

No. 12-1038

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IN THE  
**Supreme Court of the United States**

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

JOHN DENNIS APEL,

*Respondent.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF OF *AMICI CURIAE* THE REPORTERS  
COMMITTEE FOR FREEDOM OF THE PRESS AND  
TEN NEWS MEDIA ORGANIZATIONS IN SUPPORT  
OF RESPONDENT**

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici*, described in Appendix A, are The Reporters Committee for Freedom of the Press and ten of the nation’s leading news organizations – Advance Publications, Inc., Media Law Resource Center, The National Press Club, the National Press Photographers Association, National Public Radio, Inc., the Newspaper Guild – CWA, the Online News Association, the Radio Television Digital News Association, the Society of Professional Journalists, and the Student Press Law Center.

*Amici* are advocates for the rights of news media and others who seek to provide information to the public about important issues that affect them, and thus have a strong interest in ensuring that speech in public fora receives the highest level of First Amendment protection. Any restriction on speech in streets, parks, and sidewalks – which have, since “time out of mind,” been held for use by the public to assemble, communicate, and discuss public questions, must be consistent with the First Amendment. Although the government may control the use of its own property for speech much as a private landowner, this power is not unbounded and is subject to constitutional constraints.

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<sup>1</sup> Both parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

In this case, respondent John Apel was convicted for peacefully exercising his First Amendment rights in a designated protest area created by Vandenberg Air Force Base just outside its main gate, within an easement held by the State of California and the City of Santa Barbara. The government charged three violations of 18 U.S.C. § 1382, which prohibits anyone from reentering a military installation after previously being removed and ordered not to return. When the alleged violations occurred, Apel was protesting in public space expressly set aside for free expression, and that was not under the Base's exclusive control. Apel was convicted over objections that the First Amendment bars enforcing Section 1382 in the Vandenberg designated protest area. Apel reasserted his First Amendment rights on appeal, but the Ninth Circuit reversed the convictions on grounds that the government lacks exclusive possessory rights over the Vandenberg protest area.

Although the present dispute arises in the context of access near military installations, it raises the underlying issue of when the government may restrict access to public areas notwithstanding statutory or First Amendment considerations. This is a question of substantial concern to the press. For example, journalists have had difficulty gaining access to areas near courthouses in order to report news, despite the fact that such areas generally permit public access.<sup>2</sup> And the press repeatedly has

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<sup>2</sup> See, e.g., *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir. 1970); *Arkansas Democrat-Gazette v. Zimmerman*, 20 S.W.3d 301 (Ark. 2000).

been forced to reassert the right to exit poll in public fora like sidewalks and byways around voting precincts.<sup>3</sup>

This case was decided by the court below on statutory grounds, but that decision cannot be disturbed without running headlong into the underlying First Amendment issues. Accordingly, if the Court were to find that the respondent may be barred from Vandenberg Air Force Base pursuant to Section 1382, *Amici* respectfully ask the Court to uphold the decision below under the First Amendment. *Amici* submit that the government cannot be allowed to punish speakers for engaging in peaceful activities at places specifically designated for such endeavors. In this particular context, *Amici* seek to underscore the importance of not affording military authorities unilateral control over property that has been designated as public fora.

## BACKGROUND

Respondent John Apel was convicted of violating 18 U.S.C. § 1382 for peaceably protesting on a public highway outside Vandenberg Air Force Base, within a designated protest area outside the Base's main gate. *See* Resp. Br. 1-5 (citing record). Section 1382 is a trespassing regulation governing military installations, making it unlawful for any person, having previously been removed and commanded not

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<sup>3</sup> *See, e.g., American Broad. Cos. v. Wells*, 669 F. Supp. 2d 483 (D.N.J. 2009); *American Broad. Cos. v. Heller*, No. 2:06-CV-01268, 2006 WL 3149365 (D. Nev. Nov. 1, 2006); *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988).

to return under a “barment order,” to later reenter the property. Apel had received two barment orders for Vandenberg, for conduct occurring within the Base proper, prior to the time of his protests giving rise to this case. *Id.* 5.

Unlike many cases arising under Section 1382 and involving the actual grounds of a military base and/or appurtenances that are clearly part of a base, the property in this case lies outside Vandenberg’s main gate, on land long designated for public use. Specifically, Vandenberg’s legal bounds encompass a public road, Highway 1, also known as “Pacific Coast Highway,” that is used by the public to travel to and from a wide variety of locations well beyond Vandenberg, having nothing to do with the Base.

Since 1962, the State of California and Santa Barbara County have held an easement over the portion of Highway 1 that overlaps Vandenberg. The right-of-way is under concurrent jurisdiction of the state and county, which, along with military police, have law enforcement authority over the area. There are no gates or sentries to control entry into the area of the easement. Traffic flows freely along Highway 1 without restrictions, except for traffic lights.

And, since 1989, outside Vandenberg’s main gate, within the Highway 1 easement and along the roadway, a specific area has been set aside for purposes of allowing peaceful protest activity. This “designated protest area” is bounded by Highway 1, Lompoc-Casmalia Road, and a painted green line



across California Boulevard that connects with roads at the intersection outside Vandenberg's main gate. There is a public bus stop inside the designated area.

On three dates in 2010, one each in January, March, and April, Apel traveled to and entered the designated protest area within the easement, to engage in peaceful expression protected by the First Amendment. Each time, Apel was cited for violating Section 1382, escorted from the area, and released. Apel moved to dismiss all three counts, arguing that the government could not constitutionally enforce Section 1382 against him, as the easement renders that portion of Highway 1 and the designated protest area public property over which the United States lacks exclusive possession. Resp. Br. 5. The trial court rejected the constitutional defense, and convicted Apel. The Ninth Circuit reversed, holding that Section 1382 applies only to areas over which the United States can claim an exclusive right of possession.

### **SUMMARY OF ARGUMENT**

The First Amendment precludes applying Section 1382 to allow the government to punish peaceful expression on property over which the military lacks exclusive control and that, more fundamentally, is specifically designated as a public forum. Apel was prosecuted for engaging in protected speech at a designated protest area that, along with the adjoining roadway, lies in an easement that Vandenberg Air Force Base ceded to the State of California and Santa Barbara County. This makes the thoroughfare and protest area no different from other streets

or parks that are among the archetypical public fora in which the First Amendment strictly limits the government's ability to regulate speech.

While the government's power to regulate the use of its property is perhaps greatest on military bases which are not traditionally public fora, that authority is diminished where the property at issue is a public thoroughfare or similar public space. When the military abandons control of part of its property such that that portion becomes indistinguishable from a public park or street, as it did in this case, it forfeits any claim of a special interest in limiting expressive activity there. Nothing in this Court's jurisprudence hints that the mere proximity of *other* military property, which may not be a public forum, alters the equation.

Section 1382 also cannot be enforced against Apel as he was in an area *designated* as a public forum. As a consequence, any regulation of his speech must satisfy strict scrutiny. Whatever may have been the basis for Apel's prior barment orders, he was cited for exercising free speech rights in a public forum *outside* the military's exclusive control. It is difficult to imagine any government interest in selectively keeping him out of a public space open to all citizens for expressive purposes. Accordingly, Apel's convictions cannot be upheld, regardless of how the Court resolves the statutory question in this case.

## ARGUMENT

Although this case was decided below on statutory grounds, it also raises the question whether

military authorities may use an anti-trespass law to limit activities that unquestionably are protected by the First Amendment. This Court may affirm the decision below on that basis. *E.g.*, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Of course, if the Court rejects the Ninth Circuit’s reading of Section 1382, it must rule on the constitutional question if it is to uphold the conviction, or at least remand the case with instructions to rule on the First Amendment issue. *Accord* Gov’t Br. 27. Any such constitutional ruling must adhere to the Court’s public forum jurisprudence.

#### **I. Section 1382 Cannot Be Enforced in an Easement Designated For Public Use**

Although the government is empowered to control the use of its own property, streets, parks, and sidewalks “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939). Such space occupies a “special position in terms of First Amendment protection.” *United States v. Grace*, 461 U.S. 171, 180 (1983). Indeed, this Court repeatedly has referred to public streets “as the archetype of a traditional public forum,” noting that for “[t]ime out of mind’ public streets and sidewalks have been used for public assembly and debate.” *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). *See also Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011).

The government's ability to regulate the use of its property is at its zenith on military bases, which are not traditionally used as public forums. *Greer v. Spock*, 424 U.S. 828 (1976). But this principle loses its force where the property under military control is used as a public thoroughfare. *Flower v. United States*, 407 U.S. 197 (1972). In such circumstances, where the military opts "not to exclude the public from the street," it "abandon[s] any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue." *Id.* at 198. The same should have held true here, where Vandenberg has ceded, or at least shares, control over the relevant portion of Highway 1, and affirmatively dedicated a designated protest zone to the public for expressive activity.

This Court has long recognized that the public retains strong free speech rights in venturing onto public streets and other areas that historically have been used for purposes of assembly and discussing public questions. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). To safeguard this freedom, the government is strictly limited in its ability to regulate private speech in such traditional public fora. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). And when the government creates "a designated public forum" by intentionally opening to the public government property not traditionally open as a public forum – as with the area where *Apel* was cited – any restriction on speech must withstand the same strict scrutiny as restrictions in a traditional public forum. *Id.*

Nothing in this Court’s jurisprudence suggests that mere proximity of *other* government property, which may not be a public forum, alters that protection. Thus, the fact that government may constitutionally limit the use of property *near* a public thoroughfare does not empower it to restrict speech on the thoroughfare *itself*. *Grace*, 461 U.S. at 171. That remains true even if the proximate public property is a military installation to which Section 1382 may apply. *See, e.g., Flower*, 407 U.S. at 197-98.

This Court’s decision in *United States v. Albertini*, 472 U.S. 675 (1985), is not to the contrary. Gov’t Br. 27. In *Albertini*, the Court held only that hosting an open house on a military base did not *create* a designated public forum so as to permit holding a demonstration. 472 U.S. at 686. The government tries to apply that holding to these facts, but it does not fit. Gov’t Br. 27. *Albertini* expressly distinguished its facts from a situation where “the military so completely abandon[s] control that the base became indistinguishable from a public street[.]” 472 U.S. at 686. Unlike the situation in *Albertini*, the property at issue in this case *is* indistinguishable from a public street both because it includes the designated protest area and because Vandenberg ceded control of the area to state and local governments for use as a public thoroughfare. *Albertini* accordingly does not address the issue of the speech – or its location – that is in question here.

## II. Section 1382 Cannot Be Enforced in a Designated Public Forum

Regardless of whether the section of Highway 1 encompassed by Vandenberg may be considered a traditional public forum, Section 1382 cannot be enforced in this case because Apel was within an area set aside as a public forum. While the government is under no obligation to designate its property as a public forum, when it does so, it is subject to the same constitutional constraints that apply in a traditional public forum. *Supra* 8 (citing *Cornelius*, 473 U.S. at 800). *See also Perry*, 460 U.S. at 45-46. In either case, speech in such fora receives the highest level of First Amendment protection, such that content- or speaker-based restrictions are upheld only if they satisfy strict scrutiny. *Boos v. Barry*, 485 U.S. 312 (1988); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

In most cases involving speech on military bases, a central question is whether the government's actions to permit access for certain types of speech create a forum. *See, e.g., Albertini*, 472 U.S. 675; *Greer*, 424 U.S. 828. But that is not the issue in this case. Here, there is no dispute about the fact that Apel was arrested in an area that for over two decades has been specifically designated as a forum for speech. No permission was required for members of the public to freely use the space for purposes of expression, and no physical or other barriers indicated that the space was part of a military base or impeded speech within the protest area.

In these circumstances, the citations issued to Apel and his convictions violate the First Amendment. Whatever may have been the basis for his previous barment orders, he was cited in this case for the exercise of free speech rights in a designated public forum *outside* the military's exclusive control.

The decisions below do not address whether applying Section 1382 in this manner can satisfy strict scrutiny. The district court refused to honor the designated protest area as a public forum of any kind. Even if this Court holds the military's lack of exclusive control over the portions of Vandenberg subject to easement does not bar applying Section 1382, the government still must show that excluding barment order recipients from Vandenberg's designated protest area is narrowly tailored to serve a compelling state interest. *E.g.*, *Boos*, 485 U.S. at 334. It is hard to envision how keeping a barment order recipient out of public space that is open to any citizen for expressive purposes serves *any* government interest, let alone a compelling one. It is equally difficult to envision how Apel's convictions can be upheld, regardless how the Court resolves the statutory question.

## CONCLUSION

For the foregoing reasons, this Court should uphold the Ninth Circuit. If it does not do so on the same bases as that court, the Court should hold that the military may not exclude those engaged in peaceful protest activities in a traditional or designated public forum unless it is necessary to serve a

compelling interest using the least restrictive means. In the alternative, it should remand the case for the Court of Appeals to address the constitutional issue in the first instance.

Respectfully submitted,

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## APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper

Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information

interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center (“SPLC”) is a non-profit, nonpartisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

## APPENDIX B

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