No. 12-1038

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DENNIS APEL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a person who was previously barred from a military base may be convicted under 18 U.S.C. § 1382 for peacefully protesting on a public road easement outside the enclosed military base.

2. Whether under the First Amendment a person who was previously barred from a military base may be convicted under 18 U.S.C. § 1382 for peacefully protesting on a public street outside the enclosed military base.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent John Dennis Apel respectfully opposes the government's petition for a writ of certiorari in this case.

STATEMENT OF FACTS

This case involves an individual who was convicted for speech activities that occurred on a public highway that was outside a military base. Vandenberg Air Force Base ("Vandenberg") is a closed military base whose legal limits embrace a public highway, Highway 1, also commonly known as the Pacific Coast Highway.[1] This particular portion of Highway 1 is used by the public to reach, among other places, the city of Lompoc, as well as Surf Beach, which also has an Amtrak station.[2] There is also a public middle school off the shoulder of Highway 1, directly across from Vandenberg's main gate entrance.[3]

Since 1962, the State of California and the County of Santa Barbara have held an easement over the portion of Highway 1 that overlaps Vandenberg, thus

[1] C.A. E.R. 2, 8.

[2] C.A. E.R. 62.

[3] C.A. E.R. 8, 173.

reserving a right of way for the public.[4] The easement is under the concurrent jurisdiction of the State and County which, along with Vandenberg, have law enforcement authority in the area.[5] There are no gates or sentries to control entry onto the area of the easement.[6] Traffic flows freely in both directions on the easement (i.e., on Highway 1) and traffic lights are situated along the intersections.[7]

Within the easement is a designated area outside the main gate entrance of the base that Vandenberg has set aside for the conduct of peaceful protests, pursuant to a base policy which dates back to 1989.[8]

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[4] C.A. E.R. 8, 65-73.

[5] C.A. E.R. 8, 45, 166-67.

[6] C.A. E.R. 272.

[7] C.A. E.R. 54-55, 272.

[8] C.A. E.R. 2, 8, 50-53. That policy states in full:

> People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the Intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force Base, California. The Air Force is obligated to insure that peaceful protests do not result in unsafe vehicle and people congestion around the Main Gate. If necessary, restrictions may be placed on peaceful protesters who encumber the roadways or engage in activities which can result in unsafe conditions for themselves or others. Protest demonstrations may be curtailed in this area when they materially interfere with or have a significant impact on the conduct of the military mission of the U.S. Air Force.

(Continued on following page)

This "designated protest area" is bounded by Highway 1, Lompoc-Casmalia Road, and a painted green line across California Boulevard, which connects with Highway 1 and Lompoc-Casmalia Road to form the intersection at Vandenberg's main gate entrance.[9]

The painted green line on California Boulevard functions as a border separating the enclosed military base at Vandenberg from Highway 1.[10] It marks the point at which the easement ends and Vandenberg's exclusive jurisdiction begins.[11]

Within that exclusive jurisdiction, in an area immediately inside the green line, is a public bus stop serviced by the City of Santa Maria.[12] Just behind

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Vandenberg adopted this policy statement pursuant to a stipulated settlement in a 1989 litigation, *Fahrner*, CV 88-05627-AWT(Bx). C.A. E.R. 7, 50-53. Issuance of the policy statement was an express term of the settlement. C.A. E.R. 51 at ¶ 4. In exchange, the plaintiffs agreed to dismiss their suit. C.A. E.R. 51 at ¶ 6. The settlement was approved by Judge A. Wallace Tashima and filed upon his order. C.A. E.R. 52. Thus, the agreement was and remains judicially enforceable.

Apel stated at trial that he had been a regular visitor to the designated protest area at Vandenberg for fourteen years. C.A. E.R. 144.

[9] C.A. E.R. 7, 54, 57 at ¶ 1, 58, 272. Although Vandenberg's official statements on the designated protest area mention "temporary fencing" as one of the boundaries, it does not appear from the record that any such fencing was present on the three occasions Apel was cited.

[10] C.A. E.R. 7-8, 170-71, 261-62, 272.

[11] C.A. E.R. 7-8, 170-71, 261-62, 272.

[12] C.A. E.R. 8, 272.

that is a visitors' center that receives members of the public wishing to visit the base.[13] Still further, approximately 200 yards inside the green line, is a security checkpoint made up of a guard shack and barricade.[14] Past that checkpoint are the operational parts of the base.[15]

Outside the green line, on the side of the easement, is Highway 1.[16] All of the speech activity which gave rise to this case occurred here on Highway 1, a public road outside of the enclosed military base.[17] More specifically, it occurred in the designated protest area that comprised part of Highway 1.[18]

Apel was convicted of three counts of violating § 1382 of Title 18 for participating in peaceful demonstrations in this designated protest area after having been previously barred from the base for trespassing.[19] At all relevant times on the occasions charged, Apel was in the designated protest area along Highway 1 and thus within the area of the easement where California and Santa Barbara County exercise concurrent jurisdiction.[20]

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[13] C.A. E.R. 8, 171.

[14] C.A. E.R. 8, 272.

[15] C.A. E.R. 8, 272.

[16] C.A. E.R. 7-8.

[17] C.A. E.R. 8-9.

[18] C.A. E.R. 8-9.

[19] C.A. E.R. 1-2.

[20] C.A. E.R. 8-9.

On appeal, the Ninth Circuit reversed Apel's convictions, holding that Apel's presence within a public road easement precluded enforcement of § 1382.[21] In so holding, the court of appeals followed its recent decision in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), which precedent it determined to be "binding" and "dispositive of [the] appeal." *Apel*, 676 F.3d at 1203.[22] Subsequently the government petitioned the court for rehearing en banc. The petition was denied.[23] No circuit judge called for a vote to rehear the matter, although District Court Judge Tunheim, sitting by designation, did so.[24]

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS CORRECT.

The government's petition for certiorari is primarily concerned with error. It asserts the decision below was incorrect.[25] That, of course, is not a ground for review on a writ of certiorari. *See* Sup. Ct. R. 10

[21] Gov't's Pet. 1a-2a.

[22] Gov't's Pet. 1a-2a. Having decided the case on statutory grounds, the court had no occasion to reach Apel's constitutional argument that the First Amendment protected his right to protest on Highway 1.

[23] Gov't's Pet. 3a-4a.

[24] Gov't's Pet. 3a-4a.

[25] Gov't's Pet. 7-11.

("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This case does not present issues warranting resolution by this Court.

A. Section 1382 Does Not Apply In Areas Where The Public, By Virtue Of An Easement, Has A Right To Be Present.

Nothing in the text or history of 18 U.S.C. § 1382 suggests it was intended to reach civilians peacefully conducting themselves on a public road. On the contrary, the evidence is that Congress contemplated reasonable limits on the application of § 1382 when it enacted the statute. The exclusive-possession requirement, which originated with *United States v. Watson*, 80 F.Supp. 649 (E.D.Va. 1948), provides that conviction under § 1382 is limited to instances in which the government has exclusive control of property.

Specifically, here, there is a painted green line across California Boulevard, adjacent to Highway 1 and the public road easement, which clearly separates the area within the exclusive control of the base. For all its discussion of the military's jurisdiction, the Petition for Certiorari makes no mention of the green boundary line separating the area of the easement from the exclusive jurisdiction of Vandenberg

Air Force Base.[26] Yet this line, which is visible to all, is crucial: to one side of the line is the easement and upon it, an open, uninterrupted stretch of the Pacific Coast Highway traveled by motorists, pedestrians, and commuters riding the local buses of the City of Santa Maria. To the other side of the line is the exclusive jurisdiction of Vandenberg Air Force Base, comprising its main gate entrance and an access road, California Boulevard, which continues 200 yards to a security checkpoint controlling entry into the secured part of the base. On the three occasions he was charged, Apel at all times had been on the easement side of the green line. He never crossed the line into Vandenberg's exclusive jurisdiction. He never set foot on property in Vandenberg's exclusive possession. Rather he stayed on Highway 1, within the area of the easement, where members of the public have a right to be. This is undisputed.

The government argues that for purposes of § 1382, any federal jurisdiction is sufficient.[27] The government is incorrect. Although there is federal jurisdiction, there is also an easement, and the easement is paramount under § 1382.

According to the government, "The easement simply grants the State of California and Santa Barbara County a right-of-way to allow traffic across the land, *provided that federal law (including Section*

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[26] Gov't's Pet. 7-10.

[27] Gov't's Pet. 7-8.

1382) otherwise permits individuals to be there."[28] That proviso has no source in law or fact.

In essence, the government's view of the easement is: "Individuals may use and occupy Highway 1 pursuant to the easement unless they have been barred, in which case the easement ceases to apply as to those individuals and any subsequent presence by such individuals on Highway 1 shall be punishable by fine or imprisonment pursuant to § 1382." The government misapprehends what it means to grant an easement, as well as what it means to hold one. An easement is not a courtesy. The holder of an easement has an interest in the burdened property and an affirmative right to use it for the purposes authorized. *See Lesnoi, Inc. v. United States*, 170 F.3d 1181, 1191 (9th Cir. 1999) ("It is well settled that an easement is an interest in real property."); Restatement (Third) of Property (Servitudes) § 1.2 (2000). While vested, that right cannot be revoked, qualified, or made newly subject to conditions predicate by the grantor at the grantor's leisure and discretion. *See* Restatement (Third) of Property (Servitudes) § 1.2 cmt. g (2000).

The government insists the mere presence of federal jurisdiction should be enough to enforce § 1382 on the easement, and that its "grant of a roadway easement for Highway 1 across Vandenberg

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[28] Gov't's Pet. 8 (emphasis added).

does not remove that area from federal jurisdiction."[29] However, as discussed, the easement is more than its geographic area. Within that area, the easement carries rights and entitlements. Federal jurisdiction may lie, but it lies concurrently with the rights of the easement-holding public. Thus, properly framed, the question is not whether the presence of federal jurisdiction should suffice to permit enforcement of § 1382 on the Highway 1 easement, but whether it should suffice *in light of* the concurrent presence of the Highway 1 easement and the affirmative right the easement affords members of the public to be on that road.

As the Ninth Circuit correctly held in this case and in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), the answer is no: Section 1382 requires the government to have exclusive right of possession over the area of the alleged trespass. An easement destroys the requisite exclusive possession because it gives the public the right to be there. Simply put, Apel, like anyone else, had a right to be present at all times on this stretch of public highway outside the military base.

The easement's clause subjecting Highway 1's "use and occupation . . . to such rules and regulations as the [base commander] may prescribe . . . to properly protect the interests of the United States"[30] does

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[29] Gov't's Pet. 8.

[30] C.A. E.R. 65.

not justify a departure from the Ninth Circuit's holdings. There is a marked difference between legislating rules for conduct on the easement and barring people from even going upon the easement. The latter effectively voids the easement with respect to the barred individuals. This exercise of authority goes well beyond the scope of the "rules and regulations" clause.

In *United States v. Watson*, 80 F.Supp. 649 (E.D.Va. 1948), the United States acquired a strip of land subject to an implied public road easement. As the easement was implied, there was no written provision for the government's right to promulgate rules and regulations. The court explained that no such provision was necessary: the government had *exclusive* criminal jurisdiction of the road. *Id.* at 651. Hence the district court held the government had the authority "to police the road, and to punish the defendant for improper conduct on the road." *Id.* Nevertheless, the court held it was not within the government's authority to "proscri[be] . . . a correct use of the road." *Id.*

Similarly, here, the government may police Highway 1,[31] and it may punish conduct in violation of its rules and regulations pursuant to its authority under § 797 of Title 50 (punishing anyone who "willfully violates any defense property security regulation" with fine or imprisonment up to a year).

[31] C.A. E.R. 213.

Consistent with *Watson*, however, the government may not outright exclude people from Highway 1 under the guise of enforcing such rules and regulations – at least, not so long as the easement continues in effect. The government may extinguish the easement "for failure to comply with any or all of the terms or condition of [its] grant, or for nonuse for a two-year period or abandonment of rights granted hereto."[32] But this is an all-or-nothing right. It cannot be selectively invoked for the limited purpose of excluding particular individuals, such as John Dennis Apel.

The government's claim that the holding in this case "create[s] a federal-law-free zone in which civilians may violate federal statutes with impunity" is hyperbole and a mischaracterization.[33] The only federal statute rendered unenforceable in the area of the easement by the decision below is § 1382. Any other federal statutes regulating conduct on federal property, such as 50 U.S.C. § 797 (punishing the violation of any "defense property security regulation"), continue to apply in that area.

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[32] C.A. E.R. 66 at ¶ 8.

[33] Gov't's Pet. 9.

B. The Text Of Section 1382 Does Not Justify Its Application To A Road Where the Public Has A Right To Be Present.

The textualist argument for § 1382 applying anywhere the federal government has some jurisdiction has no basis. The government rests this argument on the statute's prohibition on reentry into a military base "within the jurisdiction of the United States."[34] 18 U.S.C. § 1382. It claims the language "within the jurisdiction of the United States" contradicts any requirement that federal jurisdiction be exclusive, and further that the absence of language on ownership and possession forecloses any requirement that they be absolute and exclusive, respectively.[35]

The government devotes much attention to the phrase "within the jurisdiction of the United States." The government's construction of this phrase, however, is a red herring. The phrase cannot and does not have the vast, unbounded meaning the government urges upon it: that any measure of federal jurisdiction may sustain a conviction under § 1382, whatever the concurrent rights and interests lying in the area of the alleged trespass. Such a meaning is unsupported by precedent and unwarranted.

Not one court that has interpreted § 1382 has ascribed to the "within" language that meaning; the government in its Petition identifies no such decision.

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[34] Gov't's Pet. 7-9.

[35] Gov't's Pet. 8.

Evidently, the only court that has even addressed that language in the context of § 1382 is the district court of Maryland in *United States v. Holmes*, 414 F.Supp. 831 (D.Md. 1976). There, the court observed, "While this language is not entirely clear in its meaning, it probably refers to the situs of the geographical areas within which the statute applies rather than to any concept of the particular type of jurisdiction or control which the United States Government exercises over said geographical areas." *Id.*, 414 F.Supp. at 836. The court noted that the term "United States" is used in § 1382 merely in a "territorial sense": "it includes all places and waters, continental or insular, subject to the jurisdiction of the United States. . . ." *Id.* (citing 18 U.S.C. § 5). Thus, in *Holmes*, the court had no trouble finding that the area the defendant was alleged to have trespassed – the shores of a river in Harford County, Maryland – was "within the jurisdiction of the United States" for the purposes of § 1382, as it was "geographically within the continental area subject to the jurisdiction of the United States." *Id.*

Were this the extent of the inquiry, the posture of this case would be quite different: easement or no easement, it cannot be disputed that Apel was geographically within an area subject to the jurisdiction of the United States the times he was arrested. But the *Holmes* court did not stop there. Instead it proceeded to impose the exclusive-possession requirement from *Watson*:

> [I]n order for the United States to be able legally to prosecute the presence of the

> defendant upon the subaqueous area of the beach at Chillbury Point, it must not only have the right to exercise [territorial] jurisdiction over such areas, but it must also, as an element of the law of trespass, have a right of sole ownership or possession in those areas as against the defendant.

Id., 414 F.Supp. at 838. Thus, the court made clear that (1) this threshold finding of "territorial" jurisdiction is necessary but not sufficient for the exercise of § 1382; (2) such jurisdiction is separate and distinct from that entailed in absolute ownership and exclusive right of possession; and (3) *absolute ownership or exclusive right of possession is an additional requirement that must be met by the government before the government may enforce § 1382.*

For these reasons, the "within" language is not dispositive here. Although the government, of course, is correct that the text of a statute is controlling, the text does not control if it does not apply. This especially holds true where, as here, the text is of a criminal statute and the government's interpretation of that text would maximize the scope of criminal liability. *See Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

Furthermore, the government's interpretation of "within the jurisdiction of the United States" is not even plausible in the context of the statute. Defining "within the jurisdiction of the United States" as simply within the legislative and law enforcement

jurisdiction of the United States would make that phrase superfluous. *See United States v. Albertini*, 472 U.S. 675, 682 (1985) (rejecting limit on § 1382 to closed bases because such limit would make superfluous the proscription in paragraph (2) against going upon a base for a prohibited purpose). The notion that the United States might lack *legal* jurisdiction of its own "military, naval, or Coast Guard" bases is illogical. Anyone who finds himself within the boundaries of a United States military base is necessarily under some species of federal law jurisdiction. In fact, the government readily admits this in a footnote in the Petition, citing various Title 10 provisions that "define federal military installations as facilities 'under the jurisdiction' of the Department of Defense."[36] If the government's interpretation were correct, then § 1382 would lose none of its meaning or scope if it omitted the "within" language and read simply: "Whoever goes upon any military, naval, or Coast Guard base, or reenters one after having been barred, shall be fined or imprisoned not more than six months." *See Heckler v. Chaney*, 470 U.S. 821, 829 (1985) (noting common-sense principle that a statute is to be read to give effect to each of its clauses).

The government complains that the exclusive-possession requirement appears nowhere in the text of § 1382. The government seeks to limit § 1382 and

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[36] Gov't's Pet. 8 n.2 (citing, *e.g.*, 10 U.S.C. §§ 2687(e)(1), 2391(d)(1), 2667(i)(3)).

cites *Albertini* as providing support for a strict literal construction of § 1382.

Far from supporting the government's argument, *Albertini* undermines it, even as this Court there aspired to "follow the plain and unambiguous meaning of the statutory language." *Albertini*, 472 U.S. at 680. The letter of § 1382 draws no distinction between valid and invalid bar orders. *Id.* at 700 (Stevens, J., dissenting). Yet this Court agreed that "prosecution under § 1382 would be impermissible if based on an invalid bar order." *Id.* at 682; *compare with United States v. Jelinski*, 411 F.2d 476, 477 n.6 (5th Cir. 1969) ("The underlying bases of the [bar] order are not in issue in the criminal proceeding. The criminal responsibility under § 1382 is premised on a violation of the mandate of the order, not its substantive basis.").

Similarly, the letter of § 1382 does not insist that the bar order come from the base commander, only an "officer or person in command or charge thereof." Yet this Court left open the question "in what circumstances, if any, § 1382 can be applied where anyone other than the base commander has validly ordered a person not to re-enter a military base." *Albertini*, 472 U.S. at 684. Finally, the letter of § 1382 contains no requirement of knowledge or volition. Yet this Court expressly reserved the right to read one into the statute if presented with different facts: "[W]e [do not] decide or suggest that the statute can apply where a person unknowingly or unwillingly reenters a military installation." *Id.*

Perhaps most damaging to the government's reliance on *Albertini* is that decision's treatment of *Flower v. U.S.*, 407 U.S. 197, 198 (1972). Although the *Albertini* Court distinguished *Flower*'s facts in rejecting the defendant's First Amendment argument, it also preserved *Flower*'s holding: "The Court [in *Flower*] determined . . . that the military had abandoned *not only the right to exclude civilian traffic from the avenue,* but also any right to exclude leafleteers." *Albertini*, 472 U.S. at 685 (emphasis in original). This was taken by the Ninth Circuit in *United States v. Vasarajs*, 908 F.2d 443, 447 (9th Cir. 1990), correctly, to mean "that the government must exercise control over its property in order to preserve the right to exclude others from it pursuant to § 1382."

To be sure, the letter of § 1382 makes no mention of control or its exercise by the government. But this Court's decision in *Flower* and its subsequent ruling in *Albertini* demands that such a requirement be read into the statute. Consequently, the argument that the exclusive-possession requirement is improper or anomalous because it does not appear in the statute is wrong. This Court, as well as virtually all of the lower courts that have applied § 1382 have, whether expressly or impliedly, read extra-statutory requirements into § 1382, including the exclusive-possession requirement. Presumably, the courts have done this to avoid what Justice Stevens in his dissent in *Albertini* calls "the excesses of statutory literalism" and all the "oppressive and absurd consequences" in which they manifest themselves. *Albertini*, 472 U.S.

at 699 (Stevens, J., dissenting). The criminalization and punishment of a civilian peacefully present on a public road is as good an example of this as any. As Justice Stevens quotes, and as this Court has held, "It seems wiser to presume that 'the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.'" *Id.* (citing *United States v. Kirby*, 74 U.S. 482, 486 (1868)).

The decision of the court of appeals in this case was controlled by its earlier decision in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), which had the same issues and almost identical facts. There, as here, the court held that (1) absolute ownership or exclusive right of possession is an element of the offense of § 1382; (2) a public road easement deprives the government of absolute ownership or exclusive right of possession; and (3) as a result, the government may not enforce § 1382 against an individual present on a public road easement, even if the individual was previously barred from the base. Although the government points out that the court in this case "question[ed] the correctness" of *Parker*, given the chance to revisit it upon the government's petition for rehearing en banc, the court declined.

Parker rested on a uniform line of Ninth Circuit authorities, post-*Watson*, requiring a showing of absolute ownership or exclusive right of possession

for § 1382 to apply.[37] *See, e.g.*, *United States v. Vasarajs*, 908 F.2d 443 (9th Cir. 1990); *United States v. Douglass*, 579 F.2d 545 (9th Cir. 1978); *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978); *United States v. Packard*, 236 F.Supp. 585 (N.D.Cal. 1964), *aff'd sub nom. Packard v. U.S.*, 339 F.2d 887 (9th Cir. 1964). As *Parker* indicates, *Douglass* and *Vasarajs* specifically identify easements as an affirmative defense negating the government's absolute ownership or exclusive right of possession for purposes of § 1382. *Parker*, 651 F.3d at 1183 (citing *Vasarajs*, 908 F.2d at 446-47 (noting that government exercised actual control over area and defendant did not argue she or the public benefitted from an easement burdening that portion of roadway) and *Douglass*, 575 F.2d at 547 (rejecting defendant's argument that government lacked requisite ownership and possession of area where, inter alia, no easement resided in the public there)).

Vasarajs, in particular, is noteworthy because it follows this Court's decision in *Albertini*. Having occasion to consider *Albertini*, the court of appeals in *Vasarajs* correctly concluded that *Albertini* aligned with earlier cases in and outside of the circuit which

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[37] The court in *Parker* also noted that its position was consistent with the United States Attorney's Manual, which states that § 1382 applies to any military reservation "over which the United States has exclusive possession." *Parker*, 651 F.3d at 1183 n.2 (citing *U.S. Attorney's Manual, Title 9, Criminal Resource Manual* § 1634 (2010)).

had held that "the government may only bar civilians [pursuant to § 1382] . . . if it has exercised actual control over the area." *Vasarajs*, 908 F.2d at 447 (citing *Douglass*, 575 F.2d at 547 (concluding not only that "no easement residing in the public" existed, but that the record failed to "reflect any relinquishment of control over the area by the base personnel"); and *United States v. Renkoski*, 644 F.Supp. 1065 (W.D.Mo. 1986) ("Mere title to real estate does not allow issuance by the Government of a 'ban and bar' notice. The area in question must be controlled.")). The *Parker* court endorsed this treatment of *Albertini*, and properly determined that *Albertini*'s recognition of control as a condition predicate identified it with the requirement of absolute ownership or exclusive right of possession. *Parker*, 651 F.3d at 1184.

The government criticizes *Parker* for not addressing "the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command."[38] *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 893 (1961). But this begs the question of whether a commanding officer can exclude civilians from a public road over which an easement grants the public the right to be present. *McElroy* does not address this, which is the issue in this case. Indeed, the government cites no case that has allowed a base

[38] Gov't's Pet. 10.

commander to exclude individuals from an "area of command" that included a public road easement.

II. THERE IS NO CIRCUIT SPLIT IN NEED OF RESOLUTION BY THIS COURT.

The government's claim of a circuit split is inaccurate. Besides the Ninth Circuit, the First, Second, and Eighth Circuits all have adopted some iteration of the absolute ownership or exclusive right of possession requirement as to § 1382. *See, e.g.*, *United States v. Ventura-Melendez*, 275 F.3d 9 (1st Cir. 2001) (Navy "occupied and controlled" area of alleged trespass); *United States v. Allen*, 924 F.2d 29, 31 (2d Cir. 1991) (Navy had "exclusive rights to occupy . . . area"); *Holdridge v. United States*, 282 F.2d 302, 308 (8th Cir. 1960) (government's "exclusive possession" of the area was established); *see also United States v. Renkoski*, 644 F.Supp. 1065, 1066 (W.D.Mo. 1986) (area must be "controlled" to permit issuance of a bar order); *United States v. Holmes*, 414 F.Supp. 831, 838 (D.Md. 1976) ("[T]he United States . . . must . . . , as an element of the law of trespass, have a right of sole ownership or possession in those areas as against the defendant."); *United States v. Watson*, 80 F.Supp. 649, 651 (E.D.Va. 1948) ("[T]he United States must show an absolute ownership, or an exclusive right to the possession, of the road, in order to enforce [§ 1382].").

In other words, contrary to the government's assertion, this case would have come out exactly the same way in these other circuits. All recognize that

§ 1382 does not apply where the public has a right to be present.

Although closer to the government's position, the Sixth Circuit's rulings are not in conflict with the Ninth Circuit's decision in this case. In fact, based on *United States v. McCoy*, 866 F.2d 926 (6th Cir. 1989), the Sixth Circuit would likely have overturned Apel's convictions in this case, just as the Ninth Circuit did. The government's contention that "on the approach taken by [the First, Second, and Sixth] courts of appeals, [Apel]'s convictions in this case would be upheld" is simply untrue.

The issue in *McCoy* was whether the government could enforce Section 1382 over land it did not own. The Sixth Circuit held that the absence of government ownership is not a prerequisite to a Section 1382 violation so long as the government possesses and controls the property. *Id*. at 830-31 & n.4. While *McCoy* did not address the degree of government control or possession necessary to sustain a Section 1382 violation, the Sixth Circuit did not hold that anything less than exclusive possession or actual control is required. In fact, the land at issue in *McCoy* was marked off and controlled by the military; and thus was deemed by the Sixth Circuit to be part of the military base. Because the issue in *McCoy* was about ownership, not possession and control, there is no conflict with the court of appeals' decision here.

McCoy ostensibly adopts a mere "possessory interest" standard for when the government can

punish individuals under § 1382. *Id.* at 830. But in applying the standard, *McCoy* qualified its meaning. The Sixth Circuit decision went out of its way to adopt the portion of Justice Stevens's dissent in *Albertini* in which he expressed that "[t]he use of these military lands for the limited public purposes for which they have been set aside does not involve the bold defiance of authority that is foreseen by the structure of the statute and reflected in its legislative history." *Id.* at 831 (citing *Albertini*, 472 U.S. at 698-99 (Stevens, J., dissenting)). In other words, a defendant could not be convicted under § 1382 for proper use of an easement.

The Sixth Circuit then decided *McCoy* on the fact that the defendant had crossed a painted white line representing the boundary of the base and the end of the easement that existed on the adjacent highway. *McCoy*, 866 F.2d at 831 ("[W]hen [defendant] chose to cross the line separating the through traffic lane from the entrance to the military installation, she chose to break the law."). Had the defendant not crossed that line, the outcome of the case evidently would have been different. Here, unlike in *McCoy*, Apel did not cross the line; he stayed at all times on the highway within the area of the easement. Consequently, the Sixth Circuit would not have decided this case any differently.

Following *McCoy*, the Sixth Circuit in *United States v. LaValley*, 957 F.2d 1309, 1313-14 (6th Cir. 1992) reiterated its approval of Justice Stevens's reasoning. Contrary to the government's contentions,

LaValley does not endorse a possessory interest standard under which an easement would always be subject to § 1382. Rather, *LaValley* stands for the proposition, expressed by this Court in *Albertini*, "that the government must exercise control over its property in order to preserve the right to exclude others from it pursuant to § 1382." *Vasarajs*, 908 F.2d at 447 (citing *Albertini*, 472 U.S. at 685).

In *LaValley*, the defendants pushed down a snow fence to enter the restricted portions of a military base. *LaValley*, 957 F.2d at 1311. The snow fence, which had been newly erected by the base commander, blocked access to a previously accessible grassy strip that was covered by an easement. *Id.* The defendants' failure to respect the geographic restriction imposed by the base commander's snow fence was sufficient for the Sixth Circuit to affirm the convictions under § 1382. *Id.* at 1313-14. It did not matter in this instance that an easement lay on the grassy strip. The court of appeals held, "The mere fact that an easement had been granted to the state for the construction, maintenance and use of highway F-41 did not give the protestors the right, *in bold defiance of military authority*, to enter the base, after being previously barred." *Id.* at 1313 (emphasis added). The "bold defiance of authority" was not the defendants' sheer presence on an easement overlying base property, but their overrunning the snow fence after it had been put up by the base commander in a rightful exercise of control. *Id.* ("Unlike Justice Stevens' hypothetical person innocently traversing a highway

. . . , appellants . . . boldly defied military orders. They crossed over a snow fence on which warning signs were posted. They remained on [the restricted portions of] the base even after they were ordered to leave by the base authorities."); *see also Renkoski*, 644 F.Supp. at 1066 ("Even a temporary special form of control, such as a cordon, would doubtless suffice.") (citing *Albertini*, 472 U.S. at 688).

This case involves no such "bold defiance of authority." Apel went upon the easement peacefully and while there conducted himself peacefully. He used no force, removed no barriers, and infiltrated no restricted areas of the base. All Apel did was picket on a public street.[39] Thus, *LaValley* does not compel a contrary ruling from the Sixth Circuit in this case, any more than *McCoy*.

Nor, contrary to the government's assertion, do decisions of the First and Second Circuits create a conflict. While both circuits have cited *McCoy* for the proposition that fee ownership is not a prerequisite for enforcement of § 1382, neither circuit has adopted a standard that would allow the military to enforce § 1382 on property over which it lacks exclusive possession or actual control.

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[39] Not only was Apel on a public street, Apel was in an area of the public street which Vandenberg had specifically set aside for exactly the activity he was engaged in: peaceful protest demonstrations. This distinguishes Apel's conduct even further from the "bold defiance" of the fence-trampling defendants in *LaValley*.

The First Circuit in *Ventura-Melendez* and the Second Circuit in *Allen* applied an "occupation-and-control" test that is much the same as the absolute ownership or exclusive right of possession requirement used by the Ninth Circuit in this case and *Parker*. In both cases, enforcement jurisdiction was not defeated by the absence of absolute ownership because in each case the military exerted exclusive control over the subject area which, accordingly, was deemed part of the military reservation at issue. *See Ventura-Melendez*, 275 F.3d at 16-17 (citing *McCoy* for the proposition that government ownership of the property at issue is not a prerequisite to violating Section 1382 and extending enforcement jurisdiction to the area which federal regulations had designated a "danger zone" and over which federal regulations had conferred to the Navy the right to "occupy and control") [40]; *Allen*, 924 F.2d at 31 (citing *McCoy* for the proposition that government ownership is not a prerequisite to violating Section 1382 and extending enforcement to area which "Navy had exclusive right[ ] to occupy"). Nothing in *Ventura-Melendez* or *Allen* suggests that those courts would have found enforcement jurisdiction in a case where, as here, there was no exclusive right to occupy and/or control.

Here, the presence of the easement – and its occupation and use by the public – keeps Vandenberg

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[40] Significantly, in so holding, the First Circuit expressly recognized that the Second Circuit's holding in *Allen* echoed the Ninth Circuit's holding in *Mowat*. *Id*. at 31.

from having the necessary occupation and control to enforce § 1382 along the covered stretch of Highway 1 under the approaches of the First and Second Circuits.

In fact, none of the circuits that have considered the issue would have decided this case differently. There is no split among the circuits warranting review in this Court.

III. THE NATIONAL SECURITY CONCERNS RAISED IN THE PETITION ARE UNFOUNDED.

The government argues that depriving the military of the ability to convict under § 1382 for speech activities on public road easements threatens national security. The argument has no basis.

In advancing this argument, the government pointedly fails to describe the area of the easement. It is a public road that is but one small stretch of the Pacific Coast Highway, which runs throughout California along its coast. Along this road are a public middle school and a public Santa Maria City bus stop. Among its destinations are a public Amtrak station and a public beach. Traffic moves freely in both directions, and in large enough waves to require traffic lights at the intersections. The image the government conveys of a secure back road winding through a heavily fortified military complex has no basis in reality.

The government cites several cases involving defendants who infiltrated secured military bases and committed acts of sabotage once inside. The settings of these crimes include the "security zone" waters surrounding a naval base where a nuclear submarine was moored and which the defendants reached by swimming and paddling up a river (*Allen*); an island beach of Puerto Rico that was part of a naval camp dedicated to military maneuvers (*Ventura-Melendez*); and an Air Force building housing the ground control center for a military navigation system that the defendant, after breaking into the building, destroyed using a crowbar, boltcutters, hammer, and cordless drill (*United States v. Komisaruk*, 885 F.2d 490 (9th Cir. 1989)).

These cases are wholly inapposite to the issue in this case which involves speech on a public road where the public has an easement to be present. The government's ability to punish conduct within closed facilities is not endangered by preventing it from punishing speech in areas in which the public has a right to be present.

The government argues that easements pose a special threat because they are "permanent," "not easily monitored," and likely to "run near sensitive areas of military installations."[41] But it stands to reason that because they are permanent and less easily monitored, easements are purposely *not* located

[41] Gov't's Pet. 15.

near sensitive areas of a military base (and vice versa), and in this way speech there is highly unlikely to be a threat.

That is the case at Vandenberg. It cannot be a coincidence that the security checkpoint into the controlled areas of the base is 200 yards, or the length of two football fields, beyond the green line where the Highway 1 easement meets the main gate entrance. Appropriately, the places most accessible from the Highway 1 easement are the visitors' center and the city bus stop – both of which sit just inside the green line; neither of which could be deemed "sensitive."

In light of these facts, the Hobson's choice posited by the government has no foundation. The public would suffer without the easements, but it should not have to because the government has no good cause to withhold them. Whatever security concerns may exist in the abstract, or in other cases, the government has failed to demonstrate that they exist here, in this particular case.

IV. APEL'S SPEECH ACTIVITIES ON HIGHWAY 1 WERE PROTECTED BY THE FIRST AMENDMENT.

As an alternative ground for the decision below, Apel had a First Amendment right to peacefully protest on Highway 1. The application of § 1382 in these circumstances was thus unconstitutional.

A. Highway 1 And The Designated Protest Area Are Public Fora.

At the time of his arrests, Apel was peacefully demonstrating in the designated protest area beside Highway 1. Apel was, therefore, engaged in First Amendment activity. *United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing . . . [is an] expressive activit[y] involving 'speech' protected by the First Amendment."). He was also in a place where the First Amendment has particular force: a public street.

"Streets are natural and proper places for the dissemination of information and opinion. One who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Flower v. U.S.*, 407 U.S. 197, 198-99 (1972). It cannot be disputed that the stretch of Highway 1 adjacent to Vandenberg's main gate entrance is a public street. Everywhere else along its route, which includes most of the Pacific coastline, Highway 1 is a public street. This particular segment of Highway 1 is no different merely because it happens to overlap with Vandenberg. Motorists and pedestrians travel it just as freely. There are no gates or sentries at the points of entry, or checkpoints anywhere in between. People come and go as they please.

" 'Public places' historically associated with the free exercise of expressive activities, such as streets . . . are considered, without more, to be 'public

forums.'" *Grace*, 461 U.S. at 177. Indeed, public streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Highway 1, then, is a public forum.

It does not matter that Highway 1, here, is a public street only by virtue of an easement. It is no less a public forum for purposes of the First Amendment. As the Tenth Circuit has stated,

> Easements are . . . constitutionally cognizable property interests. [H]olding that an easement cannot be a forum would lead to the conclusion that many public streets and sidewalks are not public fora. Public highways or streets are often easements held for the public, with title to these property interests remaining in abutting property owners.

First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1122-23 (10th Cir. 2002). Thus, the Air Force may own the land crossed by Highway 1, but its mere title to that land cannot divest the street of the public character afforded it by the easement. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 947 (9th Cir. 2001).

Similarly, the base commander's declaration that Vandenberg is a "closed" base does not keep Highway 1 from being a public street if it otherwise has the characteristics of a public street. In other words, simply calling the base "closed" "does not alter its characteristics so as to make it something other than what it actually is." *Cf. Lebron v. Nat'l R.R. Passenger*

Corp., 513 U.S. 374, 393 (1995) (holding that Amtrak is subject to the First Amendment despite provision in its charter declaring it to be private corporation) (internal quotation and citation omitted). At least with respect to Highway 1, Vandenberg is not closed. To the extent the base commander's declaration could be construed as a manifestation of intent for Highway 1 *not* to be a public forum, that intent is irrelevant. *See 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.").

A public street remains a public forum even where, as here, it touches property that is specifically not a public forum. "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Grace*, 461 U.S. at 180. In *Grace*, this Court held that the public sidewalks forming the perimeter of the Supreme Court grounds represented a public forum even though the Supreme Court building and grounds the sidewalks abutted "had not been traditionally held open for the use of the public for expressive activities." *Id.* at 178. In so holding, the Court distinguished *Greer v. Spock*, 424 U.S. 828, 830 (1976):

> In *Greer,* the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, New Jersey, and were

> thus separated from the streets and sidewalks of the city itself. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.

Grace, 461 U.S. at 179-80; *compare with Albertini*, 472 U.S. at 678 (normally secured areas inside gates of closed military base not public fora despite being temporarily open to the public during annual open house). As this Court explained, "The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently." *Grace*, 461 U.S. at 179.

The same reasoning should apply to Highway 1 here. The road is open. Traffic is unimpeded. There are no gates, sentries, or checkpoints to suggest the road is anything other than an ordinary public road. These facts liken this case to *Flower*, and Highway 1 to New Braunfels Avenue. In *Flower*, 407 U.S. at 197, the Court summarily reversed the § 1382 conviction of a civilian who had been "quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio." Like Highway 1, New Braunfels Avenue "was a completely open street." *Id.* at 198. Like Highway 1, it "was a public thoroughfare no different than other streets in

the city." *Albertini*, 472 U.S. at 685 (reading *Flower*). No sentry or guard was posted at either entrance or anywhere along the street. *Flower*, 407 U.S. at 198. The street was open to unrestricted civilian traffic 24 hours a day. *Id.* Public transit vehicles, including buses, used the street as freely as did private vehicles. *Id.* As this Court held,

> Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street.

Id. The only difference between Highway 1 and New Braunfels Avenue is the manner by which they came to be public streets. New Braunfels Avenue was a public street because the commander of Fort Sam Houston had left it alone. Highway 1, now, is a public street because the commander of Vandenberg ceded it for that very purpose. He granted an easement, and thereupon relinquished exclusive legislative jurisdiction to the State and County. If New Braunfels Avenue was a public street, Highway 1 is even more so.

In the alternative, the designated protest area where Apel was demonstrating is a designated public forum. Designated public fora are created by purposeful governmental action. *Arkansas Educ. Television Comm'n*, 523 U.S. at 677. Government intent is the essential question to determining if a designated

public forum has been created. *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). That intent must be discerned from the government's policy and practice. *Cornelius*, 473 U.S. at 802.

Here, the government's intent to create a designated public forum could not be clearer. Vandenberg's 1989 Policy Statement provides in relevant part: "People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the Intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force Base, California."[42]

The record shows Vandenberg has consistently observed this policy statement since its adoption twenty-four years ago.[43] The government does not argue otherwise. The policy and practice of the government, then, evinces a plain intent to create a designated public forum in the designated protest area.

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[42] Statement of Facts, *supra*, n.8.

[43] *See* Statement of Facts, *supra*, n.8.

B. The Application Of § 1382 To A Public Road Outside An Enclosed Military Base Serves No Significant Government Interest.

In a public forum, "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Grace*, 461 U.S. at 177 (internal quotation and citation omitted).

Highway 1, including the designated protest area, is a public forum for the reasons stated. Consequently, if § 1382 is to operate to proscribe Apel's speech activities on Highway 1, it must meet the requirements of a reasonable time, place, and manner restriction. It does not. As applied to Highway 1, § 1382 serves no significant government interest.

Highway 1 is a public road which travels across Vandenberg-owned property but outside the jurisdictional boundaries of the base. This road is outside the green line, outside the main gate entrance, and outside the enclosed base that is Vandenberg proper. Further, it lies on an easement given to the concurrent jurisdiction of the State and County. Excluding Apel from a public road such as this serves no identifiable government interest. The government cites

security, as it frequently does.[44] But it speaks to this interest in generalities (easements are "permanent," "not easily monitored," and "may run near sensitive areas of military installations")[45] and rhetoric (the decision below "threatens substantial harm to the safe and orderly operation of military bases in the Ninth Circuit"),[46] not facts. As aptly expressed by Justice Marshall, "[T]he First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. Those interests cannot be invoked as a talismanic incantation to support any exercise of power." *Greer*, 424 U.S. at 852-53 (Marshall, J., dissenting).

Here, the government has not shown, and cannot show, that Apel's peaceful speech activities on Highway 1 threatened base security or that Apel's exclusion helped maintain it. *See Grace*, 461 U.S. at 182 ("There is no suggestion . . . that appellees' activities in any way obstructed the sidewalks or access to the [Supreme Court] Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds."). Absent that showing, Apel's mere proximity to the base as a result of his presence on an adjoining public street cannot give rise to a significant government interest in security. *See id.*; *cf.*

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[44] Gov't's Pet. 14-18.

[45] Gov't's Pet. 15.

[46] Gov't's Pet. 15.

Frisby, 487 U.S. at 481 ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.").

There is no colorable argument that excluding barred civilians from a public street that is *outside* an enclosed military base serves a significant government interest. This case is not *Greer*, where all the roads at issue were *inside* the enclosed military reservation. *Greer*, 424 U.S. at 830. Nor is this case *Albertini*, where the barred defendant used the occasion of an annual open house event to make his way inside the gates of a normally closed military base. *Albertini*, 472 U.S. at 678; *see also Parker*, 651 F.3d at 1184 ("*Albertini* did not address the scenario where a military base or area thereof is *permanently* open to the public by virtue of a public easement.") (emphasis in original).

Even barred, Apel retains the right to be present on Highway 1, a public road beyond the secure confines and exclusive jurisdiction of Vandenberg Air Force Base. So long as Apel is on that public road, his peaceful protest activities have the sanction and protection of the First Amendment.

CONCLUSION

The petition for a writ of a certiorari should be denied.

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