[ORAL ARGUMENT NOT YET SCHEDULED]

No. 24-5207

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PATRICK J. MAHONEY,

Plaintiff-Appellee,

v.

U.S. CAPITOL POLICE BOARD, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

Except for American Civil Liberties Union of the District of Columbia, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants. References to the rulings at issue and related cases also appear in Appellants' Brief.

Statutes and Regulations

All applicable statutes and regulations are contained in the addendum to the Brief for Appellants, the addendum to the Brief for Appellee, and the Joint Appendix.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), *amicus* American Civil Liberties Union of the District of Columbia states that it is a 501(c)(3) non-profit organization and has no parent corporations. It does not issue any stock, and therefore no publicly owned corporation holds ten percent or more of its stock.

/s/ Aditi Shah
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GLOSSARY

ACLU-DC	American Civil Liberties Union of the District of Columbia
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NTEU	National Treasury Employees Union
Pl. Br.	Brief of Plaintiff-Appellee

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae American Civil Liberties Union of the District of Columbia ("ACLU-DC") is a non-profit, non-partisan organization with more than 10,000 members. Throughout its sixty-four years of existence, ACLU-DC has advocated for the First Amendment free speech rights, among other issues, of people from across the ideological spectrum who live in, work in, or visit the District. ACLU-DC regularly appears in the courts of this Circuit as counsel or *amicus* in cases involving violations of the First Amendment, including facial challenges to laws and policies under the First Amendment. *See, e.g.*, *Guffey v. Mauskopf*, 45 F.4th 442 (D.C. Cir. 2022) (counsel); *Hodge v. Talkin*, 799 F.3d 1145 (D.C. Cir. 2015) (*amicus*); *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002) (counsel); *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984) (counsel); *WallBuilder Presentations v. Clarke*, 2024 WL 2299581 (D.D.C. May 21, 2024) (counsel); *ACLU v. Washington Metro. Area Transit Auth.*, 2023 WL 4846714 (D.D.C. July 28, 2023) (counsel).

Pursuant to Circuit Rule 29(a)(4)(E), *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court held that the Capitol Police regulation banning expressive activity on the lower portion of the Capitol Building's East Steps is unconstitutional on its face and enjoined its enforcement as to anyone. On appeal, the government contests not only the merits of the district court's decision but also the scope of its injunction. This brief explains why such an injunction is the proper remedy when a law is held to be facially unconstitutional.

Each year, approximately 3-5 million people visit the United States Capitol Building.[1] Surrounding the Capitol Building are the Capitol Grounds, which include landscaping, walkways, benches, and plazas. On the East Front of the Capitol there are three sets of steps: the East Senate steps, which lead to an entrance to the Senate chamber, the East House steps, which lead to an entrance to the House chamber, and the East Capitol steps, which are situated between the House and Senate steps and lead to an entrance to the Capitol rotunda (collectively referred to here as the "East Steps"). The upper portions of the East Steps are cordoned off to the public, but the lower portions are not. As a result, members of the public regularly access those portions of the steps, walk up them, stand on them, sit on them, take photographs on

[1] *U.S. Capitol Building*, Architect of the Capitol, https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitol-building#:~:text=In%20addition%20to%20its%20active,alone)%20and%20approximately%20850%20doorways (last accessed April 1, 2025).

them, and congregate on them. And before September 11, 2001, the East Steps served as a salient locus for expressive activities; Mahoney himself participated in at least forty demonstrations there between 1976 and 2001. Pl. Br. at 9; JA 407.

In the wake of September 11, however, the Capitol Police Board revised its Traffic Regulations to prohibit the public from engaging in demonstration activity on those steps unless organized or sponsored by a member of Congress. JA 356 (TRAFFIC REGULATIONS FOR THE UNITED STATES CAPITOL GROUNDS, § 12.2.20 (2019)). This categorical prohibition prevents Mahoney from holding prayer vigils and other peaceful demonstrations on the lower portions of the East Steps. The district court correctly held that those portions of the steps constitute a public forum and that the Capitol Police's regulation violates the First Amendment on its face because "the near-total ban on expression . . . is not narrowly tailored." *Mahoney v. U.S. Capitol Police Bd.*, 734 F. Supp. 3d 114, 130 (D.D.C. 2024), *reconsideration denied*, 2024 WL 4235429 (D.D.C. July 31, 2024); JA 437. The court held that the regulation was both "troublingly overinclusive" because it bans nearly all forms of expressive activity and "seriously underinclusive" because it does not prohibit members of the public from accessing and congregating on the lower portions of the East Steps for other purposes. *Id.* at 130–31; JA 437–38. Finding the regulation facially invalid, the court enjoined Defendants-Appellants ("Defendants") from enforcing the regulation on the lower portions of the East Steps. *Id.* at 133; JA 443.

Amicus agrees with the district court's analysis and conclusion on the merits of Mahoney's First Amendment claim. It writes separately to support the propriety of the scope of the relief ordered by the court. Defendants argue that the court erred in granting "universal relief" and that at a minimum, any relief must be limited to Mahoney. Defs. Br. at 44. As the district court explained, however, notwithstanding recent debates over "nationwide" or "universal" injunctions, "binding authority makes clear that the judicial power extends to broadly enjoining facially invalid laws in cases brought by individual plaintiffs." *Mahoney*, 2024 WL 4235429, at *3; JA 496. This is especially so in the First Amendment context: The Supreme Court reaffirmed as recently as last year that a less exacting standard applies to facial challenges under the First Amendment as compared to other types of facial suits "[t]o 'provide[] breathing room for free expression.'" *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (second alteration in original) (quoting *United States v. Hansen*, 599 U.S. 762, 769 (2023)). As a result, "[w]here, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967–68 (1984).

Given that the district court properly held that the Capitol Police's regulation

prohibiting demonstration activity on the lower portions of the East Steps violates the First Amendment on its face, it properly enjoined Defendants from enforcing that prohibition as to anyone. This Court should affirm the district court's decision in its entirety, including the scope of the relief.

ARGUMENT

I. Courts can enjoin enforcement of a facially invalid law as to anyone.

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415 (2015). As a general matter, "[a] facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case"; "[a]n as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). To prevail on a facial challenge, a plaintiff must "establish that no set of circumstances exists under which the [law] would be valid, or . . . that the law lacks a plainly legitimate sweep," *Moody*, 603 U.S. at 723 (internal quotation marks omitted), whereas an as-applied challenge "ask[s] only that the reviewing court declare the challenged statute or regulation unconstitutional on the facts of the particular case," *Sanjour v. E.P.A.*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995). In the First Amendment context, there is "'a second type of facial challenge,' whereby a law

may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

The distinction between facial and as-applied challenges serves an important practical purpose: The distinction is "both instructive and necessary, for it goes to the breadth of the remedy employed by the Court[.]" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). *See also Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) ("[C]lassifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated *and the corresponding 'breadth of the remedy*[.]'") (emphasis added) (quoting *Citizens United*, 558 U.S. at 331). Notwithstanding recent debates regarding the propriety of injunctive relief that goes beyond the individual plaintiffs who brought a case, the discussion below demonstrates that longstanding principles and binding precedents support the scope of the injunction the district court issued here.

A. Courts have consistently held that enjoining the enforcement of a law as to anyone is appropriate when the law is facially unconstitutional.

The Supreme Court has held unequivocally that "if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is proper." *Whole Woman's Health v. Hellerstedt*, 579

U.S. 582, 603 (2016), *abrogated on other grounds* by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (internal quotation marks and citation omitted). In other words, as the district court held, "the breadth of the relief follows from the nature of the constitutional defect." *Mahoney*, 2024 WL 4235429, at *3; JA 496.

The origins of this rule trace back to first principles. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall held that "a legislative act contrary to the constitution is not law." *Id.* at 177. The Constitution therefore "automatically displaces any conflicting statutory provision from the moment of the provision's enactment." *Collins v. Yellen*, 594 U.S. 220, 259 (2021). Accordingly, if a court determines that a law is facially unconstitutional, then by definition it cannot be enforced against anyone because it is simply not a valid law. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.5 (1982) ("A facial challenge [to the overbreadth and vagueness of a law] means a claim that the law is invalid *in toto*—and therefore incapable of any valid application.") (internal quotation marks and citation omitted). Enjoining the enforcement of a law that is facially unconstitutional therefore is conceptually analogous to the constitutional instruction in the federal preemption context "that a state law may not be enforced if it conflicts with federal law," *Riley v. Kennedy*, 553 U.S. 406, 427 (2008), and the administrative law context, where this Court has explained that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the

rules are vacated—not that their application to the individual petitioners is proscribed," *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989).

Cases in which courts have enjoined the enforcement of facially invalid laws as to anyone, including nonparties, exemplify these principles. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 582 (2017) (affirming injunction invalidating executive order banning entry by people from certain Muslim countries "with respect to [non]parties similarly situated" to plaintiffs); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012) ("The remedy for that constitutional violation [where the Medicaid-expansion portion of the Affordable Care Act facially violated the Spending Clause] is to preclude the Federal Government from imposing such a sanction."); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the District's prohibition on possession of usable handguns in the home facially violated the Second Amendment and affirming this Court's decision ordering the district court to grant relief sought by plaintiffs, which included enjoining defendants from enforcing the prohibition); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 619 (6th Cir. 2009) ("[T]his court has repeatedly held that facially unconstitutional laws will not be enforced.").

The relief issued in these cases—enjoining the enforcement of a facially unconstitutional law as to anyone, not only the individual plaintiffs—rests on the general principles discussed above that the breadth of the relief should match the

nature of the defect and that when a law is found to be facially invalid, there is no law left to enforce.

B. Enjoining the enforcement of facially unconstitutional laws as to anyone is especially appropriate in the First Amendment context.

The propriety of enjoining the enforcement of a facially invalid law as to anyone applies with special force in the First Amendment context. As the Court held in *Citizens United*, where a statute imposes an "ongoing chill upon speech that is beyond all doubt protected," it is "necessary . . . to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." 558 U.S. at 336. As noted above, courts apply a less stringent standard for facial suits under the First Amendment given the desire "[t]o provide[] breathing room for free expression." *Moody*, 603 U.S. at 723 (internal quotation marks omitted). Indeed, even with respect to Article III standing, the Supreme Court has held that "in the First Amendment context, [l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988) (subsequent history and internal quotation marks omitted).

This Court's analysis in a closely related case to this one, *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002), is a prime example of how relief in a First Amendment facial challenge can appropriately extend beyond the parties. In *Lederman*, this Court held that a different portion of the Capitol Police's Traffic Regulations that restricted expressive conduct on the sidewalk adjoining the House and Senate steps on the East Front of the Capitol facially violated the First Amendment because the regulation was not narrowly tailored to serve the government's interests in controlling traffic and promoting security near the Capitol. *Id.* at 46. In its analysis, the Court, like the district court here, focused on the text of the regulation to determine whether it was narrowly tailored. *Id.* at 45–46. Determining that the regulation violated the First Amendment on its face, this Court "remand[ed] for entry of an injunction barring enforcement of the ban" as a whole, not only as to the appellant who brought the challenge. *Id.* at 48.

The particular species of First Amendment facial challenge known as "overbreadth" challenges further illustrates the appropriateness of enjoining facially unconstitutional laws on their face, not merely as to the plaintiff. A law is overbroad—and therefore facially unconstitutional—if it "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (citation omitted). "[T]he overbreadth doctrine instructs a court to hold a statute [regulating speech] facially

unconstitutional even though it has lawful applications" because "[o]verbroad laws 'may deter or 'chill' constitutionally protected speech,' and if would-be speakers remain silent, society will lose their contributions to the 'marketplace of ideas.'" *Hansen*, 599 U.S. at 769–70. "To guard against those harms, the overbreadth doctrine allows a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak." *Id.* at 770; *see also Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 483 (1989) ("Where an overbreadth attack is successful, the statute is obviously invalid in all its applications, since every person to whom it is applied can defend on the basis of the same overbreadth.") (emphasis omitted); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) ("Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'"). Fundamentally, "facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Munson*, 467 U.S. at 958.

Here, as noted above, the district court held that the Board's regulation was

"troublingly overinclusive" given that the near-total ban on expressive activity covers not only Mahoney's small prayer vigils, but also would "seem to cover a pair of individuals gathering on the Eastern Steps to oppose or support the latest editorial in the *New York Times*." *Mahoney*, 734 F. Supp. 3d at 130; JA 438. The Supreme Court and this Court have enjoined the enforcement of laws that facially violate the First Amendment, including because the laws were overbroad, in multiple cases. *See, e.g.*, *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 619 (2021) (holding that state's compelled disclosure requirement facially violated the First Amendment and that district court "correctly . . . permanently enjoined the [state] Attorney General from collecting [forms at issue]"); *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (holding that provisions of federal statute were facially overbroad in violation of the First Amendment and affirming district court's order preliminarily enjoining government from enforcing those provisions); *Zukerman v. USPS*, 961 F.3d 431, 447 (D.C. Cir. 2020) ("USPS's regulation banning custom postage designs containing any depiction of political content did not provide objective, workable standards to guide the exercise of the government's discretion, and thus, was facially unconstitutional."); *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 588 (D.D.C. May 9, 1972) (three-judge court), *aff'd*, 409 U.S. 972 (1972) ("[T]he judgment we propose to enter will, in addition to declaring [the statute regulating access to and conduct on Capitol Grounds] to be void on its face because

of the constitutional infirmities exposed hereinbefore, permanently enjoin the defendants from enforcing [the statute].”). Thus, as another court of appeals summarized, “[i]f a facial challenge is upheld, then the state cannot enforce the statute against anyone.” *Amelkin v. McClure*, 205 F.3d 293, 296 (6th Cir. 2000).

Given that the district court held that the Capitol Police’s regulation “was not narrowly tailored and thus required retooling to have any valid application to *any protester*,” *Mahoney*, 2024 WL 4235429, at *9; JA 509 (emphasis added), there is no doubt that it had the authority to enjoin its enforcement consistent with the injunction ordered by this Court in *Lederman* and the injunctions upheld in the other cases discussed above.

II. Article III does not require limiting injunctive relief to Mahoney.

Defendants argue that Article III of the Constitution prohibits relief to nonparties even in the context of a facial First Amendment challenge. Article III, however, does not constrain courts’ authority to issue relief “proportional to the constitutional flaw in the statute causing [the plaintiff’s] injury.” *Mahoney,* 2024 WL 4235429, at *5; JA 499.

As a threshold matter, Defendants use the wrong frame for their argument. Whether a court has Article III jurisdiction over a case is different from the scope of the relief it may issue. Under longstanding Supreme Court precedent, even if a court were to enjoin activity that was “in no way related” to the controversy at issue, “the

error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much [from a jurisdictional perspective]." *Swift & Co. v. United States*, 276 U.S. 311, 331 (1928). *See also Davis v. Passman*, 442 U.S. 228, 239–40 n.18 (1979) ("*[J]urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case, . . . and *relief* is a question of the various remedies a federal court may make available."); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 561 (1968) ("The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy."); *Goodluck v. Biden*, 104 F.4th 920, 923–24 (D.C. Cir. 2024) ("A court granting the equitable remedy of an injunction has discretion to 'mold its decree to meet the exigencies of the particular case.'") (quoting *Int'l Refugee Assistance Project*, 582 U.S. at 580).

It accordingly is no surprise that "Article III courts have issued injunctions that extend beyond just the plaintiff for well over a century." Mila Sohoni, *The Lost History of the 'Universal' Injunction*, 133 HARV. L. REV. 920, 924 (2020); *id.* 935–943 (discussing Supreme Court cases from the 1890s where the Court "affirm[ed] injunctions against enforcement of state laws with effects on nonparties equal to or even greater than those of today's universal injunctions"); *see also Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022) ("an order enjoining the Government

from taking any action to enforce the loan-repayment limitation" was appropriate remedy sought by individual plaintiffs, who had standing to challenge threatened enforcement of regulation that was source of the loan-repayment limitation).

Defendants attempt to fit their argument into the "redressability" prong of Article III standing, Defs. Br. at 44–45, but to no avail. "To establish standing, . . . a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). The last prong, that "the injury likely would be redressed by the requested judicial relief," does not require that the relief a court issues be *limited* to redressing the plaintiff's injury. It requires simply that the requested relief will redress the plaintiff's injury; it says nothing about whether the requested relief may benefit non-parties.[2] Indeed, under Defendants' theory, courts would be barred under Article III from issuing relief even if it benefits nonparties *incidentally*—a position that even some of the most ardent critics of universal injunctions have not taken. *See, e.g.*, *United States v. Texas*, 599 U.S. 670, 693 (2023) (Gorsuch, J., concurring) (noting that traditionally, "[i]f the court's remedial order affects nonparties, it does so only incidentally");

[2] Of course, relief to redress Mahoney's injury would necessarily include the group he wishes to lead in prayer vigils.

Trump v. Hawaii, 585 U.S. 667, 717 (2018) (Thomas, J., concurring) (describing "[i]njunctions barring public nuisances" as an example where injunctions incidentally benefited nonparties); *cf. Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 955 n.124 (5th Cir. 2024) (subsequent history omitted) ("We recognize, of course, that even ordinary, party-specific injunctions can incidentally benefit nonparties.").

Instead, the relevant requirement with respect to remedies accords with the principle discussed above that the scope of the relief should match the nature of the constitutional defect: "The remedy must . . . be limited *to the inadequacy that produced* the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (emphasis added). Here, the "inadequacy that produced" Mahoney's injury—his inability to hold prayer vigils and other demonstrations on the East Steps—is the constitutional defect on the face of the Capitol Police's regulation. Where the "inadequacy that produced the injury" is "systemwide," *id.* at 359, systemwide relief is warranted.

Defendants argue that "[e]xtending relief beyond plaintiff's desired demonstration activities flouts the axiomatic Article III principle that '[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury.'" Defs. Br. at 44 (quoting *Gill v. Whitford*, 585 U.S. 48, 73 (2018)). But that sentence from *Gill* is taken out of context. In *Gill*, the Court held that the plaintiff lacked Article III

standing in a racial gerrymandering case because the plaintiff's injury needed to be district-specific, and therefore the remedy needed to be as well. 585 U.S. at 66–67. That is entirely consistent with the principle that the inadequacy that produces the injury governs the scope of the remedy: in *Gill*, a district-specific remedy was required for a district-specific injury; here, by contrast, facial invalidation is the appropriate remedy for facial unconstitutionality.

The other cases Defendants cite are similarly unavailing. As the district court explained, the principle that "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants," *United States v. Nat'l Treas. Employees Union ("NTEU")*, 513 U.S. 454, 478 (1995), simply does not apply here because in that case, the Court held that certain nonparties, namely "high-level employees," were not similarly situated to plaintiffs and therefore an injunction barring enforcement of the law as to all federal employees was not warranted. *Id.* at 477–78; *see also Mahoney*, 2024 WL 4235429, at *9; JA 508 (distinguishing *NTEU* from this case). Here, by contrast, the district court held the opposite: "It is simply not true that this Court could have reached a different outcome on the merits had the challenger been some other, more disruptive would-be demonstrator. The analysis would have proceeded exactly as it actually did; the Traffic Regulation, in banning nearly all demonstration in the relevant area, was not narrowly tailored and thus required retooling to have any valid application to any protestor." *Mahoney*, 2024

WL 4235429, at *9; JA 509 (emphasis omitted). Nothing in *NTEU* suggests a court cannot enjoin the enforcement of an unconstitutional law when it determines, as the district court did here, that there is no subset of prospective violators with respect to whom the challenged law could constitutionally be applied. *Id.*

Defendants' invocation of *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), Defs. Br. at 46, is even less helpful to them. Defendants quote from *Doran* the statement that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs," but that principle was articulated in the specific context of considering the *Younger* rule, which sharply limits federal court intrusion into state criminal proceedings. 422 U.S. at 931 (discussing "the concerns for federalism which lie at the heart of *Younger*," 401 U.S. 37 (1971)) (emphasis added). Indeed, the sentence quoted above continues as follows: "and the State is free to prosecute others who may violate the statute." *Id.* Moreover, the statement Defendants quote does not mention *facially unconstitutional* statutes or ordinances. *Id.*

The other main case Defendants rely on, *Labrador v. Poe by & through Poe*, 144 S. Ct. 921 (2024), is inapposite for a simple reason: unlike here, the district court in that case did not find the challenged statute to be unconstitutional on its face.[3]

[3] Other cases Defendants invoke, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) and *Nebraska Dep't of Health & Human Servs. v. Dep't of Health &*

Thus, that stay decision—which produced no majority opinion—does not implicate the principle that a facially unconstitutional law may be enjoined as to anyone.

III. Defendants' policy-based arguments fare no better.

Unable to ground their arguments in the Constitution or relevant precedents, Defendants make policy arguments, which they characterize as based in "equity," to limit courts' ability to enter injunctive relief in accord with the nature of the constitutional flaw that caused the plaintiff's injury. Defs. Br. at 45. Each of these arguments fails as well.

First, they contend that "the district court's injunction allows nonparties to use the stairways for demonstration activities even when those activities present considerably greater security risks because they are different in character and scope than the activities that were the focus of this litigation." *Id.* But that is a consequence of Defendants' refusal to issue a revised, constitutionally valid regulation, not of the district court's injunction. The court, in fact, suggested a number of "less restrictive alternatives" for Defendants to consider; they could, for instance, "limit the number of people who can demonstrate on the Eastern Steps at one time." *Mahoney*, 734 F.

Human Servs., 435 F.3d 326, 330 (D.C. Cir. 2006), *see* Defs. Br. at 45, similarly did not involve facial challenges to laws. *Madsen* involved a challenge to the constitutionality of an injunction, 512 U.S. at 765, and *Nebraska Dep't of Health & Human Servs.* challenged a final agency action upholding the agency's rejection of appellee's cost allocation plan, 435 F.3d at 330.

Supp. 3d at 131; JA 439. "They could also ban the use of props, . . . ban expressive activities at certain times of the day, or force prospective demonstrators to submit to police screening[,]" or enforce the federal law that prohibits certain types of conduct on the Capitol Grounds. *Id.* "What they cannot do is ban nearly all expressive conduct on the Eastern Steps in the name of security while looking the other way as to non-expressive or Member-sponsored activities that may present as great a threat to the Capitol and its Grounds." *Id.* at 131–32; JA 468. Rather than issuing a constitutional regulation that addresses their concerns, Defendants implicitly challenge the court's refusal to rewrite the regulation for them. But courts may "not rewrite . . . a law to conform it to constitutional requirements." *Reno*, 521 U.S. at 884–85 (quoting *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 397). The solution to the problem of which Defendants complain is in their own hands.

Second, Defendants rely on the general principle that nonmutual collateral estoppel does not apply to the government, *United States v. Mendoza*, 464 U.S. 154, 160 (1984), to argue that the district court's injunction "undermine[s] the judicial system's goals of encouraging the 'airing of competing views' by multiple judges." Defs. Br. at 48 (citation omitted). Whatever force there might be to that objection in other situations, it has none here, where the decision of this Court in this case will settle this issue for this Circuit, and there are no other circuits in which a challenge to the Traffic Regulations could be brought. Moreover, the injunction merely

prohibits Defendants from enforcing a facially unconstitutional regulation that if permitted to stand otherwise would prolong the chilling effect it has already had on Mahoney and any other person wishing to engage in expressive or demonstrative conduct on the lower portions of the East Steps.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court, including the scope of the relief it entered.

Respectfully submitted,

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April 11, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that my word processing program, Microsoft Word, counted 5,072 words of the foregoing brief, excluding the items exempted by Federal Rule of Appellate Procedure 32(f) and that this complies with the word limit set forth in Federal Rule of Appellate Procedure 29(a)(5).

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, I electronically filed the foregoing brief in support of Plaintiff-Appellee with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the Appellate CM/ECF system, which will send notice to all counsel who are registered CM/ECF users.

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