No. 12-1038

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. The decision below is incorrect....1
B. The decision below is in conflict with decisions of this Court and other courts of appeals....5
C. The decision below is settled circuit law that threatens substantial harm to the safe and orderly operation of many of this Nation's military installations....10
Conclusion....11

TABLE OF AUTHORITIES

Cases:

Bates v. *United States*, 522 U.S. 23 (1997)....2
Cutter v. *Wilkinson*, 544 U.S. 709 (2005)....5
Flower v. *United States*, 407 U.S. 197 (1972)....7, 8
RKO-Stanley Warner Theatres, Inc. v. *Mellon Nat'l Bank & Trust Co.*, 436 F.2d 1297 (3d Cir. 1970)....4
Singleton v. *Wulff*, 428 U.S. 106 (1976)....5
United States v. *Albertini*, 472 U.S. 675 (1985)....2, 5, 6, 7, 8
United States v. *Allen*, 924 F.2d 29 (2d Cir. 1991)....9
United States v. *Komisaruk*, 885 F.2d 490 (9th Cir. 1989)....11
United States v. *LaValley*, 957 F.2d 1309 (6th Cir.), cert. denied, 506 U.S. 972 (1992)....9, 10
United States v. *McCoy*, 866 F.2d 826 (6th Cir. 1989)....9, 10
United States v. *Parker*, 651 F.3d 1180 (2011)....10
United States v. *Ventura-Meléndez*, 275 F.3d 9 (1st Cir. 2001)....9

Constitution and statutes: Page

U.S. Const. Amend. I 5, 6, 8
Act of Mar. 4, 1909, Pub. L. No. 60-350, ch. 21, § 45, 35 Stat. 1097 3
Act of Mar. 28, 1940, Pub. L. No. 76-445, ch. 73, 54 Stat. 80 3
Act of June 25, 1948, Pub. L. No. 80-772, ch. 645:
§5, 62 Stat. 685 3
§ 1382, 62 Stat. 765 3
15 U.S.C. 3603(3) 7
18 U.S.C. 5 3
18 U.S.C. 793(a) 7
18 U.S.C. 1382 .....*passim*
50 U.S.C. 797 11
50 U.S.C. 797(a)(4)(A) 11

Miscellaneous:

H.R. Rep. No. 3190, 80th Cong., 1st Sess. (1947) 3
1 Restatement (Third) of Property (Servitudes) (2000) 4
S. Rep. No. 739, 76th Cong., 1st Sess. (1939) 3

In the Supreme Court of the United States

No. 12-1038

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Section 1382 of Title 18 prohibits any person from reentering a military installation "within the jurisdiction of the United States" after having been ordered not to reenter by a commanding officer. Respondent concedes (Br. in Opp. 2, 4, 7, 13) that the express requirements of Section 1382 are satisfied here: following a valid barment order, respondent repeatedly reentered a federal military base within federal jurisdiction. Respondent nevertheless defends the decision below, which read into Section 1382 a requirement of exclusive possession that by respondent's own admission "does not appear in the statute." *Id.* at 17. The decision below is thus demonstrably incorrect, and it should not evade review on the theory that the government's petition seeks only error correction. See *id.* at 5. The court's erroneous interpretation of Section 1382 has created a conflict in the courts of appeals, and the Ninth Circuit's approach threatens substantial harm to the safe and orderly operation of

many of this Nation's military installations. This Court's review is warranted.

A. The Decision Below Is Incorrect

1. Respondent acknowledges that the statutory requirements of Section 1382 are met here if "any federal jurisdiction is sufficient." Br. in Opp. 7. "[I]t cannot be disputed," respondent admits, "that [he] was geographically within an area subject to the jurisdiction of the United States the times he was arrested." *Id.* at 13. Moreover, respondent concedes that "the letter of [Section] 1382 makes no mention of control or its exercise by the government." *Id.* at 17. As respondent puts it, "the exclusive-possession requirement * * * does not appear in the statute." *Ibid.* That is not a cause for concern for respondent, because in his view courts have and should "read extra-statutory requirements into [Section] 1382, including the exclusive-possession requirement." *Ibid.*

For the proposition that courts can add requirements to Section 1382 not to be found in its text, respondent cites (Br. in Opp. 17) the dissent in *United States* v. *Albertini*, 472 U.S. 675 (1985). But the Court in *Albertini* made clear that "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *Id.* at 680; see pp. 5-6, *infra*. Here, Section 1382 plainly and unambiguously applies to any unlawful reentry "within the jurisdiction of the United States." By respondent's own admission, "it cannot be disputed" that he was "within an area subject to the jurisdiction of the United States the times he was arrested." Br. in Opp. 13. Accordingly, the judgment below should be reversed. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (This Court "ordinarily re-

sist[s] reading words or elements into a statute that do not appear on its face.").

Respondent incorrectly argues (Br. in Opp. 14-15) that on the government's approach the phrase "within the jurisdiction of the United States" is superfluous. As originally enacted in 1909, the statute did not contain any jurisdictional element; it simply prohibited reentry following barment from any military reservation. See Act of Mar. 4, 1909, Pub. L. No. 60-350, ch. 21, § 45, 35 Stat. 1097. The question arose, however, whether the statute applied to the outlying possessions of the United States. See S. Rep. No. 739, 76th Cong., 1st Sess. 1 (1939). In 1940, Congress amended the statute to make clear that it applied "within the territory or jurisdiction of the United States, including the Canal Zone, Puerto Rico, and the Philippine Islands." Act of Mar. 28, 1940, Pub. L. No. 76-445, ch. 73, 54 Stat. 80. Then in 1948, when Congress codified the statute at 18 U.S.C. 1382, it removed the references to "territory" and "Canal Zone, Puerto Rico, and the Philippine Islands." See Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, § 1382, 62 Stat. 765. Congress did so because, with the exception of the Canal Zone, those areas were covered by the definition of "United States" that Congress contemporaneously adopted in Section 5 of Title 18. See H.R. Rep. No. 3190, 80th Cong., 1st Sess. A102 (1947); see also § 5, 62 Stat. 685 (1948). The phrase "within the jurisdiction of the United States" in Section 1382 is thus not superfluous. In conjunction with the broad definition of "United States" in Section 5, the phrase extends Section 1382 to military bases that are outside U.S. borders but that are nevertheless subject to U.S. jurisdiction.

2. Contrary to respondent's contention (Br. in Opp. 7-11), the federal government's grant of a roadway

easement across Vandenberg does not alter the analysis. The easement 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 1382) otherwise permits individuals to travel through that area. Respondent is simply incorrect that the easement confers an absolute right of use and occupation that is not subject to federal, state, and local law. See, *e.g.*, *RKO-Stanley Warner Theatres, Inc.* v. *Mellon Nat'l Bank & Trust Co.*, 436 F.2d 1297, 1300 n.6 (3d Cir. 1970) (A public easement is "subject to power in the state to regulate or forbid altogether [the permitted activity] for the public benefit."); 1 Restatement (Third) of Property (Servitudes) § 3.1 cmt. c (2000) ("Many federal, state, and local statutes and other governmental regulations prohibit or restrict the use of servitudes."); *ibid.* ("[A] servitude that authorizes a use prohibited by zoning is illegal or unenforceable to that extent.").

Even assuming the easement were relevant, respondent recognizes (Br. in Opp. 8) that the use of an easement may be made subject to conditions by the grantor. Here, the easement expressly provides that the roadway's "use and occupation * * * shall be subject to such rules and regulations as the [base commander] may prescribe from time to time in order to properly protect the interests of the United States." C.A. E.R. 65. Vandenberg's base regulations say the same thing as Section 1382: anyone barred from Vandenberg may not reenter the base. See *id.* at 59. Respondent is left to argue (Br. in Opp. 10) that base regulations may regulate conduct on the easement but may not exclude anyone from the easement. That distinction has no basis in the language of the government's reservation of rights. Nor would it make sense for the gov-

ernment to have surrendered the authority to exclude: without that authority, the government often will lack an effective remedy for unlawful and disruptive conduct.

3. Respondent defends (Br. in Opp. 29-38) the judgment below on the alternative ground that his conduct was protected by the First Amendment. As respondent recognizes (*id.* at 5 n.22), the court of appeals did not reach that ground. Respondent does not provide any reason why this Court should depart from its usual practice of reversing the court of appeals' incorrect statutory holding and permitting that court to consider respondent's constitutional claim on remand. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 n.7 (2005); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). In any event, as the government explained in its petition (at 11 n.5), respondent's First Amendment argument lacks merit for the reasons given by the district court. See Pet. App. 11a-14a. Even assuming that the designated protest area at Vandenberg qualifies as a limited public forum, this Court held in *Albertini* that "Section 1382 is content-neutral and serves a significant [g]overnment interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security." 472 U.S. at 687.

B. The Decision Below Is In Conflict With Decisions Of This Court And Other Courts Of Appeals

The decision below conflicts with this Court's decision in *Albertini*, as well as with decisions of the First, Second, and Sixth Circuits. Respondent avoids a conflict only by misdescribing those cases and their holdings.

1. In *Albertini*, defendant James Albertini attended an open house at a military base years after having been barred from reentering that base, for which he was convicted of violating Section 1382. See 472 U.S. at 677.

Although Albertini challenged his conviction on First Amendment grounds, the Court asked the parties to address the predicate question of whether Albertini's conduct was covered by Section 1382. See *id.* at 680-681. Albertini argued that his conduct was not covered by the statute for three reasons: he had reentered the base long after being ordered not to return; at the time of his reentry, the base was open to the general public for purposes of its open house; and he was allegedly unaware that his conduct violated the previous barment order. See *id.* at 681.

This Court rejected all three efforts to engraft an extratextual limitation onto Section 1382. "First," the Court reasoned, "nothing in the statute or its history supports the assertion that [Section] 1382 applies only to reentry that occurs within some 'reasonable' period of time." 472 U.S. at 682. Thus, even assuming "most prosecutions * * * have involved reentry within a year after issuance of a bar order," that fact would not "justif[y] engrafting onto [Section] 1382 a judicially defined time limit." *Ibid.* The Court further reasoned that Section 1382 "applies during an open house," because "[t]he language of the statute does not limit [Section] 1382 to military bases where access is restricted." *Ibid.* Finally, the Court held that Section 1382 does not require the specific intent to violate a barment order: the statute "does not contain the word 'knowingly' or otherwise refer to the defendant's state of mind." *Id.* at 683.

The decision below adds an extratextual requirement to Section 1382 and is therefore irreconcilable with *Albertini*. The *Albertini* Court made clear that, in interpreting Section 1382, lower courts should "follow the plain and unambiguous meaning of the statutory language" rather than "engraft[] onto" the statute "judi-

cially defined" limits. 472 U.S. at 682. Here, the court of appeals did exactly what *Albertini* forbids. The court engrafted onto Section 1382 a limit that the statute does not contain—*i.e.*, a requirement of exclusive ownership or possession. Congress specified that the statute applies whenever the defendant's reentry is "within the jurisdiction of the United States," without saying anything about exclusive possession. Congress well knows how to provide that limitation. See, *e.g.*, 15 U.S.C. 3603(3) (defining common areas of certain housing projects to be spaces not designated "for exclusive possession or use"); cf. 18 U.S.C. 793(a) (prohibiting the gathering of defense information from, *inter alia*, any area "within the exclusive jurisdiction of the United States").

Respondent argues (Br. in Opp. 16) that, no matter what the Court in *Albertini* said, in fact it departed from the statutory text. According to respondent, the Court read into Section 1382 a requirement that an existing barment order must be valid in order to sustain a prosecution under the statute. See *ibid.* (citing *Albertini*, 472 U.S. at 682). Respondent infers that it was therefore permissible for the Ninth Circuit to read into Section 1382 a requirement of exclusive possession. But in noting that an existing barment order must be valid, *Albertini* interpreted the actual text of the statute. The Court concluded that a defendant has been "ordered not to reenter," 18 U.S.C. 1382, only if the commanding officer's order is valid at the time of a defendant's reentry. That act of interpreting the statute's actual text does not remotely license courts of appeals to supplement that text as they see fit.

Respondent points (Br. in Opp. 17) to *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam), in which this Court summarily reversed a conviction under Section

1382. The defendant in *Flower* was distributing leaflets on a public street within a military base from which he had previously been barred. See *id.* at 197-198. The Court set aside the conviction because "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. *Flower* thus "establishes that where a portion of a military base constitutes a public forum because the military has abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression, a person may not be excluded from that area on the basis of activity that is itself protected by the First Amendment." *Id.* at 685-686 (internal citation omitted).

That proposition is of no help to respondent. The Court in *Flower* did not question that the defendant's conduct was covered by Section 1382; the Court adjudicated only a *constitutional* challenge, not a *statutory* one. If anything, *Flower* confirms that the court of appeals erred in requiring the government to show exclusive possession of the designated protest area at Vandenberg. Nothing in *Flower* suggests that the federal government had exclusive possession of the public street at issue there. Nor does *Flower* lend any support to respondent's First Amendment argument, because Vandenberg's designated protest area is not a traditional public forum and the base commander has not "abandoned any right to exclude" individuals like petitioner who are subject to valid barment orders. *Albertini*, 472 U.S. at 685. Indeed, the Vandenberg base commander has actively sought to exercise that right, and only the court of appeals' incorrect statutory holding has prevented him from doing so.

2. The decision below is also in conflict with decisions of the First, Second, and Sixth Circuits. As the government explained in its petition (at 13-14), those circuits have rejected an exclusive-possession requirement. They have held that Section 1382 "requires only that the government demonstrate either a possessory interest in, or occupation or control of, the area reserved by the military." *United States* v. *Ventura-Meléndez*, 275 F.3d 9, 17 (1st Cir. 2001); see *United States* v. *Allen*, 924 F.2d 29, 31 (2d Cir. 1991) (per curiam); *United States* v. *LaValley*, 957 F.2d 1309, 1313 (6th Cir.), cert. denied, 506 U.S. 972 (1992); *United States* v. *McCoy*, 866 F.2d 826, 830 (6th Cir. 1989). On the approach taken by three other courts of appeals, the government would prevail because it owns the property at issue.

Respondent is correct (Br. in Opp. 21) that because the federal government did not own the underlying lands at issue in *Ventura-Meléndez* and *Allen*, the First and Second Circuits relied on the occupation-or-control prong rather than the possessory-interest prong. See *Ventura-Meléndez*, 275 F.3d at 17; *Allen*, 924 F.2d at 31. But the First and Second Circuits did not suggest—and there is no reason to posit—that the government should have less authority to enforce Section 1382 *when it actually owns* the land at issue. Moreover, the Air Force has policed the easement across Vandenberg just as the Navy policed the danger zone waters in *Ventura-Meléndez*, see 275 F.3d at 17-18, and the security zone waters in *Allen*, see 924 F.3d at 31. Thus, even if occupation and control (but not possession) were the sole test, the government could satisfy it.

Respondent has no persuasive way to distinguish the Sixth Circuit's decisions in *LaValley* and *McCoy*. In each case, the defendant was cited for violating Section

1382 in an area of a military base subject to a roadway easement. And in each case, the Sixth Circuit upheld the defendant's conviction on the ground that "an easement * * * did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred." *LaValley*, 957 F.2d at 1313; see *McCoy*, 866 F.2d at 830-831 & n.4. That same reasoning would dictate that respondent's convictions be upheld. Indeed, the Sixth Circuit in *McCoy* rejected the Ninth Circuit's exclusive-possession requirement, see 866 F.2d at 830-831 & n.4, and both the Ninth Circuit and respondent have acknowledged the conflict between that court's approach and *McCoy*, see *United States* v. *Parker*, 651 F.3d 1180, 1183 n.2 (2011); 11-50003, Doc. No. 41, at 17 (9th Cir. Aug. 17, 2012) (recognizing that in *McCoy* "the Sixth Circuit dismissed the Ninth Circuit's * * * exclusive right of possession requirement"). This Court's review is warranted to resolve that conflict.

C. The Decision Below Is Settled Circuit Law That Threatens Substantial Harm To The Safe And Orderly Operation Of Many Of This Nation's Military Installations

Respondent agrees (Br. in Opp. 18-19) with the government that the decision below is settled circuit law. See Pet. 16-17. Respondent also agrees that the decision below puts base commanders to an "all-or-nothing" choice, Br. in Opp. 11: they must restrict access to civilian traffic altogether or tolerate disruptive and even dangerous conduct by repeat offenders who refuse to comply with base rules and regulations. See Pet. 14-16. Respondent doubts (Br. in Opp. 28-29) that easements run near sensitive areas of military installations. But in light of the fact that many major military bases contain easements, see Pet. 15, it is likely that easements can and do run near sensitive areas. Moreover, proven vio-

lators in even nonsensitive areas remain a threat to enter the base and cause harm to persons or property. Cf. *United States* v. *Komisaruk*, 885 F.2d 490, 491 (9th Cir. 1989) (defendant entered Vandenberg and vandalized a space shuttle navigational system).

Finally, respondent argues (Br. in Opp. 10-11) that the government may rely on its authority under 50 U.S.C. 797 to fine or imprison anyone who "willfully violates any defense property security regulation." But Section 797 applies to certain property "subject to the jurisdiction, administration, or in the custody of the Department of Defense." 50 U.S.C. 797(a)(4)(A). Respondent does not say why on his interpretive approach Section 797 would not also be subject to an "extra-statutory" requirement of exclusive possession or control. Br. in Opp. 17. Assuming, however, that it is not, then respondent's view is that the government can fine and *imprison* him for violating his barment order—but it cannot take the lesser step of fining and *excluding* him for precisely the same conduct. That simply does not make any sense.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MAY 2013