constitutionally suspect challenged law that criminalizes all assemblies and all displays in the area, such as the unfurling of a banner?

2. Is 40 U.S.C. § 6135 overbroad and does it lack a saving construction, when the plain text of the statute would even prohibit individuals from standing on the Supreme Court Plaza while wearing T-shirts emblazoned with group affiliations and would prohibit nearly any group, even litigants from congregating on the Plaza?

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PETITION FOR WRIT OF CERTIORARI

Mr. Abraham Bonowitz and his co-petitioners, respectfully petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reprinted in the Appendix to the Petition ("Pet. App.") at App. 1.

JURISDICTION

The Court of Appeals entered its judgment on June 26, 2018. This court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE

Following are the Constitutional provisions and statutes involved in the case:

The First Amendment to the U.S. Constitution provides in pertinent part:

> Congress shall make no law… abridging the freedom of speech… or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

40 U.S.C. § 6135 states in full:

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

STATEMENT OF THE CASE

40 U.S.C. § 6135, as applied, is a violation of the Petitioners' First Amendment rights and is unconstitutional. Preceding cases on this issue have incorrectly applied this Court's First Amendment precedent to the question presented in this case.

In *Pearson v. United States*, 581 A.2d 347, 356-57 (D.C. 1990), the District of Columbia Court of Appeals read the Assemblages Clause as an "absolute" prohibition on "congregating on Court grounds." However, in order to uphold the constitutionality of the statute, the District of Columbia Court of Appeals added two additional elements: (1) the conduct must be directed at the Supreme Court, and (2) the conduct must compromise the dignity and decorum of the Court. *Id*. at 358.

In *Hodge v. Talkin*, the D.C. Circuit held that the Assemblages Clause prohibits only "joint conduct that is expressive in nature and aimed to draw attention[.]" 799 F.3d 1145, 1169 (D.C. 2015). The Supreme Court has informally embraced this construction of the Assemblages Clause through the passage of Supreme Court Building Regulation 7, which bans "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." Building Regulations, Supreme Court, available at https://www.supremecourt.gov/public info/building regulations.pdf.

The statute, however, on its face is unconstitutional. The various judicial constructions, which have allowed it to stand until now, are impermissible. While the Court is responsible to try "every reasonable construction" in order to save a statute from unconstitutionality, it may only do so where there are two possible meanings, only one of which would have an unconstitutional meaning. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 562-63 (2012), *citing Hooper v. California*, 155 U.S. 648, 657 (1895). The very "terms of the act render it

unavoidable" that in this case, the only construction available renders this statute unconstitutional. *Federation of Independent Business v. Sebelius*, 567 U.S. 519, 562 (2012), *citing Parsons v. Bedford*, 3 Pet. 433, 448-449 (1830). This Court is constitutionally responsible to interpret the statutes as written, but "in the absence of more than one plausible construction, the canon simply " 'has no application.' " " *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Warger v. Shauers*, 574 U.S. ---, --- (2014) (quoting *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001))).This statute as written is an unconstitutional violation of the First Amendment rights of the petitioners. Petitioners bring a facial challenge and an as applied challenge to this statute.

Petitioner Mr. Abraham Bonowitz was arrested on the public Plaza of the Supreme Court during a demonstration calling to end the Death Penalty on January 17, 2017. The Protest was non-violent, and more than one hundred (100) protestors assembled. Petitioner was among 18 who made their way to the steps of the Supreme Court of the United States by walking from the public sidewalk onto the public Supreme Court Plaza, and unfurled a banner that read 'Stop Executions'. Petitioner was among those 18 who were arrested. Petitioners admitted to being on the Plaza steps and to holding the banner while protesting against the death penalty in that area. The 12 who went to trial in the D.C. Superior Court were found guilty on June 29, 2017, and sentenced to time served, and ordered to pay a $200 fine, after a rejection of their argument that their actions were protected by the First Amendment. The trial court convicted Petitioners of parading,

assemblage, and display in violation of 40 U.S.C. § 6135. Petitioner was among those 18 who were arrested. The eleven Petitioners include Abraham Bonowitz, SueZann Bosler, Shane Claiborne, Randy Gardner, Derrick Jamison, Lisa Harper, Arthur Laffin, Thomas Muther, Douglas Pagitt, John Payden-Travers, and Sam Sheppard. Scott Langley was also convicted but did not appeal.

The District of Columbia Court of Appeals on June 26, 2018, granted the government's motion for summary affirmance, denying the petitioners the ability to challenge the Constitutionality of the statute under which they were convicted. Petitioners argued that the statute was an unconstitutional infringement on their First Amendment rights, and therefore the Superior Court erred in not granting acquittal and by not ruling that the enforcement of this statute constitutes an unconstitutional infringement on the petitioners' first amendment rights.

This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The District of Columbia Court of Appeals decision to uphold Bonowitz's and co-appellants' convictions under 40 U.S.C. § 6135 conflicts with this court's previous holdings in two important areas of federal law: separation of powers and First Amendment activity in nonpublic forums. First, by relying on earlier precedent that upheld the constitutionality of Section 6135, the D.C. Court of Appeals continued to rewrite the statute through its own judicial interpretation, usurping Congress' lawmaking powers. Second, the D.C. Court of Appeals ruling conflicts with a line of Supreme Court cases that have struck down overbroad First Amendment

restrictions in nonpublic forums, including the recent 2018 case of *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1884 (2018).

The D.C. Court of Appeals also incorrectly followed a line of cases that found the Supreme Court plaza is a nonpublic forum, rather than comparing it to streets or parks or the grounds at the U.S. Capitol to which it is more analogous. *See* 40 U.S.C. § 5104 (which among other prohibitions, prohibits solicitations, sales, and advertising). By granting certiorari in this case, the Court has the opportunity to clarify its complicated public and nonpublic forum doctrine, which has created inconsistent results in the lower courts and is often case determinative.

I. The Supreme Court Plaza is a public forum, and absolute speech restrictions on the Plaza do not pass the strict scrutiny test applied to public forums

The Plaza surrounding the Supreme Court is a public forum in the same way that parks, sidewalks, the area surrounding the Capitol, and the area within the Vietnam Memorial are public forums. Courts have erred by classifying the Supreme Court plaza as a nonpublic forum. Public forums are places that are devoted to assembly and debate by the government or long-standing tradition. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939). Government buildings at the center of creating, enforcing, and interpreting policy have traditionally been places for "assembly, communicating thoughts between citizens, and discussing public questions." *Id.* Restrictions on

First Amendment activity on public forums are subject to the strictest form of scrutiny, and § 6135 does not survive that test.

The Supreme Court's doctrine on public and nonpublic forums has led to confusing results and is often case determinative. This Court has an opportunity to clarify the distinction between public and nonpublic forums with this case.

A. The Supreme Court plaza is a public forum

The Supreme Court's steps and plaza should be considered a traditional public forum, which means that any restrictions on First Amendment activity in that area should be subject to a strict form of scrutiny.

The plaza surrounding the Supreme Court fits the traditional understanding of a public forum. The Supreme Court found that the sidewalks that surround the court are a traditional public forum, and, thus, any regulation of First Amendment activity in that area is subject to strict scrutiny. *United States v. Grace*, 461 U.S. 171 (1983). The areas surrounding government buildings in general have traditionally been considered public forums where viewpoints are discussed and protests and assemblies have taken place. The area surrounding the Supreme Court is most analogous to traditional public forums like sidewalks and parks, and is fundamentally different from the nonpublic interior of the committee rooms in the U.S. Congressional Office Buildings where the business of the legislative branch takes place and different from the interior of the courthouse where the business of the judiciary takes place.

However, the Supreme Court's public and nonpublic forum doctrine has created inconsistent results in the lower courts and is in need of clarity. This lack of clarity led to rulings that hold both that the sidewalks surrounding the Supreme Court is a public forum while the connected adjacent public plaza is not. *Compare United States v. Grace*, 461 U.S. 171 (1983) (holding that sidewalks surrounding Supreme Court are public forum); *see Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C.Cir.1992) (holding that sidewalks within Vietnam Veterans Memorial grounds are public forum), and *Lederman v. United States*, 291 F.3d 36, 44 (D.C. Cir. 2002) (holding that the sidewalk on the East Front of the Capitol, at the foot of the Capitol steps, is a public forum), *with Oberwetter v. Hilliard*, 639 F.3d 545, 553 (D.C.Cir.2011) (holding that interior of Jefferson Memorial is nonpublic forum), and *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1314 (D.C. Cir. 2005) (holding that some but not all post offices have public forum sidewalks), and *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 547–53 (2d Cir. 2002) (holding that area surrounding New York's Lincoln Center is a nonpublic forum).

While the government can place restrictions on speech in some areas around courthouses when that speech is aimed at interfering with justice or influencing juries, those factors do not apply to the Supreme Court plaza. In *Louisiana v. Cox*, 379 U.S. 559 (1965) the Supreme Court allowed a restriction on speech that was "in or near a building housing a court" when that speech was intended to interfere with justice, impede justice or to unduly influence a judge, juror, or court officer. The

ruling was meant to specifically protect the judicial system from influence, though it is unclear that the stated governmental interest is accepted by this court. In *Citizen's United*, the Court stated that "[t]he appearance of influence of access… will not cause the electorate to lose faith in our democracy." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 360 (2010).

The ruling in *Cox* does not apply to this case for two reasons. First, the ban upheld in *Cox* is not absolute. It was limited to any speech that is intended to interfere with justice or influence anyone with decision making authority in the courtroom. However, the statute at issue in this case criminalizes a much wider range of activity and is not limited to interference and influence. 40 U.S.C. § 6135. Second, *Cox* applied to a trial courthouse with juries, not an appellate courthouse like the Supreme Court. At a trial court level, jurors may well be susceptible to public opinion, and the justice system goes to great lengths to insulate juries from being mere courts of public opinion. However, certainly at the Supreme Court, the Justices are charged with determining what the law is and how it is to be applied devoid of personally held political beliefs, desire for a certain outcome, and without reference to public opinion on the matter. As such, the risk that this law seeks to mitigate is simply not present at the level of the Supreme Court of the United States.

Since *Cox* does not apply and the Supreme Court plaza most resembles a public sidewalk or the public grounds of any other governmental building, this Court should extend its *Grace* line of reasoning to the open-air, public space in front of the

Supreme Court, which is accessed by walking from the public sidewalk onto the public steps with no barriers, barricades or notice that you cannot express yourself there.

B. The statute does not pass a strict form of scrutiny

The government's restrictions on speech in a public forum will only survive if they pass a strict form of scrutiny. Time, place, and manner restrictions will only survive if they are 1) content-neutral, 2) narrowly tailored to serve a significant government interest, and 3) leave open ample alternative channels of communications. *United States v. Grace*, 461 U.S. 171, 177 (1983).

The law regulating speech and assembly on Supreme Court grounds certainly is not content neutral, does not serve a compelling government interest, nor is an absolute prohibition on speech and assembly a narrowly tailored way to achieve such an interest.

This Court correctly decided that unfounded fears cannot represent a compelling state interest. *Janus* at 2465. Similarly, unfounded fears about the perception of the Court as being impacted by public pressure by sign-unfurling demonstrators, if protestors were allowed in the plaza are unfounded and do not constitute a compelling state interest.

Certainly, even if there was a compelling state interest, an absolute prohibition on assembly and speech in the form of displays would not be a narrowly tailored method of addressing that interest. Moreover, the statute is not narrowly tailored because other statutes already protect the Supreme Court from disruption while

allowing significant more First Amendment liberties. Without Section 6135, the Court is still protected from riotous behavior, unlawful parades, trespass, and other forms of violent or disruptive protests in the same way that all other federal buildings in Washington D.C. are: through the D.C. Code. The D.C. code properly accommodates the governmental interest in keeping the peace and allowing the federal government to function while simultaneously permitting people to protest and engage in protected First Amendment activity. The Supreme Court has no need for any more protection from exposure to speech in the form of a banner being displayed than any other government institution has. Justice Thurgood Marshall in *Grace* said, "When a citizen is in a place where he has every right to be, he cannot be denied the opportunity to express his views simply because the Government has not chosen to designate the area as a forum for public discussion… I see no reason why the premises of this Court should be exempt from this basic principal. It would be ironic indeed if an exception to the Constitution were to be recognized for the very institution that has the chief responsibility for protecting constitutional rights." *Id.* at 184.

Further because this case has speech and nonspeech elements the government must show that the "…government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that

interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). This restriction is not incidental but directly targets expressive conduct, and chills protected rights. *Id.* at 376.

II. 40 U.S.C. § 6135 is overbroad and a limiting construction subverts Congress's powers to legislate

Even if the Supreme Court grounds are found to be a nonpublic forum, the law is overbroad because it criminalizes a substantial amount of protected speech, nonetheless. The Court cannot adopt a narrowing construction without trampling on the separate Constitutionally exclusive powers of Congress to legislate.

Under the Court's Overbreadth Doctrine, a law can be held facially unconstitutional if 1) it is found to ban a substantial amount of innocent speech, and 2) the law cannot be narrowed by a fairly possible limiting construction. *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987). The Court emphasizes that the Court does not have to decide whether the application of the law in that case is unconstitutional, that it can be determined to be "overbroad 'if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *U.S. v. Stevens*, 599 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotation marks omitted)). The court does not have to decide whether the statute as applied was unconstitutional, rather, merely recognize facial unconstitutionality based on overbreadth. Here, as in *Citizens United*, a "…statute which chills speech can and must be invalidated

where its facial invalidity has been demonstrated." 558 U.S. 310, 336 (2010). This ban functions as censorship, an outright ban backed by criminal sanctions. *Id.*

A. The statute creates an absolute ban on First Amendment activity on the Supreme Court grounds, which criminalizes a substantial amount of protected activity

A plain reading of the statute criminalizes a substantial amount of activity that cannot be constitutionally prohibited on Supreme Court grounds, especially in light of recent cases. The party claiming overbreadth does have the burden of showing that "substantial overbreadth exists." *Virginia v. Hicks*, 559 U.S. 113, 122 (2003).

The text of the law reads 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 Assemblage Clause of the statute creates an absolute ban, prohibiting moving in a group on the Supreme Court grounds. The law plainly does not include a section describing the government's interest in preserving the property for "its intended use." It does not state that the statute's intention is to protect the perception of "dignity and decorum" of the Supreme Court. The statute itself does not create an exemption for assemblage that is not aimed at drawing attention or displays included on a person's apparel. This means that tourist groups, student organizations visiting the Supreme Court, waiting in line on the Plaza to enter the Supreme Court in a group, people who were to meander in a group onto the grounds

of the Supreme Court, or meet there for any other purpose, all of which are constitutional and yet are technically in violation of the statute, but are not arrested, suggesting that only protesters are arrested therefore results in selective enforcement of this statute. An application of the statute to these circumstances would clearly be an unconstitutional infringement on the Constitutionally guaranteed right to free assembly. However, even engaging in political speech, the party engaging in that speech must prevail because "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 340 (2010).

The Display Clause of the statute similarly creates an absolute ban on displaying any device designed to bring public notice to an individual or group. A plain reading of the statute would appear to criminalize anyone on Supreme Court grounds who was wearing a T-shirt with a Tea Party logo or wearing a shirt with the words "Don't Tread on Me." *See Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1884 (2018). It would also appear to criminalize a person wearing a button that read "Please I.D. me" or simply "Vote!" *See Id.* at 1888. Similarly, it would criminalize a person wearing a jacket that said "Fuck the draft." *Cohen v. California*, 403 U.S. 15 (1971).

However, these activities have been upheld as permissible forms of expressive activity in nonpublic forums, whether it be inside a courthouse or at a polling place. In fact, this Court recently held that laws banning First Amendment activity in nonpublic places can be struck down if they create confusing line-

drawing problems when the ban is enforced. *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1889 (2018). 40 US Code 6135's broad language, even if limited by judicial interpretation or the Court's own regulations, leaves open the opportunity for abuse. *Id.* at 1891. It certainly creates a chilling effect for members of the public wishing to visit the grounds. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). While Supreme Court regulations have explicitly said that groups of tourists should not be prosecuted under this statute, its regulations are silent on other types of activities mentioned above, and the statute as drafted clearly does not make such a distinction. Because of the absolute prohibition, this case cannot be more narrowly decided about this case without chilling political speech. *See Citizens United v. Federal Election Com'n*, 558 U.S. 310, 329 (2010). Where the government seeks to restrict political speech the burden of proof falls to them to show the compelling interest and strict tailoring, which it has failed to do so. *Id.* at 440.

B. A saving construction is impermissible

The Court cannot create a saving construction of the law without rewriting the text and thwarting Congress' own powers to legislate. "The canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005)). The statute criminalizing assemblies and displays on Supreme Court grounds has survived for so long only because lower courts have impermissibly rewritten the statute to save it from being struck down

for violating the First Amendment, interpreting in a way that deviates from " 'ordinary textual analysis' ". *Id.* The Supreme Court must correct this error, which conflicts with this Court's canon of statutory interpretation and with Congress's power to legislate.

After finding that a law is overbroad, a court can search for a "saving" or "limiting" construction of the statute that is fairly possible. *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987); *Machinists v. Street,* 367 U.S. 740, 749 (1961). However, the Court cannot rewrite a statute to say what the **Supreme Court wants it to say, or thinks it should say**. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 662 (2012) (Scalia, J., dissenting). "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute ...' or judicially rewriting it." *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 841 (1986) (quoting *Scales v. United Statutes*, 367 U.S. 203, 211 (1961)). When doing statutory interpretation, Justice Gorsuch, in an 8-0 opinion, recently noted that this Court "will presume more modestly … 'that [the] legislature says ... what it means and means ... what it says.'" *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005) (internal quotation marks omitted; brackets in original)).

Turning to the statute itself, both the federal U.S. Court of Appeals for the D.C. Circuit and the District's own District of Columbia Court of Appeals have impermissibly rewritten the statute to avoid a conflict with the First Amendment.

In *Pearson v. United States*, 581 A.2d 347, 356-57 (D.C. 1990), the District of Columbia Court of Appeals upheld the Assemblage Clause of the statute by adding two additional elements not present in the actual statute: (1) the conduct must be directed at the Supreme Court, and (2) the conduct must compromise the dignity and decorum of the Court. *Id.* at 358. By adding multiple elements to the statute, that were not written by Congress, the court ended up "judicially rewriting it." *Cf. Commodity Futures Trading Com'n*, 478 U.S. at 841. Similarly, the federal U.S. Court of Appeals for the D.C. Circuit has limited prosecution of assemblies on the Supreme Court grounds to instances only when they are expressive in nature and aimed to draw attention. *Hodge v. Talkin*, 799 F.3d 1145, 1169 (D.C. Cir. 2015). The court in *Hodge v. Talkin* engaged in judicial re-writing so the statute could not be used to prosecute a person for wearing a T-shirt that conveys a message, something that would be clearly unconstitutional, yet a prosecution that would be allowed under a plain reading of the statute. This kind of judicial rewriting perverts the plain meaning of the statute and improperly transforms unelected judges into super-lawmakers. *Cf. Commodity Futures Trading Com'n*, 478 U.S. at 841; *Henson*, 137 S. Ct. at 1725.

CONCLUSION

For the foregoing reasons and any others that may appear to this Court, Petitioners respectfully request that the Court grant this petition for a writ of certiorari.

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