No. 12-1038

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DENNIS APEL,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Respondent John Dennis Apel in *United States v. Apel*, No. 12-1038.[1]

NACDL is a nonprofit organization with a direct national membership of more than 10,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts. Because this matter relates to a criminal statute with potentially broad applications (18 U.S.C.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

Also, on July 16 and July 23, 2013, Petitioner and Respondent, respectively, generally consented to the filing of *amicus curiae* briefs in this matter.

§ 1382), NACDL has a unique interest in the validity and enforcement of the criminal statute and submits this brief in support of Respondent.

SUMMARY OF ARGUMENT

This appeal concerns the scope of the government's authority under 18 U.S.C. § 1382 to prosecute conduct, even expressive conduct, near military installations on federally owned land. The central question is whether the definition of "military installation" should be interpreted so broadly as to reach expressive conduct occurring in a designated protest area, along a public road, beyond a visible green line painted by the military to demarcate the closed military base.

There is no real dispute that the government has never previously taken the sweeping position it takes now: that even peaceful protesting on a public highway outside of the area under the military's exclusive possessory control is subject to Section 1382. To the contrary, the government stipulated to the requirement of exclusive possession back in the 1940s in *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948), and since then a long line of cases has continued to apply that requirement to Section 1382 prosecutions. Even the United States Attorney's Manual and relevant Air Force regulations adopt this limitation on Section 1382's reach. *See* Respondent's Brief [hereinafter "Resp. Br."], Part II.B.

The rationale behind this longstanding limiting principle is obvious. Although great deference is given to the military's authority to regulate conduct within the closed portions of military installations, serious concerns arise when the government seeks to exercise that virtually unquestioned authority (including to control expressive conduct) in areas outside of an actual military installation and beyond its exclusive area of command. Yet, the government seeks that expansion in this case. Not only does the government claim the right to extend its regulatory and prosecutorial control onto a public road outside of a closed military installation, the government offers no limiting principle whatsoever for when and how it can exercise such authority.

Amicus curiae and its members oppose the unfettered expansion of the government's ability to selectively criminalize conduct, particularly expressive conduct in areas traditionally and apparently open to the public. And the government's sweeping new interpretation of Section 1382 raises serious concerns for *amicus curiae*:

- First, the government's interpretation extends the military's authority – both to apply existing military regulations and to promulgate new (and more onerous) regulations – onto a public road, which raises substantial overbreadth concerns that should be avoided.
- Second, the government's interpretation permits the government too much leeway to arbitrarily enforce Section 1382 against civilians,

including those who lack sufficient notice that they are in areas subject to enforcement.

- Third, the government's interpretation at most creates an ambiguity about the historical and common-sense understanding of the term "military installation," which should be resolved in favor of defendants under the rule of lenity.

Any of these concerns would justify rejecting the government's interpretation of Section 1382. Together, they form a compelling picture of the dangers of overextending the government's ability to control protected activity in public areas that have been historically understood, even by the government itself, to be beyond its reach. Accordingly, *amicus curiae* submits this brief in support of Respondent John Dennis Apel and respectfully requests that this Court affirm the judgment in his favor.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1382 WOULD RENDER THE STATUTE UNCONSTITUTIONALLY OVERBROAD

John Dennis Apel was convicted in the district court of a violation of 18 U.S.C. § 1382 for engaging in protected speech on a public, unrestricted road outside of the visible green line that the military painted

on the ground to demarcate the closed military installation at Vandenberg Air Force Base ("Vandenberg"). The court of appeals, relying on its decision in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), reversed the conviction. Joint Appendix [hereinafter "App."] 4, Dkt. No. 33; App. 11, Dkt. No. 31; App. 18, Dkt. No. 31. In *Parker*, a protestor had been prosecuted for engaging in expressive conduct on a public road that ran outside the military installation at Vandenberg. 651 F.3d at 1182. The court of appeals relied on a long line of precedents requiring "the government to prove its absolute ownership or exclusive right to the possession of the property upon which the violation occurred." *Id*. In reversing Parker's convictions, the court of appeals reaffirmed the longstanding reading of Section 1382 as not applying to public areas where the government did not have exclusive right of possession. *Id.* In this appeal, the government argues that *Parker* was wrongly decided and advances a new interpretation of Section 1382 that authorizes the government to regulate, cite, and criminally prosecute expressive conduct even if it takes place on a public road outside of the actual military installation but inside of government property lines.

As Respondent amply demonstrates, this new interpretation contravenes military regulations, legislative history, and precedent. Resp. Br., Parts II.A.-II.B. In addition, *amicus curiae* and its members believe this new interpretation would be a significant expansion of the government's power to criminalize

expressive conduct (even on public roads), which would create substantial overbreadth problems that should be avoided. *Cf. Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

A. A statute is facially overbroad when there is a realistic danger that it will significantly compromise speech rights.

Statutes are unconstitutionally overbroad when they criminalize substantially more speech and expressive conduct than may be constitutionally regulated. In a typical facial attack, a challenger must establish that "'no set of circumstances exists under which [the statute] would be valid' or that the statute lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997)). By contrast, according to the Court's overbreadth doctrine, a statute is facially unconstitutional if it prohibits a substantial amount of protected speech as "judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citation omitted); *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003).

Under the overbreadth doctrine, even an individual whose own speech may constitutionally be prohibited under a given provision is nonetheless permitted to challenge its facial validity because of the threat that the speech of individuals and groups not before the court will be chilled. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). In other words, the overbreadth doctrine is necessary to protect the First Amendment rights of speakers who may fear challenging the proscription on their own. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) ("This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.").

In applying the overbreadth doctrine, there must be a "realistic danger" that the provision will significantly compromise speech rights. *Board of Airport Comm'rs*, 482 U.S. at 574 (citation omitted). A law will not be facially invalidated simply because it has some conceivably unconstitutional applications. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). To support a finding that a prohibition on speech is overbroad, there must be a substantial number of instances in which the provision will violate the First Amendment. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

B. The government's new interpretation of Section 1382 would extend existing military regulations onto public roads, thereby infringing on a substantial amount of protected speech in a public forum.

At the outset, it is important to recognize that the court of appeals' narrower interpretation of Section 1382 leaves in place the military's broad power to regulate conduct, even expressive conduct, on the actual military installation. The closed portions of military installations are exclusively within the possessory control of the military. A military installation is "the enclave of a system that stands apart from and outside of many of the rules that govern ordinary civilian life" and, as such, greater deference is afforded to a base commander's discretion within such enclaves "because of the unique character of the Government property upon which the expression is to take place." *Greer v. Spock*, 424 U.S. 828, 842-43 (1976) (Powell, J., concurring). In the case of protestors who cross over the green line demarcating the closed military installation at Vandenberg, existing rules and regulations provide the base commander with the ability to carry out "the basic function of a military installation," including the ability to regulate and even exclude protestors "from the area of his command." Petitioner's Brief [hereinafter "Pet. Br."] 2, ¶ 1.

In exercising this authority over areas under their exclusive possessory control, base commanders

at Vandenberg have issued a series of regulations pursuant to Section 1382 that regulate even expressive conduct. For example, existing regulations permit the base commander to prohibit expressive conduct on the military installation:

- If he does not deem it "peaceful" or "nonpartisan." *See* App. 50, 52, 53 ("Activities other than peaceful protests in this area are not permitted and are specifically prohibited."); 63 (faulting Mr. Apel for allegedly refusing "to remain in the area approved by me for nonpartisan, peaceful demonstrations").
- If he does not consider it to be "adequately coordinated and scheduled." *See* App. 52 (requiring notification of protests "at least two (2) weeks in advance" and reserving right to deny permission to protests that "the installation is unable to support").
- If it involves the "distribution of any materials including pamphlets, leaflets, handouts, etc." *See* App. 53.
- If he finds it may "encumber the roadways or engage in activities which can result in unsafe conditions for themselves or others." *See* App. 50.
- If he believes it could "materially interfere with or have a significant impact on the conduct of the military mission of the U.S. Air Force." *See* App. 50.

Notably, many of these existing regulations contain a degree of vagueness to them – for example, it is

left to the base commander's discretion to determine what conduct is considered sufficiently "nonpartisan" to permit. On the closed portion of the military installation, a certain degree of flexibility is tolerable because of the recognized need for a base commander to exercise virtually total control over soldiers and conduct military operations within the actual installation. *Greer*, 424 U.S. at 838 ("[I]t is consequently the business of a military installation . . . to train soldiers, not to provide a public forum."). Even within the confines of the closed portion of the military installation, however, a base commander may not infringe on expressive conduct arbitrarily. *See id.* at 840 (upholding regulations on political speeches on installation within military's exclusive jurisdiction but acknowledging that "[i]t is possible, of course, that [military regulations] might in the future be applied irrationally, invidiously, or arbitrarily").

The problem arises when the government seeks, as the government does here, to extend a base commander's near total authority to regulate expressive conduct *onto a public road* where the government has deliberately and expressly ceded exclusive control. *See Flower v. United States*, 407 U.S. 197, 198 (1972) ("Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue."). Access to the stretch of the Pacific Coast Highway at issue is not limited. App. 78-79. No guards or gates restrict civilians from entering that stretch. *Id.* And there are no signs along the road that would indicate

that this stretch is treated differently from any other stretch of public highway. The well-trafficked public highway in this case is "equivalent in every relevant respect to a city street." *Greer*, 424 U.S. at 844 n.1 (Powell, J., concurring) ("Fort Dix, in contrast, is a discrete military enclave in a predominately rural area."). The stretch of highway is not simply an access road to the actual military installation, but rather a thoroughfare by which the public accesses, among other public sites, the city of Lompoc, the city of Guadalupe, Vandenberg Village, and Surf Beach. App. 64, ¶ 2. This road, therefore, is a public forum in which civilians have a reasonable expectation of being able to engage in expressive conduct. *Flower*, 407 U.S. at 198-99 ("[S]treets are natural and proper places for the dissemination of information and opinion. . . . [O]ne 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.") (citations and internal quotation marks omitted).

The government attempts to extend the application of Section 1382 into this public forum, in which a broad swath of otherwise protected speech and expressive conduct could then be regulated by the government. Indeed, under the government's current interpretation, receiving a barment letter would disqualify a civilian from engaging in protected speech *on a public road* even if:

- The protest is "peaceful" and "orderly." *See* App. 54 ("**Barment from Vandenberg**

> **AFB**: If you are currently barred from Vandenberg AFB, there is no exception to the barment permitting you to attend peaceful protest activity on Vandenberg AFB property."); 103 (noting that Mr. Apel was "acting in an orderly manner" on the day of his arrest).

- The protest is properly scheduled. *See* App. 102 (noting that Mr. Apel was participating in a "scheduled protest" on the day of his arrest).
- The protest violates no rules or regulations other than the "ban-and-bar." *See* App. 103 (noting that Mr. Apel had violated no rules other than being present on the public road while being listed on the "ban-and-bar").
- The protest presents no threat whatsoever to military operations. *See* App. 103 (noting that Mr. Apel did not present "a security risk to base personnel or property or operations").

This would be the result of extending existing regulations, which were previously justified to allow the military to regulate conduct within a closed installation, onto the public road outside of the closed installation. Because this would infringe on new categories of expressive conduct that otherwise would be protected by the First Amendment, it raises serious and substantial overbreadth concerns. *New York State Club Ass'n*, 487 U.S. at 14.

C. The government's new interpretation of Section 1382 would also authorize base commanders to promulgate new military regulations that could further restrict protected speech on public roads.

The aforementioned concerns would be present if a base commander simply extended existing Section 1382 regulations to the public road. Yet there is no guarantee that those are the only situations that could give rise to enforcement. Nothing constrains the military's ability to issue new, more onerous rules and regulations than the ones that it currently advances. For example, a base commander could promulgate new regulations prohibiting "anti-military" speech on the public roads adjacent to the actual military installation, or selectively choose which protestors are sufficiently pro-military to allow on the public roads running through Vandenberg. And nothing constrains the military's ability to change its mind after promulgating such regulations. *See, e.g.*, App. 57-58, ¶ 3 (stating that "permission may be withdrawn" by any installation commander, in which case "no protest activity would be permitted at any time until further notice from the installation commander").

Indeed, the government's sweeping interpretation of Section 1382 attempts to reserve the power to broadly regulate *any* speech and conduct in *any* areas within military property lines, even areas outside the physical boundaries of the actual military installation that have been specifically opened to the public. *See* Pet. Br. 2, ¶ 1 (asserting that base commander's

"historically unquestioned power" extends even to public roads with designated areas open to the public); App. 51, ¶ 2 (subjecting roadway easements "to any rules and regulations the Installation Commander may prescribe to properly protect the interests of the United States"); *see also infra* n.2 (discussing the limited ability to appeal a base commander's issuance of a barment order). It is difficult to imagine what kind of speech on a public road could not be regulated by a base commander under the government's sweeping interpretation of Section 1382. The amount of speech on a public road that would be subject to regulation "ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm." *United States v. Alvarez*, 132 S. Ct. 2537, 2547-48, 2555 (2012) (Breyer, J., concurring) (striking down Stolen Valor Act on the ground that it gave the government "a broad censorial power unprecedented in this Court's cases or in our constitutional tradition"). Because a substantial amount of protected speech would be regulated by the government's new interpretation of Section 1382, and substantially exceeds any legitimate restriction of speech on a public road, the government's interpretation of Section 1382 suffers from overbreadth. *See Washington State Grange*, 552 U.S. at 449 n.6.

II. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1382 ENCOURAGES ARBITRARY ENFORCEMENT BY THE GOVERNMENT, EVEN AGAINST CIVILIANS WHO LACK NOTICE OF HOW THE LAW IS APPLIED

The government's new interpretation of a "military installation" also raises the troubling possibility that the government could target *specific* protected speech for regulation and prosecution and engage in arbitrary enforcement. Here, the government seeks to expand both its military *and* criminal jurisdiction over a public road outside of a closed installation. Not only could the government use this discretion to impermissibly chill viewpoints of certain protestors, it would be particularly unfair when applied to protestors who reasonably believe they are within their rights to be on the public road.

A. The government's interpretation permits unfettered discretion to arbitrarily issue barment letters in the first place, and then to selectively prosecute recipients of barment letters.

As noted above, courts generally defer to the military in reviewing challenges to civilian exclusions from closed military installations. *See supra* Part I.B.; *see also United States v. Albertini*, 783 F.2d 1484, 1486 (9th Cir. 1986) ("*Albertini II*"). The military's discretion to exclude civilians from its areas of command is construed so broadly that recipients of

barment letters have no statutory mechanism to directly appeal the letters,[2] nor are they provided notice or an opportunity to be heard before the issuance of the barment letter. *See, e.g.*, *id*. at 1487; *United States v. Jelinski*, 411 F.2d 476, 477 (5th Cir. 1969).

Were this same discretion extended to the public roads outside of closed military installations, base commanders would have virtually unchecked authority to regulate and cite conduct – especially expressive conduct – in public areas. Nothing in the government's expansive reservation of the right to regulate the public roads would prevent the military from issuing barment letters to certain civilians

[2] The U.S. Air Force's Protest Advisory, Memorandum for the General Public Regarding Limited Permission for Peaceful Protest Activity, and even Respondent's barment order, provide no reference as to how one could directly appeal such an order. App. 52-66. Though defendants who are prosecuted under Section 1382 sometimes challenge their barment orders under the Administrative Procedure Act, *see, e.g.*, *United States v. Mowat*, 582 F.2d 1194, 1199 (9th Cir. 1978), the government's position about the availability and standards for such relief has narrowed. *Compare* Reply Brief for Petitioner, *United States v. Albertini*, 472 U.S. 675 (1985) (No. 83-1624), 1985 WL 669826, at *5 ("The proper way to raise such a challenge is to sue for specific relief under the Administrative Procedure Act, not to ignore the bar order and attempt to litigate the issue of reasonableness in a criminal prosecution.") *with* Brief of Defendant-Appellees at n.4, *Parker v. United States Air Force*, 173 F.3d 861 (9th Cir. 1999) (No. 98-56703), 1999 WL 33653509 ("Although Parker states that he seeks review under the Administrative Procedure Act ("APA") . . . appellees contend that a military officer's barment decision is subject to an even more deferential standard of review than that provided by the APA.").

based solely on the nature of their expressive content. The government has identified no limiting principle within its broad regulations to cabin its exercise of such unfettered discretion.

To the contrary, the government argues that it has the right to chill *repeat* protestors on the public road, whom the base commander has deemed "threats to the base under his command." Pet. Br. 8. Yet a peaceful protest outside of the actual military installation by a dedicated protestor is precisely the type of expressive conduct in a public forum protected by the First Amendment, especially if the repeat protestor is voicing unpopular views even after others have been cowed. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *see also Jenness v. Forbes*, 351 F. Supp. 88, 100 (D. R.I. 1972) (finding military's exclusion of some political candidates to campaign on base while allowing others to do so to be arbitrary and capricious). Whatever discretion is afforded to base commanders to control actual military installations, that same degree of discretion is not acceptable when extended to public roads. *See Greer*, 424 U.S. at 847 (Powell, J., concurring) ("A reasonable place to draw the line is between political activities on military bases and elsewhere.").

This potential for arbitrary enforcement is compounded by the barment process itself. Violations of any military rule or regulation can prompt the issuance of barment letters, which functionally exclude civilians from entire areas. "A debarment is not a trifling matter. It completely cuts off the affected

person's access to the base and results in *de facto* revocation of *all* base privileges. Moreover, a debarment violation is a crime." Major John R. Brancato, USAF, *Base Commander Responses to Civilian Misconduct: Systems & Problems for the Staff Judge Advocate*, 19 A.F. L. Rev. 111, 146-47 (1977) (footnote omitted).

In effect, then, Section 1382 regulates mere *presence* on any public area from which a civilian has been excluded. 18 U.S.C. § 1382 (applying to any person who "reenters or is found within" the definition of a military installation); *see also* App. 98 (government witness testifying that his job at protests was to ask protestors to leave as long as he determined they were "on the ban-and-bar roster"). And that exclusion can be indefinite: nothing prohibits the government from barring civilians from such areas *permanently*, forever stripping them of the right to use those areas. *See* App. 64, ¶ 5 (stating that Mr. Apel's 2007 barment was in effect "***permanently***") (emphasis in original); *see also United States v. Albertini*, 472 U.S. 675, 690 (1985) ("*Albertini I*") (upholding bar order of indefinite duration). This is a further reason why the government's attempt to extend Section 1382 onto a public road is so problematic. Under the government's current interpretation, the government would be permitted to issue barment letters to civilians engaging in protected activity on a public road, for any vaguely articulated – or even pretextual – reason and for any length of time the government sees fit, which automatically excludes

those civilians from accessing the public road, all without any meaningful opportunity to challenge the issuance of such letters.

In addition, the government also seeks to expand the sweep of its *criminal* prosecutorial power over conduct on those public roads. The government seeks broad prosecutorial jurisdiction to criminalize trespass onto public roads where civilians are known to engage in protected conduct, and nothing prevents the use of that power selectively and arbitrarily. Such selective prosecutions, particularly those that target the exercise of protected constitutional rights, are invalid. *Wayte v. United States*, 470 U.S. 598, 609 (1985); *United States v. Crowthers*, 456 F.2d 1074, 1079 (4th Cir. 1972) ("[The government] may not permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy.").

The risk of selective prosecution is highlighted by the government's inconsistent approach to the "designated protest area." On the one hand, the government designated an area specifically for protestors to engage in expressive conduct outside of the closed military base. On the other hand, the government now claims the unfettered discretion to regulate expressive conduct in, and even exclude protestors from, the designated protest area. The government's attempt to have it both ways – simultaneously permitting and chilling speech – should raise serious concerns about the government's ability to safeguard the free speech rights of protestors. And if these concerns exist with

regard to the one area that has been specifically designated for expressive conduct, they multiply when the government seeks to extend its authority to all areas of the public roads and sidewalks outside of the closed base.

B. The government's interpretation permits prosecution of civilians who lack notice that Section 1382 applies to them.

The concern of arbitrary enforcement is especially pronounced given the risk that civilians may be targeted for enforcement even though they lack proper notice of how Section 1382 is applied. Fundamentally underlying one of the key legal issues in this case – whether the United States must have exclusive possessory control over land in order to enforce Section 1382 – is the principle that due process requires civilians to have notice that they are subject to prosecution. *See United States v. Vasarajs*, 908 F.2d 443, 448-49 (9th Cir. 1990) ("'[C]onduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal.' . . . [D]ue process requires that there have been some way for [defendant] to learn the boundary of the Fort.") (quoting 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.1, at 271 (1986)).

While Respondent in this case may have had notice from his barment letter that he would be subject to Section 1382 if found in the protest area,

Section 1382 also contemplates the prosecution of people who go upon the "installation[ ] for any purpose prohibited by law or lawful regulation" – irrespective of whether they have been previously barred or not. 18 U.S.C. § 1382. Therefore, it could apply to first-time protesters. The government's attempt to regulate the public roads outside of the green line demarcating the closed military installation contravenes what civilians reasonably expect (and have come to rely on) in the context of Section 1382: a common-sense understanding of the installation's physical boundaries and the everyday understanding of a public road.

1. The government's sweeping new interpretation contravenes the common-sense understanding of the physical boundaries of the closed military installation.

Civilians who protest on the roadway outside of Vandenberg cannot be faulted for believing they are engaging in permissible speech on a public road – given how the government itself demarcates the installation. A visible green line marks the area designated by the United States for where the public highway ends and the military installation begins. App. 91. On the military side of the road, there are signs, an inner gate, a guard station, and barricades. *Id.* at 79. These markers, along with the green line, are intuitively understood to demarcate the boundaries of the military installation over which the

commander has exclusive control (and, therefore, are within the purview of Section 1382).

Indeed, public opinion confirms that the common-sense understanding is that protestors may not *cross* the green line, which implies that the public side of the green line is consistent with the general understanding of a public area to protest. *See, e.g.*, Adrian Castañeda, *Peace Activists Still Protest Missile Tests*, SANTA BARBARA INDEPENDENT, Mar. 3, 2008, *available at* http://www.independent.com/news/2008/mar/03/peace-activists-still-protest-missile-tests/ ("The crosswalk in front of Vandenberg Air Force Base has an **extra thick painted green line** . . . [that] demarcates the boundary that protestors may not cross.") (emphasis in original); Michael Todd, *Protest. Arrest. Dismiss. Repeat*, PACIFIC STANDARD, Oct. 18, 2012, *available at* http://www.psmag.com/blogs/the-101/protest-arrest-dismiss-repeat-48413/ ("[The protestors] stand on one side of the prominent green line painted across the asphalt near the guard shack, while military police stand on the other."). There are no gates or guards on the public side of the green line that restrict access to the public highway. There is even a "designated protest area" for the public on the public side of the green line. These markers are naturally understood to demarcate areas open to the public for expressive conduct. "[T]he common world" would understand that the military would enforce Section 1382 "if [that] certain line is passed." *See United States v. Bass*, 404 U.S. 336, 348 (1971). And Respondent had not crossed the green line when he was arrested.

Courts upholding prosecutions under Section 1382 have consistently noted the crossing of a clear delineation of military territory. *See, e.g.*, *Vasarajs*, 908 F.2d at 449 ("We hold that the signs posted along the access road leading up to the guard shack adequately announced themselves to Vasarajs as the dividing line between the highway and the Fort."); *United States v. Cottier*, 759 F.2d 760, 762 (9th Cir. 1985) ("The facility is relatively small and enclosed by a chainlink-barbed wire fence."); *United States v. Mowat*, 582 F.2d 1194, 1202 (9th Cir. 1978) ("[T]he Government and the district court note that the Instruction [barring entry] was posted on six to nine signs on the island[.]"); *United States v. Douglass*, 579 F.2d 545, 547 (9th Cir. 1978) ("[T]he boundary of the reservation is well marked by the white line[.]"); *United States v. Floyd*, 477 F.2d 217, 223 (10th Cir. 1973) ("They were warned by the sign, the five security guards, and the fence around the installation.").

And even in close situations – where defendants challenge their convictions because they contend they were on publicly accessible land (despite being on federally owned lands) – courts note the specific indicia demarcating military property that has been trespassed. *Greer*, 424 U.S. at 844 n.1 (Powell, J., concurring) ("Fort Dix, in contrast, is a discrete military training enclave in a predominately rural area."); *United States v. McCoy*, 866 F.2d 826, 829 (6th Cir. 1989) ("[A]fter the [boundary] line had been extended across the driveway, she knowingly stepped to the west of the line [from the public road] in the

course of her leafletting activities."); *United States v. Renkoski*, 644 F. Supp. 1065, 1066 (W.D. Mo. 1986) ("Defendants and others made a ritual entry past the containing rope[.]"); *United States v. Packard*, 236 F. Supp. 585, 586 (N.D. Cal. 1964) ("[T]he areas in question, although outside the perimeter fence . . . are patrolled by the Military Police. . . . [T]here are signs at the entrance to the areas[.]").

Here, however, the government's interpretation would expand the applicable zone for Section 1382 beyond the current markers that clearly delineate areas within the government's exclusive control (*e.g.*, green line, security fence, gateway, checkpoint). *See* App. 93 (government witness testimony that protest site "is in some sort of right-of-way," as readily distinguished from visitor control center "in exclusive jurisdiction"). Civilians should not be subject to prosecution for relying on a common-sense (and, before this case, undisputed) understanding of areas inside and outside of the military's exclusive possessory control. *See, e.g.*, *United States v. Parrilla Bonilla*, 648 F.2d 1373, 1379-83 (1st Cir. 1981) (overturning convictions for trespassing onto military property with an unlawful purpose where there was no signage and insufficient evidence that defendants "reasonably knew their presence was forbidden").

The government's interpretation would allow the government to even criminalize activity in areas which have been designated by it for such activity to take place. When the government asserts the right to regulate the entire stretch of road outside of the

closed military base, keeps that stretch of road open to the public, and then designates a defined portion of that road to be suitable as a "protest area," protestors have a reasonable expectation that they can use that particular area for protected activity. To then cite and prosecute protestors in that area, for engaging in precisely the kind of expressive conduct for which the area is reserved, belies any claim that civilians are truly permitted to engage in protected activity in the designated protest area. At the very least, it creates confusion as to the role of a designated protest area on a public road.

2. The government's sweeping new interpretation undermines the principle of permanent rights granted by an easement.

Not only would ordinary civilians lack notice that their mere presence *outside the green line* of the closed military installation could trigger enforcement under the government's interpretation of Section 1382, the government's interpretation of Section 1382 upends the everyday expectation of the right to be *on a public street*.

Noting that "highways or other public easements often bisect military reservations," Justice Stevens noted in *Albertini I* 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." 472 U.S. at 698-99 (Stevens, J., dissenting). That is especially the case for public roads, which civilians have historically understood to be safe spaces to engage in protests. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) ("We have repeatedly referred to public streets as the archetype of a traditional public forum, noting that 'time out of mind' public streets and sidewalks have been used for public assembly and debate.") (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

The public's expectation is not diminished in any way simply because the public road is operated subject to an easement that the federal government granted to California. *Cf. Marsh v. Alabama*, 326 U.S. 501, 506 (1946) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."). If anything, the existence of an easement granted to the California public suggests the permanent right to use Pacific Coast Highway, including for traditional purposes like protected speech. *Cf. Pennock v. Dialogue*, 27 U.S. 1, 16 (1829) ("Thus, if a man dedicates a way, or other easement to the public, it is supposed to carry with it a permanent right of user."); *see also* Resp. Br. 14-15.

Here, civilians perceive Pacific Coast Highway as an unrestricted public road to access public sites such as a local school, Surf Beach, and Lompoc. The lack of any signs or other indicia that use of the road is

limited only reaffirms civilian expectations in this regard. The choice to protest on these roads does not hinge on a "bold defiance of authority," but rather an acceptance of the invitation that the government has implicitly extended by leaving the streets to be quintessentially public.

Where all available indications would lead ordinary civilians to believe they are complying with Section 1382 while outside of the visible green line and on a public road, it would be manifestly unfair to prosecute them in those cases. *See generally Lambert v. California*, 355 U.S. 225, 228 (1957) ("[T]he principle [of requiring notice] is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."); *cf. United States v. Gourley*, 502 F.2d 785, 787-88 (10th Cir. 1973) (overturning convictions for illegal reentry where the alleged reentry occurred in places where visitors were encouraged and no restrictions were imposed for access, based on "the realities of the circumstances, and not on a theoretical [basis of whether it is a closed base]").

III. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1382 SHOULD BE REJECTED UNDER THE RULE OF LENITY

The government's argument in this case would permit regulation, exclusion, and prosecution of civilians engaging in expressive conduct on government

property, without limitation, even on a public highway. This new interpretation of Section 1382 bucks the longstanding (and narrower) understanding of the statute that permitted criminalization of conduct only in areas within the exclusive possession of the military. *See Parker*, 651 F.3d at 1183 ("The government acknowledges our section 1382 authority, but challenges its precedential value.").

Respondent demonstrates why traditional principles of statutory interpretation, as well as the legislative history of Section 1382 and its predecessor, clearly support the existing narrow reading of the statute and belies the government's proposed extension of the statute. *See* Resp. Br. 22-23. Because the statutory text does not lend itself to the government's interpretation, and the government has cited no case that has adopted its broad reading of "military installation," the Court should affirm the court of appeals' narrower interpretation of Section 1382.

Even assuming *arguendo* that the Court believes that the government's interpretation has some merit, *amicus curiae* and its members are strong proponents of the principle that courts attempting to interpret criminal statutes should err on the side of caution. Here, the government's interpretation at most raises questions about whether public roads fall within the purview of a "military installation." Neither Congress nor any prior court has resolved these questions with the sweeping answers that the government now advocates. Therefore, even if the Court believes that the government has identified an ambiguity in Section

1382, such an ambiguity should be resolved in favor of Respondent under the doctrine of the rule of lenity.

A. The rule of lenity is applied whenever there is substantial ambiguity as to the application of a criminal statute.

"[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity[.]" *Rewis v. United States*, 401 U.S. 808, 812 (1971). Although the rule of lenity is invoked only after traditional canons of statutory interpretation fail to reveal a definitive construction of a criminal statute, this Court has explained the importance of this doctrine as a safeguard against overcriminalization:

> In various ways over the years, we have stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. . . . [A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Bass, 404 U.S. at 347-50 (internal quotation marks omitted). In addition, this Court has stated:

> This venerable rule not only vindicates the fundamental principle that no civilian should be held accountable for a violation

> of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008) (concluding that, where statute remained coherent and without redundancies under both possible interpretations of an ambiguous term, "[u]nder a long line of our decisions, the tie must go to the defendant").

The rule of lenity does not require the defendant to prove that his is the only possible interpretation of the criminal statute and that the government's interpretation is utterly impossible. *Bell v. United States*, 349 U.S. 81, 83 (1955) ("It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. . . . [However, when] Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."). Even if neither the defendant's nor the government's interpretation is a perfect fit for the statute, the rule of lenity may be invoked as long as the narrower interpretation in favor of the criminal defendant is the "more plausible construction." *Bass*, 404 U.S. at 339-40 (adopting narrower reading in favor of defendant even though both competing interpretations of statutory provision created some redundancy in the statutory scheme and

"the statute does not read well under either view"). In addition, the rule can be invoked where the government's interpretation creates "substantial doubt about the statute's constitutionality." *Id*. at 338.

In cases where there is more than one plausible interpretation of a criminal statute and the issue would be dispositive of criminal liability, the Court should not presume that Congress intended the statute to be applied more broadly than necessary because such a presumption "turns the rule of lenity upside down. [The Court] interpret[s] ambiguous criminal statutes in favor of defendants, not prosecutors." *Santos*, 553 U.S. at 519. Accordingly, the Court's cases often "give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.* at 523 (quoting *Clark v. Martinez*, 543 U.S. 371, 380 (2005)).

B. At most, the government's interpretation of Section 1382 points to an ambiguity in the phrase "military installation," which should be resolved in favor of Respondent under the rule of lenity.

Here, the court of appeals reaffirmed the long-standing interpretation of Section 1382 as requiring proof of the government's "absolute ownership or exclusive right to the possession of the property upon

which the violation occurred." *Parker*, 651 F.3d at 1182. The government argues, however, that there is no "exclusive possession" requirement under Section 1382 because the phrase "military installation" should be construed broadly to cover property in which the military has only partial interest and concurrent jurisdiction. Pet. Br. 12-16.

Respondent amply demonstrates why the court of appeals' interpretation of Section 1382, compelled by longstanding precedent applying the provision only to areas within the exclusive possession and command of the military, is correct. *See* Resp. Br. 22-33. Respondent, however, also argues that the rule of lenity should be applied to the extent that the Court believes there is an ambiguity in Section 1382. *Id*. at 54-55. *Amicus curiae* and its members strongly support the application of the rule of lenity in such cases.

The crux of the government's position is that the "plain language of Section 1382" makes it unlawful to reenter "a military installation within the jurisdiction of the United States," meaning "any place subject to military command." Pet. Br. 10, 12. In particular, the government argues that "nothing in the list of military facilities suggests Congress intended to exempt from coverage the many public roadways running through military installations." *Id*. at 13. Although that statutory list of military facilities does not expressly *exclude* public roadways from coverage under the statute, it also does not *include* public roadways for coverage under the statute. Thus, the government's argument "is a textbook example of begging

the question." *Santos*, 553 U.S. at 515 (rejecting government's circular attempt to advance a statutory purpose based on nothing more than its assumption about the meaning of the contested statutory phrase that was "the very issue in the case").

The government cites no legislative history to show that Congress even considered this issue, let alone that Congress specifically intended for Section 1382 to cover public roadways over which other parties share jurisdiction. It is equally possible (and arguably more likely) that Congress, in listing military facilities where a person "goes upon" such as a "reservation, post, fort, arsenal, yard, station, or installation," simply did not consider public roadways to, through, and from those closed military enclaves to be within the purview of the statute. Absent proof that Congress considered and resolved the question of the application of Section 1382 to public roads in the sweeping fashion that the government now advocates, this Court should not accept the invitation "to speculate regarding a dubious congressional intent." *See Santos*, 553 U.S. at 514-15 ("When interpreting a criminal statute, [the Court does] not play the part of a mindreader."); *see also Bass*, 404 U.S. at 347-50 ("[C]ourts should define criminal activity. This policy embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.") (internal quotation marks omitted).

In advancing its broad interpretation of Section 1382 in this case, the government also argues that

"[n]othing in the statute suggests that Congress limited the authority of military commanders over their installations simply because the United States' property rights may be less than 'absolute' and 'exclusive.'" Pet. Br. 13. That authority, the government asserts, stems from a base commander's "historically unquestioned power . . . summarily to exclude civilians from the area of his command." *Id*. at 2, ¶ 1. Again, this begs the question: Did Congress, with respect to Section 1382, evidence any intent for that historically unquestioned power to extend so broadly that it covers a public road on which civilians like Respondent are peacefully protesting?

The government's generic appeal to that "historically unquestioned power," as well as its warning that any narrow construction of Section 1382 "would threaten substantial harm to the safe and orderly operation of many of this Nation's military installations," amounts to a request that the Court *presume* that Congress intended for Section 1382 to be applied broadly because of military necessity. *See* Pet. Br. 22-26. Any suggestion that the government has a compelling security interest is belied by the fact that (a) the statute classifies violations as merely misdemeanors; (b) the government's broad reading of the statute is relatively recent and, in fact, contravenes positions it has taken in prior litigation; and (c) other courts have concluded that any military interest is minimal in open areas not subject to the exclusive control of the military. *See, e.g.*, *Gourley*, 502 F.2d at 788 (dismissing charges under Section 1382 against

protestors on the ground that "[t]he practical way in which the matter of public entry to the stadium and at the Chapel [on the Air Force Academy] is treated, and the realities thereof," forfeits the government's right to claim a special interest to those areas).

This Court has previously rejected attempts to avoid the rule of lenity and read criminal statutes broadly based on nothing more than generic references to inchoate governmental interests. *See Santos*, 553 U.S. at 514-15 (rejecting governmental claims that defendant's narrower interpretation "hinders effective enforcement of the law" and fails to give the statute "its proper scope"). It should be particularly wary of doing so where the claim of military necessity must be balanced against the right to free speech and assembly. "[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 (Brennan, J., dissenting) (citation and internal punctuation omitted). Where the government's interpretation of Section 1382 is based more on assumptions than evidence about congressional intent, and at most identifies an ambiguity in what Congress meant by "military installation," the Court should apply the rule of lenity in favor of Respondent.

C. The rule of lenity is particularly important where, as here, civilians may have a more "common-sense" understanding of how a criminal statute is applied and enforced in the real world.

One of the principle justifications for the rule of lenity is that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Bass*, 404 U.S. at 348 (citation omitted). In the context of Section 1382, consideration should be given to "[t]he practical way in which the matter of public entry" to the area in question is treated. *See Gourley*, 502 F.2d at 787-88 (taking into account that military installation did not stop automobiles at entrance gates during football games, did not stop tour buses on the grounds, and provided grounds access to over one million visitors per year).

As noted above, the government's sweeping interpretation of Section 1382 departs from any common-sense understanding of when the criminal statute applies and when it does not apply. *See supra* Part II.B. Even if this is a *possible* interpretation of Section 1382, when a particular reading of a criminal statute is neither intuitive nor established, it raises genuine questions about the fairness and consistency of its application in individual cases. "If

anything, the rule of lenity is an additional reason to remain consistent, lest those subject to the criminal law be misled." *Santos*, 553 U.S. at 523.

In this instance, the public's settled expectations are not only based on common sense, but were also shaped by the actions of the government itself. The government painted the thick green line. It is understood that the government enforces it regulations on the military side of the line. *See supra* Part II.B.1 (citing articles). Its prosecution manual, the U.S. Attorney's Manual, and its Air Force regulations limit the application and enforcement of Section 1382 to areas within the government's exclusive possession and control, *i.e.*, areas "within" the green line at Vandenberg – a position the government has not contravened since the 1970s. *See* Resp. Br. 31-33. This consistent position taken by the government only reinforces the common-sense understanding of the green line by civilians, and exacerbates the lack of notice to civilians who have justifiably relied on that clear green line.

Consistency and certainty not only protect potential protestors at Vandenberg, but also the military itself. To the extent that the government seeks to preserve the military's interest "in deterring repeat harmful conduct in the first instance" (Pet. Br. 8), uncertainty about where and when Section 1382 is applied undercuts the government's professed interest in deterrence. Section 1382 cannot effectively deter civilians who lack a clear understanding about

where they would be violating the law and who reasonably believe they are not violating the law as long as they are peacefully protesting in a designated protest area in a public road over which the government does not have exclusive jurisdiction. At most, Section 1382 would only deter persons who decide to abandon their protests altogether, because they do not want to risk violating any law given its uncertain application. But this kind of "deterrence" scares away civilians who would engage in otherwise peaceful and protected activity on a public road, and is not limited to deterring only "repeat harmful conduct."

Amicus curiae and its members have a long-standing interest in ensuring that criminal statutes are applied consistently, fairly, with ample notice, and in accordance with common-sense understandings of the law. Accordingly, *amicus curiae* respectfully believes that the rule of lenity should be applied, to the extent the Court concludes there is an ambiguity in the scope of Section 1382.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court reject the government's interpretation of Section 1382 and affirm the judgment in favor of Respondent.

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