[ORAL ARGUMENT NOT YET 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
(No. 12-cv-104 (BAH))

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AS *AMICUS CURIAE* [Re-corrected]

Arthur B. Spitzer
Adam R. Pulver
American Civil Liberties Union
of the Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, D.C. 20008
T: 202-457-0800
F: 202-457-0805
E: artspitzer@aclu-nca.org

Counsel for *Amicus Curiae*

January 30, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

All parties are listed in the Brief for Appellants.*

B. Rulings Under Review

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

C. Related Cases

Amicus curiae adopts the statement of related cases presented in the Brief for Appellants.

D. Statutes and Regulations

All applicable statutes and regulations are contained in the Brief for Appellants.

/s/ *Arthur B. Spitzer*
Arthur B. Spitzer

Counsel for *Amicus Curiae*

* While the official corporate name of *amicus curiae* is the American Civil Liberties Union Fund of the National Capital Area, *amicus* does business under the name American Civil Liberties Union of the Nation's Capital, and that is how this brief is titled.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, *Amicus* American Civil Liberties Union Fund of the National Capital Area states that it is a nonprofit membership organization, that it has no parent or subsidiary corporations, and that it does not issue stock. It is an affiliate of the American Civil Liberties Union, which is also a nonprofit membership organization that has no parent or subsidiary corporations, and that does not issue stock.

/s/ *Arthur B. Spitzer*
Arthur B. Spitzer

Counsel for *Amicus Curiae*

CERTIFICATE PURSUANT TO FED. R. APP. P. 29(c)(5)

Undersigned counsel for amicus curiae hereby certifies:

(A) No counsel for a party authored this brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and

(C) No person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief

/s/ *Arthur B. Spitzer*
Arthur B. Spitzer

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

* Asterisks in the left margin indicate authorities chiefly relied upon.

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Amicus American Civil Liberties Union of the Nation's Capital is the Washington, D.C., affiliate of the American Civil Liberties Union, an organization devoted to protecting the civil liberties of all Americans, particularly their right to free expression. *Amicus* has often represented parties and filed amicus briefs in the courts of this jurisdiction in support of those goals. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Certain types of places are so vital to a healthy and robust public discourse that they are accorded special status under the first amendment. The government cannot constitutionally prohibit all expressive activities in these public fora; access to them is a small but invaluable part of every American's heritage." *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1526 (D.C. Cir. 1984).

Historically, the grounds of courthouses have served as such places—places where citizens express their views on issues of the day and voice their concerns about injustices in society—in organized protests and rallies, in spontaneous outbursts of expression, and in advocacy with the media. The range of viewpoints expressed on courthouse grounds throughout the country spans the political spectrum, and is a testament to the fact that citizens view the "courthouse steps" as

an extension of the town square—a place to air their grievances with the judicial system, or the government or society more generally.

The United States Supreme Court is no different from other courts in this regard.[1] Americans with views on various issues regularly gather on the sidewalk in front of the Court, holding signs and banners, and using the Court as a visual backdrop for their expressive activity. They also engage in expressive activity on the Plaza in front of the building ("the Plaza"). The Plaza is open to the public 24 hours a day, seven days a week. Litigants and their advocates gather on the Plaza to make their case to the public via the media. Rather than seeing the Court grounds as a sacred place of silent neutrality, the public is accustomed to images of the Court grounds serving as an open forum, featuring this expressive activity. The public perception of the grounds in front of the Court is, as one news article noted in language quoted by the court below, that of "the public square."[2] The Plaza thus bears the "defining characteristic" of a public forum under the First Amendment—it has been "'devoted to assembly and debate.'" *Marijuana Policy Project v.*

[1] Although, as discussed below, there are differences between the Supreme Court and other courts that minimize the interest in barring expressive activity outside the Supreme Court.

[2] Jennifer Wishon, "'Obamacare' Protests Expand to Abortion Coverage," *CBN News* (Mar. 28, 2012), *available at* http://www.cbn.com/cbnnews/politics/2012/March/Washingtons-Obamacare-Protests-Expand-to-Abortion/, JA 35, quoted in JA 218-19.

United States, 304 F.3d 82, 86 (D.C. Cir. 2002) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

In deciding this case, the district court found it unnecessary to determine whether the Plaza is a public forum, JA 219, and "assume[d], without deciding, that [it] is a nonpublic forum." JA 218. While *amicus* agrees with the district court's determination that the application of the challenged statute to the Plaza is unreasonable, and thus unconstitutional, even if the Plaza is a nonpublic forum, *amicus* submits that the deep historical tradition in this country relating to expressive activity on courthouse grounds, the actual use of the Plaza for expressive activity, the physical nature of the Plaza, and case law of this Court and the Supreme Court compel a finding that the Plaza is a traditional public forum.

Accordingly, only regulation of expression that is "'narrowly tailored to serve a significant governmental interest'" is permissible. *Oberwetter v. Hilliard*, 639 F.3d 545, 551 (D.C. Cir. 2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). As 40 U.S.C. § 6135 purports to prohibit all expressive activity on the Supreme Court grounds, and is not limited to regulating the time, place, and manner of speech, it is unconstitutional as applied to the Plaza. The district court's judgment should be affirmed on these grounds.

ARGUMENT

I. THE SUPREME COURT PLAZA IS A TRADITIONAL PUBLIC FORUM

Limitations on expressive activity on government property are analyzed under the "public forum doctrine." *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 685 F.3d 1066, 1070 (D.C. Cir. 2012) ("*Initiative & Referendum Inst. II*"), *cert. denied*, 133 S. Ct. 1802 (2013). "This approach divides government property into three categories, and the category determines what types of restrictions will be permissible." *Id.* The first category, the "traditional public forum," comprises properties that have "by law or tradition been given the status of a public forum." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (plurality op.) (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802-803 (1985)). The second category—the "designated public forum"—exists where "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (citing *Cornelius*, 473 U.S. at 802). Regulations of such designated public fora are subject to the same strict scrutiny standard as the traditional public forum. *Id.* Finally, "nonpublic forums" are those "'not by tradition or designation a forum for public communication.'" *Initiative & Referendum Inst. II*, 685 F.3d at 1070 (quoting *Perry*, 460 U.S. at 46). In nonpublic forums, a restriction on First Amendment

activity is permissible so long as it is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id*.

In examining whether certain property is a public forum, this Court "look[s] not only at the Government's 'stated purpose' but also at 'objective indicia of intent,' such as 'the nature of the property, its compatibility with expressive activity, and the *consistent* policy and practice of the government." *Bryant v. Gates*, 532 F.3d 888, 896 (D.C. Cir. 2008) (quoting *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1017 (D.C. Cir. 1988) (emphasis in original)). *See also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) ("[T]raditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers."). While the District Court found it unnecessary to determine where the Plaza falls under this typology, the Plaza's status as a public forum is well supported by such objective indicia, including the historical role of courthouse grounds in American civil discourse, the physical nature of the Plaza, its compatibility with expressive activity, and the actual ways in which the Plaza has been used for expressive activity.

A. Courthouse Grounds Are Traditional Centers of Expressive Activity

In determining whether certain property is a public forum, courts look beyond the specific property at issue, to consider whether it "is part of a class of

property which by history or tradition has been open and used for expressive activity." *Warren v. Fairfax County,* 196 F.3d 186, 190 (4th Cir. 1999) (*en banc*); *see also American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1103 (9th Cir. 2003) (quoting *Warren*); *Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 547 (2d Cir. 2002) (quoting *Warren*). As this Court explained in *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992), in determining how a given property has traditionally been treated, "tradition operates at a very high level of generality." *See also Oberwetter*, 639 F.3d at 552.

Oberwetter's analysis is instructive. In determining that the interior of the Jefferson Memorial is not a public forum, this Court reasoned that, "[a]s a general matter, the interior space of national memorials has not traditionally 'been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" 639 F.3d at 552 (quoting *Perry*, 460 U.S. at 45). While there is only one United States Supreme Court Plaza, the Plaza belongs to the more general category of courthouse grounds. Unlike the interior space of national memorials, outdoor spaces on courthouse grounds *have* traditionally "been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Examples of such uses are located throughout the federal

reporters, and in documents submitted to and considered by the district court. Even a cursory examination of protests since the 1960s shows a deep historical tradition of using courthouse grounds as a public forum for expressive activity.

During the civil rights movement, protests and gatherings at courthouses were a major tool of advocates organizing opposition to segregation.[3] For example, in striking down an anti-protest ordinance in Mississippi, a district court discussed speeches made from the courthouse steps in the wake of the assassination of Dr. Martin Luther King, Jr. *Robinson v. Coopwood*, 292 F. Supp. 926, 929 (N.D. Miss. 1968), *aff'd*, 415 F.2d 1377 (5th Cir. 1969). Similarly, *Cochran v. City of Eufaula, Ala.*, 251 F. Supp. 981, 983 (M.D. Ala. 1966), reflects a pattern of civil rights protests on the steps of the Barbour County Courthouse in Eufaula, Alabama.

[3] This Court may take judicial notice of this history for two reasons. First, it represents "legislative facts," which "do not usually concern the immediate parties but the general facts which help the tribunal decide questions of law and policy and discretion." *Nat'l Org. for Women, Washington, D.C. Chapter v. Soc. Sec. Admin. of Dep't of Health & Human Servs.*, 736 F.2d 727, 738 n. 95 (D.C. Cir. 1984) (quoting 2 K. Davis, Administrative Law Treatise § 12:3 at 413 (2d ed. 1979)); *see also Friends of Earth v. Reilly*, 966 F.2d 690 (D.C. Cir. 1992). This Court has explained that there are no formal requirements for a court to take notice of such facts, citing the notes to the Federal Rules of Evidence, which explicitly distinguish between adjudicatory and legislative facts. *Ass'n of Nat. Advertisers, Inc. v. F.T.C.,* 627 F.2d 1151, 1163 n. 24 (D.C. Cir. 1979) (quoting Advisory Committee Note, Fed. R. Evid. 201, collecting cases of judicial notice of legislative facts). Second, to the extent this history is reflected in records and opinions of other court cases, judicial notice is independently justified. *See Covad Commc'ns Co. v. Bell Atl. Corp.,* 407 F.3d 1220, 1222 (D.C. Cir. 2005).

The use of courthouse grounds as fora for expressive activities was also common during the Vietnam War, when protesters often gathered at courthouses around the country. Multiple reported cases discuss these protests. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction of individual who burned his draft card on the steps of federal courthouse); *United States v. Ferguson*, 302 F. Supp. 1111, 1112 (N.D. Cal. 1969) (denying motion to dismiss charges for burning flag at an anti-war rally on "the front steps or 'plaza'" of federal courthouse).[4]

This tradition is not an historic anomaly associated with the unrest of those times; courthouse plazas, steps, and grounds have remained sites of First Amendment activity through today. These protests are reflected in case law, *see, e.g.*, *Mitchell v. City of Morristown*, No. 2:07-CV-146, 2012 WL 2501102 (E.D. Tenn. June 28, 2012) (lawsuit arising out of lawful anti-immigration rally on state courthouse grounds), as well as media reports, *see* JA 24-26 (protest at Durham, N.C. courthouse plaza); JA 29-30 (vigil at Spokane, Wash. courthouse plaza).[5] *See*

[4] In neither of these cases were the protests themselves illegal, only the literally incendiary acts were.

[5] Judicial notice of these articles and accompanying photographs is appropriate. *See Farah v. Esquire Magazine*, No. 12-7055, 2013 WL 6169660, at *4 (D.C. Cir. Nov. 26, 2013) (citing Fed. R. Evid. 201(b); *Wash. Post v. Robinson,* 935 F.2d 282, 291 (D.C. Cir. 1991); *Wash. Ass'n for Television & Children v. FCC,* 712 F.2d 677, 683 n. 12 (D.C. Cir. 1983)).

also August 21, 2013, protest outside Los Angeles courthouse;[6]

July 2013 rally at Springfield, Massachusetts courthouse;[7]

[6] "Bradley Manning Sentencing Protest," http://lacatholicworker.org/photo-3/index.php/BRADLEY-MANNING-SENTENCING-PROTEST.

[7] "Springfield groups plan federal courthouse rally to protest acquittal of George Zimmerman in death of Trayvon Martin," *The Republican* (Springfield, Mass.), July 18, 2013, http://www.masslive.com/news/index.ssf/2013/07/springfield_groups_plan_federa.html.

April 2013 protest at Jacksonville, Florida, courthouse;[8] and

photographs of "Occupy the Courts" protests at courthouses around the country on January 20, 2012, including at the Minneapolis federal courthouse plaza;[9]

[8] "Rally against '21st Century Confederacy' in Jacksonville, Florida," *FightBackNews*, April 30, 2013, http://www.fightbacknews.org/2013/4/30/rally-against-21st-century-confederacy-jacksonville-florida.

[9] http://www.flickr.com/photos/74806877@N07/6733242495/in/set-72157628959008875/.

at the Utah federal courthouse;[10]

at the San Antonio federal courthouse;[11]

[10] http://www.flickr.com/photos/74806877@N07/6743396639/in/set-72157628959008875/.

[11] http://www.flickr.com/photos/74806877@N07/6733047001/in/set-72157628959008875/.

and at the federal courthouse in Santa Ana, California.[12]

This tradition of protests on plazas and steps of courthouses has been recognized by many federal courts that have applied heightened scrutiny to the regulation of exterior spaces on courthouse grounds. In *Dorfman v. Meiszner*, 430 F.2d 558, 561, 563 (7th Cir. 1970), the court struck down a regulation barring photography of the plaza outside Chicago's federal courthouse, explaining that the plaza was "frequently used for demonstrations" and the regulation would "prohibit effective photographing or broadcasting of a demonstration in the plaza." More recently, in *Grider v. Abramson*, 994 F. Supp. 840, 844 (W.D. Ky. 1998) *aff'd,* 180 F.3d 739 (6th Cir. 1999), the court found that the steps of a Louisville, Kentucky

[12] http://www.flickr.com/photos/74806877@N07/6733243117/in/set-72157628959008875/. Photographs of demonstrations at many other courthouses on that date are at the "Occupy the Courts," Flickr stream, http://www.flickr.com/photos/74806877@N07/sets/72157628959008875/.

courthouse had "traditionally been used by citizens to exercise their freedom of speech," that they were a public forum, and that the Ku Klux Klan had a right to hold a rally there.[13]

While there are of course differences between the Supreme Court and other courts in America, these differences do not impact their grounds' status as public fora. If anything, the unique role of the Supreme Court minimizes concerns that may exist at other courthouses: unlike at a trial court, there are no jurors to be swayed at the Supreme Court, nor witnesses to be intimidated. Unlike the judges in many state courts, the Justices are insulated from popular opinion by their lifetime tenure.

In light of the regularity with which Americans have used, and continued to use, the grounds of courthouses—including the steps and plazas in front of them—for peaceful First Amendment activity, courthouse grounds are "a class of property which by history or tradition has been open and used for expressive activity," and thus merit traditional public forum status.

[13] On appeal, the parties stipulated to the location's public forum status, and thus the court did not address the issue. 180 F.3d at 748 n.11.

B. Actual Use of the Plaza is Consistent with Public Forum Status

In addition to the inquiry into the historical treatment of the category to which the Plaza belongs, the Court "examine[s] the history and characteristics of the particular property at issue." *Oberwetter*, 639 F.3d at 552. Notably, "[t]he test is not whether the property was designed for expressive activity, but whether the objective uses and purposes of the property are compatible with the wide measure of expressive conduct characterizing public fora." *Warren*, 196 F.3d at 195.

The Government argues that the Plaza has not historically been a site of public expression, was not designed for such a use, and therefore cannot be considered a traditional public forum. *See* JA 121. This argument fails for two reasons. First, this Court has previously held that a lack of expressive activity as a result of the very restriction being challenged is irrelevant to determining whether a property is a public forum. Second, although there may be a formal prohibition of expressive activity on the Plaza, the actual, consistent practice of the Supreme Court has been to allow expressive activity of various kinds. The existence of a formal policy cannot defeat the public forum status of a venue that is regularly used for expressive activity.

1. The Existence of the Challenged Statute Does Not Destroy the Plaza's Public Forum's Status

In the district court, the Government made much of the asserted fact that the Plaza historically has been closed to expressive activity. That is inaccurate. But even if it were true, it would not be dispositive under this Court's decisions.

The Supreme Court building opened in 1935. JA 31. As the district court explained, *see* JA 187-88, the prohibition on expressive activity on the Plaza began in 1949, and was modeled on the Capitol Grounds statute, since declared unconstitutional in *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583-84 (D.D.C.), *aff'd mem*, 409 U.S. 972 (1972).

The Supreme Court has repeatedly held, including with respect to the challenged statute, that Congress cannot "by its own *ipse dixit* destroy the 'public forum' status" of areas that have historically been public fora. *United States v. Grace*, 461 U.S. 171, 180-81 (1983) (quoting *U.S. Postal Service v. Greenburgh Civic Ass'ns.*, 453 U.S. 114, 133 (1981)). In *Lederman v. United States*, 291 F.3d 36, 43 (D.C. Cir. 2002), this Court rejected the argument that historical unavailability as a result of legislation destroyed the public forum status of sidewalks on the Capitol Grounds. There, the Court deemed the fact that the "sidewalk has never been available for public expression" to be irrelevant, as that unavailability was the result of an unconstitutional statute. *Id.* *Grace* itself is also instructive. Until that decision, there had been no legal expressive activity on the

Supreme Court's sidewalks, courtesy of the statute being challenged here. If the lack of lawful expressive activity did not preclude a finding of public forum status for the sidewalks, the same statute and lack of expressive activity cannot defeat the public forum status of the Plaza.

2. The Plaza is Consistently Used for a Variety of Expressive Activities

According to Supreme Court Police Deputy Chief James Dolan, "it is the policy of the Supreme Court police not to allow demonstrations or other types of expressive activity that violate the statute on the plaza." JA 18. But the Supreme Court Police use their discretion in determining whether particular expressive activity is prohibited. According to Dolan, this discretion is guided by "the narrowing construction of the Assemblages Clause that has been adopted by the District of Columbia courts." *Id.* But even according to Dolan, the statute is not the end of the inquiry, as he concedes the statute is ignored for "two very limited circumstances." *Id*. The reality is that a variety of expressive activity is allowed on the Plaza, in a manner unconnected to the language of the statute.

Although the district court declined to determine whether the Plaza is a traditional public forum, it did note that, based on the evidence before it, "[c]ertainly, unless told otherwise, it seems clear the public believes that the Supreme Court plaza is a public forum." JA 218. That public understanding is well founded, in light of the frequent use of the Plaza for a variety of expressive

activities. These activities make clear that the Plaza's uses go beyond that of a mere path of ingress and egress. Not only is the Plaza conducive to First Amendment expressive activity, it is welcoming of such activity.

a. Expressive Activity by Litigants and Their Counsel

It is undisputed that litigants and their counsel use the Plaza to engage with the media on argument days. *See, e.g.,* JA 127-29. The Government suggests that this is a sort of *de minimis*, non-expressive activity that the Government allows as a matter of grace.[14] *See, e.g.*, JA 128-29. In reality, this activity is part of a choreographed advocacy strategy that is no less expressive than the conduct in which Mr. Hodge engaged—and far more obtrusive. Not only does this show the artifice of the distinction drawn by the Government, it also rebuts the contention that the Plaza is (and must be) an advocacy-free zone.

There are two features of this conduct that the Government glosses over. First is the physical scope and temporal duration this activity encompasses. Deputy Chief Dolan minimizes this activity, stating "the Court allows attorneys and parties in cases that have been argued to address the media on the plaza immediately following argument." JA 18. But, particularly when high-profile cases are involved, these press events involve speech by multiple persons, and lengthy question-and-answer sessions, drawing large crowds of onlookers and

[14] But not as a matter of *Grace*.

dominating the Plaza for substantial periods of time. Second, these events are not objective summaries recounting what happened inside the courthouse. Rather, they are opportunities for advocates to convey a legal, political, or cultural message to the media, and thus the public, with the Supreme Court as a physical backdrop.

There are numerous instances in the record below, and in the judicially noticeable public record, demonstrating these features.[15] A recent report by longtime Supreme Court correspondent Nina Totenberg describes one example involving Arizona Governor Jan Brewer, who held a press conference in "the usual gaggle place[16] where the cameras were set up on the nearby plaza" outside the Court after the oral argument in *Arizona v. United States*, 132 S. Ct. 2492 (2012). Totenberg noted that that was the first time in her experience that Supreme Court police had asked reporters for Ids to enter the gaggle—suggesting a general open

[15] At oral argument below, the Government conceded that the Court could take judicial notice of the "nature of the property at issue and the history of the use and sort of views about how that property was gonna be used." JA 122. *See also* note 3, *supra.*

[16] A "gaggle" is a flock of geese not in flight. Apparently a flock of journalists makes a similar sound effect.

access policy.[17] As numerous media reports and photographs indicate, the interaction between advocates and media on the Plaza is not limited to these events, nor is it a development of recent vintage. One reporter has written that, after the 1992 arguments in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), she "milled about the crowd on the Supreme Court plaza, interviewing advocates who had just watched arguments in the most momentous case of the term." JA 32. And advocates have used the Plaza and

[17] Nina Totenberg, "Also At The Supreme Court This Week: The Case Of The Sidewalk Snafu," http://www.npr.org/blogs/itsallpolitics/2012/04/26/151464032/also-at-the-supreme-court-this-week-the-case-of-the-sidewalk-snafu.

The number of microphones on the mike tree in the accompanying photograph, below, suggests the size of the media crowd at these events. It does not reflect how many bystanders also gather to listen, watch, and argue with each other.

Arizona Gov. Jan Brewer speaks to reporters outside the Supreme Court on Wednesday, after oral arguments on Arizona's immigration law. At left, in brown and wearing sunglasses, is NPR's Nina Totenberg.

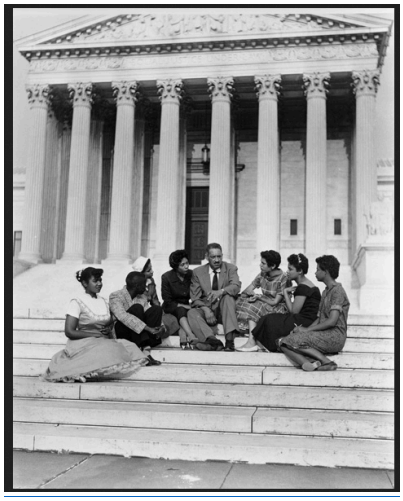
steps of the Court to pose for advocacy-oriented photography since at least 1954. One widely published photograph showed Nettie Hunt on the front steps of the Court with her daughter, explaining the meaning of *Brown v. Board of Education*, and holding a newspaper with a headline reflecting the decision.[18]

Another showed petitioners' counsel in *Brown v. Board of Education* posing in celebration on the Plaza after the case was decided.[19]

[18] http://www.loc.gov/pictures/item/00652489/.

[19] http://www.rand.org/pubs/periodicals/rand-review/issues/summer2004/perspectives.html.

A few years later, then-litigator Thurgood Marshall and the "Little Rock Nine" posed for photographs on the steps of the Court, in connection with the argument in *Cooper v. Aaron*, 358 U.S. 1 (1958).[20]



This use of the Plaza as a place for advocates to pose for photos continues today. In a widely-published photo, the respondents and their counsel in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), posed on the steps with their arms linked and raised in victory after their opponents' appeal was dismissed.[21]

[20] http://exhibitions.nypl.org/africanaage/photos/civilrights/195_222.jpg.

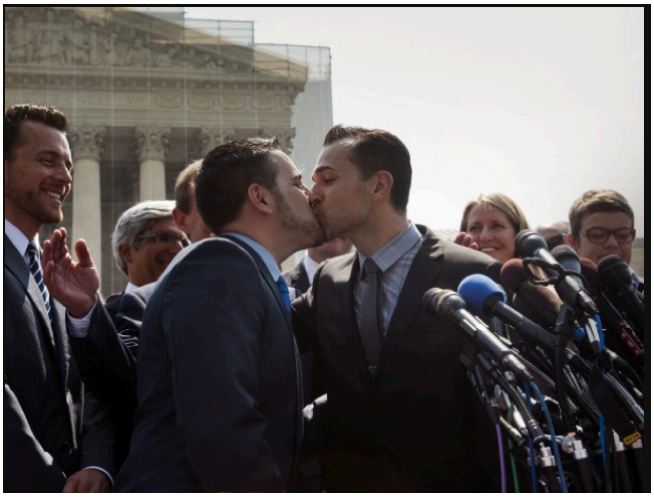
[21] http://www.washingtonpost.com/politics/victories-for-gay-marriage/2013/06/26/cc614f28-de6f-11e2-b797-cbd4cb13f9c6_gallery.html#photo=14.

The Government does not address this activity in its opening brief in any detail. Below, however, it repeatedly suggested that any such expressive activity was *de minimis*. This fundamental misconception also underlies several of the D.C. Court of Appeals' decisions regarding First Amendment rights on the Plaza.[22] In *Pearson v. United States*, 581 A.2d 347, 353 (D.C. 1990), that court stated that the only activity allowed on the Plaza is "disseminating information about and from the Court to the public." *See also Bonowitz v. United States*, 741 A.2d 18, 21 (D.C. 1999).[23] While the sorts of media advocacy and other expressive activity engaged in on the Plaza by litigants and their counsel could be characterized as the "dissemination of information about the Court," so could Mr. Hodge's conduct. The suggestion by the *Pearson* court that the communications on the Plaza were neutral and objective was incorrect; the media advocacy in which parties and their

[22] This Court, of course, is not bound by the D.C. Court of Appeals' interpretations of federal constitutional law. *Blair-Bey v. Quick*, 151 F.3d 1036, 1050 (D.C. Cir. 1998), *reh'g denied*, 159 F.3d 591; *Ellis v. District of Columbia*, 84 F.3d 1413, 1420 (D.C. Cir. 1996).

[23] The D.C. Court of Appeals has also been mistaken as to who engages in expressive activity at the Plaza. In *Pearson*, the Court of Appeals concluded that there was insufficient history of the plaza being used for "public expression by the media, attorneys and others." 581 A.2d at 352. In *Bonowitz*, though, that court acknowledged that "Plaza access for First Amendment purposes" was available to "anyone associated with a case before the Court, the news media, and the film media for movies relating to the Supreme Court." 741 A.2d at 2.

counsel engage is hardly a neutral, objective recitation of facts, as exemplified by respondents Jeff Zarrillo and Paul Katami after their victory in *Hollingsworth*:[24]



Insofar as the D.C. Court of Appeals has relied on this misunderstanding, the persuasive authority of its case law is greatly diminished.

b. Non-Litigants Regularly Engage in Expressive Activity on the Plaza

Contrary to the Government's suggestion, the Plaza is not a place where only "highly specialized government business" occurs. Appellants' Brief at 23.[25] Not only do litigants and their counsel engage in far more expressive activity on the Plaza than the Government suggests, non-litigants also regularly engage in expressive activity on the Plaza. This is encouraged by the fact that there is no

[24] http://www.washingtonpost.com/politics/victories-for-gay-marriage/2013/06/26/cc614f28-de6f-11e2-b797-cbd4cb13f9c6_gallery.html#photo=16

[25] As Deputy Chief Dolan noted, more than 340,000 people visited the Court in 2011. JA 6. Certainly few of them were engaged in "highly specialized government business."

enforced general policy against congregating or crowding on the Plaza. In fact, the Supreme Court's own website encourages visitors to show up whenever they wish, stating "Visitors may begin lining up on the Front Plaza as early as they feel comfortable." JA 22.[26] Thus, long lines of people congregate on the Plaza waiting to enter, while others stand in groups off to the side.[27]

While many court visitors do not engage in expressive activity on the Plaza, many do, and are allowed to do so. One news reporter photographed two girls dancing on the Plaza, while four Supreme Court police officers stood by, unconcerned.[28]

[26] As a matter of plain textual interpretation, this would appear to conflict with the statute's prohibition of "parad[ing], stand[ing], or mov[ing] in processions or assemblages" on the Plaza. 40 U.S.C. § 1635.

[27] A brief video depicting this practice can be found at http://www.volokh.com/2011/11/08/the-supreme-court-plaza-on-a-sunny-day/.

[28] http://www.gettyimages.com/detail/news-photo/makenzi-smith-of-norman-okla-and-mallee-mcgee-of-midwest-news-photo/99576677.

This spontaneous expressive activity reflects the attitudes of the American public, the actual practice of the Court, and the fact that such activity is consistent with the intended uses of the Plaza.

Additionally, the Court *does* allow individuals to gather regularly for at least one form of organized, group First Amendment activity—group prayer. For several years, the group Faith in Action has held twenty-minute group prayer sessions on the Plaza to commemorate the "National Day of Prayer." JA 105-107.[29] The statute does not have a carveout for prayer, and there is no reason to think that a group of individuals praying in a circle would be any less disruptive than Mr. Hodge standing with his small sign.

C. The Plaza's Physical Nature Supports its Status as a Public Forum

The Government argues that the "physical nature" of the Plaza supports the conclusion that it is not a public forum. But, as the district court noted, "the physical features of the Supreme Court plaza—with its long benches and fountains

[29] Some news sources indicate that "special permission" was given to allow this group to commemorate its mission with prayer. *See, e.g.,* "A Mighty Fortress Is Our God—America's Sixtieth National Day Of Prayer," http://usrenewal.squarespace.com/home/a-mighty-fortress-is-our-god-americas-sixtieth-national-day.html; Religious Freedom Coalition, "Report From Washington—May 5, 2012," http://www.religiousfreedomcoalition.org/2012/05/05/report-from-washington-may-5-2012/. One participant noted that the permission was conditioned on the prayer not being a "demonstration," while acknowledging, "The line between the two is very ill defined."

and wide open space in front of an iconic American building open to the public—suggest a more welcoming invitation to the public and public expression than is suggested by the defendants or the statute." JA 218. Contrary to the Government's suggestion, the physical nature of the Plaza actually supports a finding of public forum status.[30]

The Plaza is a large open oval, approximately 252 feet wide, and has been a part of the Court since its opening. JA 17-18. The Court was architecturally designed to "harmonize[] with nearby congressional buildings," JA 31, the grounds of which have been held to be public fora. *See Lederman*, 291 F.3d 36.

The Plaza is made of marble, unlike the surrounding sidewalks, a fact on which the Government places great reliance, attempting to distinguish this case from *Grace*. Appellants' Brief at 22; JA 18. But no court has ever held that the building material used in a specific area is dispositive of the area's public forum status. To the contrary, multiple Circuits have warned against relying too much on this aspect of physical design in determining whether the space is a public forum.

[30] In *Pearson*, the Government argued that the "physical and functional attributes" of the Plaza were *not* particularly relevant to determining whether the Plaza was a public forum. 581 A.2d at 352. The D.C. Court of Appeals thus did not rely on the physical attributes of the Plaza in its decision, though it acknowledged the appellant protesters' contention that the Plaza is "an unenclosed, accessible area immediately adjacent to an important government building, [] physically and functionally similar to the public sidewalks surrounding that area, and the spacious public lawns and open areas surrounding the Capitol." *Id.*

As the Third Circuit explained, "we are aware of no authority suggesting that a unique construction material underfoot, without more, would necessarily put an individual on notice that he was suddenly treading on a different sort of government property where expressive activity was disallowed. In fact, courts have concluded quite to the contrary." *United States v. Marcavage*, 609 F.3d 264, 276 (3d Cir. 2010) (citing *ACLU of Nevada v. City of Las Vegas,* 333 F.3d 1092, 1103 (9th Cir. 2003)); *see also Venetian Casino Resort v. Local Joint Executive Bd. of Las Vegas,* 257 F.3d 937, 945 (9th Cir. 2001); *Gerritsen v. City of Los Angeles,* 994 F.2d 570, 576 (9th Cir. 1993); *Defending Animal Rights Today and Tomorrow v. Washington Sports and Entertainment, LP*, 821 F. Supp. 2d 97, 104 (D.D.C. 2011) (finding section of sidewalk under an overhang outside the Verizon Center was a public forum "[e]ven though the paving material changes in the recessed portion").

At best, the marble paving of the Plaza indicates some difference between the Plaza and the sidewalk. But that is not enough to show that the Plaza is not a public forum. As the Third Circuit explained, the question is not whether an individual was put on notice that "he was suddenly treading on a different sort of government property," but whether he was put on notice that he was on the sort of property "where expressive activity was disallowed." *Marcavage*, 609 F.3d at 276. While the *Grace* sidewalks provide neither of these kinds of notice, the Plaza fails

to provide the latter. That the Plaza is paved with marble does not signify it is unwelcoming of public expression, particularly in light of the benches and the loose policies about gathering discussed above. There is nothing inherent about marble paving that indicates a nonpublic forum. There are differently-surfaced areas in traditional public fora throughout the city, *e.g.,* Freedom Plaza (inlaid stone), Lafayette Square (brick walkways), the steps of the Lincoln Memorial (granite and marble), and the National Mall (grass, gravel, and dirt)—not to mention the ur-Forum in ancient Rome (paved with travertine, *see* http://en.wikipedia.org/wiki/Roman_Forum).

As noted by the D.C. Court of Appeals in *Pearson*, 581 A.2d at 352, the Plaza is in many ways similar to the sidewalks on the Capitol Grounds that were deemed public fora by this Court in *Lederman*. Like those sidewalks, the Plaza is "'continually open, often uncongested, and . . . a place where people may enjoy the open air or the company of friends and neighbors,' and a place from which tourists may view and photograph the [Court]." *Lederman*, 291 F.3d at 44 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 651 (1981)). And as the sidewalks provide "pedestrian access to the entire front of the building in addition to the doors, thereby facilitating tourist access to the Capitol—a centerpiece of our democracy," the Plaza does the same for the Court—another centerpiece of American government.

The Plaza is also physically similar to plazas outside other government buildings, which are regularly found to be public fora. *See, e.g.*, *United States v. Gilbert*, 920 F.2d 878, 886 (11th Cir. 1991) ("unenclosed plaza" outside federal building and courthouse is public forum); *Occupy Minneapolis v. Cnty. of Hennepin*, 866 F. Supp. 2d 1062, 1069 (D. Minn. 2011) (plaza outside municipal building is public forum); *Courtemanche v. GSA*, 172 F. Supp. 2d 251, 266 (D. Mass. 2001), *subsequent opinion sub nom. Arnam v. GSA*, 332 F. Supp. 2d 376, 390-91 (D. Mass. 2004), (plaza outside federal building is public forum).

The Government relies heavily on this Court's decision in *Oberwetter*, which held that the inside of the Jefferson Memorial was not a public forum. 639 F.3d at 552. But there is no comparison between the *inside* of a memorial and an open, exterior plaza.[31] The more apt comparison would be to the block of Pennsylvania Avenue outside the White House, now turned into a pedestrian plaza, and recognized to be a public forum in *Mahoney v. Doe*, 642 F.3d 1112, 1117 (D.C. Cir. 2011).

[31] Nor is the Government's comparison to the interior postal sidewalks in *Initiative & Referendum Institute II* appropriate. Appellants' Brief at 23. As discussed above, and made clear by the presence of benches for the public to sit on, the Plaza is indeed a "gathering place." The fact that the Plaza is "not a public thoroughfare" is of little import, as many public fora are not "thoroughfares." *See, e.g.*, *Summum*, 555 U.S. at 464 (holding park is a public forum).

II. 40 U.S.C. § 1635 DOES NOT CONSTITUTE A PERMISSIBLE, NARROWLY TAILORED REGULATION OF EXPRESSION IN A PUBLIC FORUM

In a public forum, "the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication." *Burson v. Freeman*, 504 U.S. 191, 197 (1992). To be narrowly tailored, a regulation 'need not be the least restrictive or least intrusive means' of serving the government's interests. Nonetheless, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1307 (D.C. Cir. 2005) ("*Initiative & Referendum Inst. I*") (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 798-99 (1989)).

Below, the Government asserted three interests that it claims are furthered by the statute. But given the scope of 40 U.S.C. § 6135, which essentially prohibits *all* protest and/or group activity on the Plaza, it cannot be defended as narrowly tailored to serve the asserted interests. "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately

targeted evil." *Initiative & Referendum Inst. I*, 417 F.3d at 1307 (quoting *Frisby v. Schultz,* 487 U.S. 474, 485 (1988)).[32]

First, the Government observes that it has a significant interest in "facilitat[ing] ingress and egress of employees and visitors to the Court in a manner that comports with that order and decorum." Appellants' Brief at 11. This is a valid interest. But as the District Court explained, the statute "encompasses not only a ban on activity that actually impedes ingress and egress, and/or is intended to impede ingress and egress, but also bans a variety of other unobtrusive [expressive] actions." JA 220. Mr. Hodge impeded no one, and interfered with no one's decorum. There are obvious ways that appropriate time, place, and manner regulations can prevent disruption to ingress and egress without completely prohibiting First Amendment activity on the Plaza. For example, the Court's own Regulation Six already states "no person shall carry or place any sign in such a manner as to impede pedestrian traffic, access to and from the Supreme Court

[32] On appeal, the Government argues that the statute does not prohibit expressive activity at all, but "operates simply to direct people to the sidewalk as opposed to other parts of the Supreme Court grounds," suggesting that the Supreme Court's decision in *Grace*, combined with the text of the statute, creates a time, place, and manner regulation. Appellant's Brief at 16, 30-31. There is no support for the notion that a court's striking down a prohibition as applied to one area somehow insulates the rest of the statute from being labeled a prohibition. As the Government argues in other portions of its brief, the Plaza is not the same as the public sidewalk. Speech remains completely prohibited on the Plaza.

Plaza or Building, or to cause any safety or security hazard to any person."[33] Such regulations can fully serve the Government's "interest in protecting the 'safety and convenience' of persons using a public forum." *Heffron*, 452 U.S. at 650. They can also ensure that large numbers of protesters will not overtake the Plaza.[34]

Second, the Government contends that the statute serves the interest of "preserving the appearance of the Court as a body not swayed by external influence." Appellants' Brief at 8. While this is also a legitimate interest, there is no indication that the statute furthers this goal. Despite the statute's existence, a 2012 Rasmussen survey found that most Americans "believe justices pursue their own political agenda rather than generally remain impartial." JA 76. Given the

[33] http://www.supremecourt.gov/publicinfo/buildingregulations.aspx, cited in Appellants' Br. at 4.

[34] As in many other cases, the Government relies on *Heffron* to argue that if anyone is allowed to exercise free speech on the Plaza, the aggregate number of people who do so will create disruption. *See* Appellants' Brief at 30. By that reasoning, no one should be allowed to exercise free speech anywhere, as there is no venue that can accommodate an unlimited crowd. The simple response to the aggregation concern is to place a reasonable limit on the number of people allowed in one place at one time—a mechanism with which the Government is quite familiar. *Heffron* involved a unique situation—the exceptionally congested walkways at a State Fair—and did not involve a ban on any First Amendment activity, simply a regulation requiring persons who wished to sell merchandise and solicit donations to do so from a fixed location.

longevity of the statute, it does not appear to be doing much to further this goal.[35]

Beyond this data as to how Americans actually see the Court, the prohibition of expressive activity on the Plaza also fails a logic test. Photographs and video images of the Court show the signs, protests, and pickets that already occur on the sidewalk. The Government concedes that these protests "are readily seen by the public and regularly covered by the press." Appellants' Brief at 19. In rejecting the same supposed interest in *Grace*, the Court noted "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." 461 U.S. at 183. By the same token, it is unlikely that the public would draw a different inference as to the Court's susceptibility to public influence from seeing the free speech activities pictured below on the Plaza rather than on the sidewalk—assuming viewers not personally present could even tell the

[35] Research suggests that the Court actually is responsive to public opinion. *See, e.g.*, Christopher J. Casillas, et al., *How Public Opinion Constrains the Supreme Court*, 55 Am. J. Pol. Sci. 74 (2011) (JA 79-93); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. Politics 1018 (2004); *see also United States v. Windsor*, 133 S. Ct. 2675 (2013).

Query whether the goal of *deceiving* the public into believing that "the Court as a body [is] not swayed by external influence" is a legitimate governmental interest at all. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

difference—or from Mr. Hodge's sign on the Plaza rather than at the foot of the steps.[36]

[36] Upper photo, Zoe Carpenter, "Jubilant Crowd Greets Supreme Court Rulings," http://www.thenation.com/blog/174997/jubilant-crowd-greets-supreme-court-rulings (June 26, 2013). Lower photo, "81 Arrested in Guantanamo Protest at Supreme Court," http://guerillawomentn.blogspot.com/2008/01/81-arrested-in-guantanamo-protest-at.html (January 11, 2008).

CONCLUSION

For the reasons stated above, *amicus* respectfully requests the Court affirm the decision below, on the basis that the Plaza is a public forum, and the statute at issue fails to survive strict scrutiny.

Respectfully submitted,

/s/ *Arthur B. Spitzer*

Arthur B. Spitzer
Adam R. Pulver
American Civil Liberties Union
of the Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, D.C. 20008
T: 202-457-0800
F: 202-457-0805
E: artspitzer@aclu-nca.org

Counsel for *Amicus Curiae*

January 30, 2014

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains exactly 7000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the word-count function of Microsoft Word for Mac 2011 (version 14.3.9).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman.

/s/ *Arthur B. Spitzer*
Arthur B. Spitzer

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2014, I filed the foregoing brief with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the appellate CM/ECF system. Participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Arthur B. Spitzer*
Arthur B. Spitzer