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 FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether it violates the First Amendment for a person who was previously barred from a military installation to be convicted under 18 U.S.C. §1382 for peacefully protesting on a fully open public street, which has been designated as a public protest area, on federal property outside the closed military installation.

2. Whether a person who was previously barred from a military installation may be convicted under 18 U.S.C. §1382 for peacefully protesting on a public roadway easement on federal property outside the closed military installation.

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STATEMENT OF FACTS

Dennis Apel was convicted of reentry under 18 U.S.C. §1382 for engaging in peaceful speech activities on a public highway *outside* of a closed military installation, though on land owned by the federal government. Vandenberg Air Force Base ("Vandenberg") is a military base located in Santa Barbara County, about nine miles northwest of the city of Lompoc. It is a closed base in the sense that a person has to enter it through gates that are guarded and there is a green line outside of those gates that Vandenberg has marked as the point at which the base officially begins.

This case involves peaceful speech that occurred entirely outside of the closed installation and on the public side of the green line on a major public road in an area that is officially designated as a protest area. The United States also owns land surrounding the closed installation, including land used for two public highways, Highway 246 and Highway 1. Brief for the Petitioner [hereinafter "U.S. Br."] 3. This case involves speech on Highway 1.

Highway 1 is commonly known as the Pacific Coast Highway, and as its name suggests, it runs throughout California along the coast. The portion of Highway 1 overlying United States property is used by the public to reach Lompoc and Santa Maria. J.A. 64, ¶2. Directly across from Vandenberg's main gate entrance, on the shoulder of Highway 1 and on federally owned land, is a public middle school.

Court of Appeals Excerpts of Record 8 [(hereinafter "C.A.E.R.").

Since 1962, the State of California and the County of Santa Barbara have held an easement and a public right of way over the stretch of Highway 1 that overlaps with the property of Vandenberg Air Force Base. J.A. 35-38. This area of overlap between Highway 1 and Vandenberg is under the concurrent jurisdiction of the State, the County, and the military, with the State and County assuming primary law enforcement authority over the area. J.A. 40; C.A.E.R. 8, 167. This is a completely public road. Access onto the easement is open and uncontrolled. J.A. 78-79. There are no gates or sentries at either end of the easement, or anywhere along the road that travels it. *Id.* Traffic flows freely in both directions at all hours, and traffic lights are situated along the intersections. J.A. 74, 78-79. There are no signs indicating that this stretch of Pacific Coast Highway is different from any other in California or that it is federal land.

Within the area of the easement and just outside the main gate entrance of the closed base is a small area set aside by Vandenberg for public protests, pursuant to a base policy which dates back to 1989.[1]

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[1] That policy states in full:

> People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the Intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force

(Continued on following page)

J.A. 50; C.A.E.R. 2, 7. This "designated protest area" is bounded by Highway 1, Lompoc-Casmalia Road, and a painted green line across California Boulevard, which together with Highway 1 and Lompoc-Casmalia Road, form the intersection at the main gate of Vandenberg. J.A. 52-53, 57, 74.

The painted green line on California Boulevard separates the closed military installation from the open public road that is Highway 1. J.A. 91; C.A.E.R. 7-8, 261-62. The green line is the installation's boundary; that is where the easement ends and the installation begins. *Id.* Similarly, at the green line, concurrent jurisdiction of the State and County ends; exclusive military jurisdiction and control begins. *Id.* In addition, the green line marks the start of California Boulevard, an access road that leads to

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> Base, California. The Air Force is obligated to insure that peaceful protests do not result in unsafe vehicle and people congestion around the Main Gate. If necessary, restrictions may be placed on peaceful protesters who encumber the roadways or engage in activities which can result in unsafe conditions for themselves or others. Protest demonstrations may be curtailed in this area when they materially interfere with or have a significant impact on the conduct of the military mission of the U.S. Air Force.

Vandenberg adopted this policy statement pursuant to the stipulated settlement of a lawsuit in federal court, *Fahrner v. Olivero*, CV 88-05627-AWT(Bx). J.A. 45-50. Issuance of the policy statement was an express term of the settlement. J.A. 46, ¶4. The settlement was approved by Judge A. Wallace Tashima and filed upon his order. C.A.E.R. 52. Thus, the agreement remains judicially enforceable.

Vandenberg's inner controlled entry gate, approximately 200 yards away. J.A. 79. Moreover, the Air Force's own description of Vandenberg is clear that the closed base is defined by the green line: "Vandenberg AFB is a closed base and non-military and non-DoD personnel are prohibited from entering the installation without the express permission of the installation commander or his/her designee." J.A. 57. The public roads outside of the base are not, by this definition, part of the closed installation.

Just behind the green line, down the California Boulevard access road, a visitors' center receives members of the public wishing to visit the base. J.A. 79. Behind the visitors' center there is a public bus stop serviced by the City of Santa Maria. J.A. 79; C.A.E.R. 8. Past the visitors' center, the access road continues until it arrives at the inner gate, which consists of a guard shack and barricade. *Id.* This is where visitors and Air Force personnel gain "formal entry into the base." *Id.* Beyond this formal controlled-access entry point lies the base proper and all its operations and facilities, including its missile- and space-launch centers. U.S. Br. 2.

On the other side of the green line is Highway 1. C.A.E.R. 7-8. All of the speech activity that gave rise to this case occurred in this area: a small segment of the Pacific Coast Highway running outside and past the closed installation at Vandenberg Air Force Base. C.A.E.R. 8-9. More specifically, the speech occurred in the designated protest area that is located on the highway. *Id.*

Dennis Apel has been a visitor to the designated protest area at Vandenberg for 14 years, joining in peaceful protests to the military's activities. C.A.E.R. 144. Apel has twice been issued letters barring him from entering the Vandenberg installation, the first time in 2003 for trespassing and vandalizing base property, and the second time in 2007 for trespassing. J.A. 59-66 (barment orders).

On three separate occasions in 2010, Apel entered the designated protest area on Highway 1 to engage in peaceful demonstrations; he did not cross the green line or enter the closed part of the military installation. On each occasion, Apel was cited for violating 18 U.S.C. §1382 and escorted away. C.A.E.R. 8-9. He conducted himself peacefully at all times, did not interfere with traffic or military operations, and left without incident after being cited. *Id.* The United States does not dispute this. Nonetheless, Apel was convicted before a magistrate judge of three counts of violating 18 U.S.C. §1382 for reentering the designated protest area after having been previously barred from the base for trespassing. C.A.E.R. 1-2.

The district court affirmed and Apel appealed. Pet. App. 1a-2a, 5a-15a. Relying on its recent decision in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), the Ninth Circuit reversed Apel's convictions. The Court of Appeals held that the existence of a public road easement over the area of Apel's alleged reentry deprived the government of the exclusive right of possession necessary to sustain a conviction under §1382. Pet. App. 1a-2a. The government petitioned for

rehearing en banc. Pet. App. 3a-4a. The petition was denied. *Id.*

SUMMARY OF ARGUMENT

Dennis Apel was convicted of violating 18 U.S.C. §1382 for speech that occurred on a public road, Highway 1, in an area which has been officially designated by Vandenberg as a protest area. Section 1382 was deemed applicable to Apel's peaceful protest activity solely because this stretch of Highway 1 is owned by the federal government, even though an easement has been granted for its public use to the State of California and the County of Santa Barbara. The area where Apel was protesting is outside of the closed military installation at Vandenberg Air Force Base; all of Apel's speech activities for which he was convicted were on the public side of the green line separating the closed base from the area that is freely open to the public.

The decision reversing Apel's convictions should be upheld for two reasons. First, Apel's convictions violate the First Amendment. Public roads, such as Highway 1, long have been recognized as quintessential public forums. *Schneider v. State*, 308 U.S. 147, 163 (1939); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). At the very least, this stretch of Highway 1 is a designated public forum because the government, pursuant to a consent decree, has opened it to speech and protest activities. J.A. 45. Apel's peaceful speech,

on a street that is a traditional public forum or at least a designated public forum, is protected by the First Amendment.

Prior decisions of this Court have upheld convictions under §1382 for speech activities occurring *within* the confines of a closed military installation. *United States v. Albertini*, 472 U.S. 675 (1985). But never has this Court upheld a conviction under §1382 for speech occurring *outside* of a closed installation merely because the military owns the land on which the speech occurred. Quite the contrary, in *Flower v. United States*, 407 U.S. 197, 198 (1972), this Court held that §1382 did not apply when the speech occurred on a public road, even though the road was on land owned by the United States.

Second, the Court of Appeals correctly interpreted §1382 as applying only to land over which the United States has exclusive possession and control. By its express terms, §1382 applies to "military installation[s]." Contrary to the government's assertion, that term has never been understood to include all land owned by the military regardless of how it is used. Rather, a military installation is defined by the fact that it is land the government uses for military purposes. For that reason, a "military installation" also has clearly defined boundaries and is subject to military control. Prior to this case, even the government recognized as much, as the Air Force has consistently construed the language of §1382 to require exclusive possession and control by the military.

A public road outside of a closed installation, even on land owned by the military, is not a part of the "installation" and not under the control of the commander. At the very least, any doubt over the meaning of §1382 must be resolved in Apel's favor, as the statute must be interpreted to avoid the serious constitutional problems raised by the government's view and because under the rule of lenity a criminal statute's ambiguity must be decided in favor of a criminal defendant.

Finally, there is no foundation for the government's claim that national security would be compromised if §1382 is interpreted to require exclusive government possession and control. Vandenberg is a closed installation that must be entered through a guard gate. Highway 1, and the designated protest area, are outside of this installation and on the side of the green line that delineates public space. No sensitive military activities occur in that public area. If they did, the base commander would be required by law to include it in the area of the controlled military installation. The government offers no reason to believe that the closed, guarded perimeter is not sufficient to protect military security. Moreover, the government's interpretation of §1382 is unnecessary because there are a plethora of other federal laws and state statutes that could be used to punish any harmful behavior.

Apel was arrested and convicted for exercising his constitutional right to peacefully protest the

military's activities. Neither the First Amendment nor §1382 permits this result.

ARGUMENT

I. The Decision Below Should Be Affirmed Because Dennis Apel's Conviction Violated the First Amendment.

Dennis Apel was convicted for engaging in speech on a busy public road, in a designated protest area, outside of the closed installation at Vandenberg Air Force Base. His convictions violate the First Amendment. At the very least, this Court must interpret §1382 to avoid the serious constitutional questions that would arise under the government's expansive interpretation of the statute.

A. Apel Was Convicted for Engaging in Peaceful Speech in a Traditional Public Forum.

At the time of his arrests, Apel was peacefully demonstrating against the military's policies in the designated protest area beside Highway 1. He was on the public road outside of the closed military base and outside of the green line that the military has designated as the perimeter of the base. There can be no dispute that Apel was engaged in First Amendment activity. *United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing . . . [is an] expressive activit[y]

involving 'speech' protected by the First Amendment.").

Apel was protesting in a place where the First Amendment has particular force: a public street. This Court long has stressed that "[s]treets are natural and proper places for the dissemination of information and opinion." *Schneider v. State*, 308 U.S. 147, 163 (1939). In *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), this Court famously explained:

> Wherever the title of streets and parks may rest, they 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 thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Thus, the law is clear that "[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." *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

The stretch of Highway 1 adjacent to Vandenberg's main gate entrance is, by any measure, a public street. Everywhere else along its route, which includes most of the Pacific coastline, Highway 1 is a public street. This particular segment of Highway 1 is no different merely because it happens to be on federally owned land adjacent to the closed installation at Vandenberg. Motorists and pedestrians travel this

portion of Highway 1 just as freely as they traverse it throughout the state. There are no gates or sentries at the points of entry, or checkpoints anywhere in between. There are no signs indicating that it is a place where speech is restricted in any way, or that anything is different about this stretch of Highway 1 compared to the rest of its length in California. People come and go as they please.

The government properly identifies *Flower v. United States*, 407 U.S. 197 (1972), and *United States v. Albertini*, 472 U.S. 675 (1985), as the decisions of this Court applying §1382 in the context of peaceful expression on military bases. U.S. Br. 27. However, *Albertini* is readily distinguishable because it involved speech *on the military base*, whereas this case involves speech on a public road *outside* of the closed base. The critical and controlling precedent is *Flower*.

In *Flower*, the Court summarily reversed the conviction under §1382 of a civilian who was subject to a bar order and "quietly distribut[ed] leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio." *Id.* at 197. Like Highway 1, New Braunfels Avenue "was a completely open street." *Id.* Like Highway 1, it "was a public thoroughfare no different than other streets in the city." *Albertini*, 472 U.S. at 684-85 (describing the facts in *Flower*). No sentry or guard was posted at either entrance or anywhere along the street. *Flower*, 407 U.S. at 198. The street was open to unrestricted civilian traffic 24 hours a day. *Id.* Public transit vehicles, including buses, used the street as freely as did private vehicles. *Id.* As this Court held, "Under such

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

The only difference between Highway 1 and New Braunfels Avenue is the manner by which they became public streets. New Braunfels Avenue was a public street because the commander of Fort Sam Houston had left it alone and permitted the public to pass freely through the gated entryway and into the confines of the installation. *United States v. Flower*, 452 F.2d 80, 90 (5th Cir. 1972). Highway 1, which is *outside* the gates and confines of Vandenberg's installation, is a public street because the Air Force ceded it to the public for that very purpose by granting an easement to the State and the County over 50 years ago. J.A. 35-38. If New Braunfels Avenue was a public street, Highway 1 is even more so. This Court was emphatic that "[t]he First Amendment protects petitioner from the application of §1382 under conditions like those of this case." *Flower*, 407 U.S. at 199.

In sharp contrast, *Albertini*, upon which the government relies, did not involve speech on a public road outside a military base, but instead was about expression *on* a closed military base. An open house was held on Hickam Air Force Base in Hawaii and Albertini, who was subject to a bar order, was convicted because he "reentered" the base during the

time of the open house. *Albertini*, 472 U.S. at 680. In concluding that §1382 applies "to open houses on military bases," this Court emphasized that it was considering a situation of "reentry to closed military bases." *Id*. at 682. The Court also emphasized the limits of its holding by carefully distinguishing between *Albertini* and *Flower*. In the Court's words: "*Flower* 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 685-86 (internal citations omitted). That is exactly this situation: the military has relinquished any right to limit civilian traffic on Highway 1 and even has designated it as a protest area.

Flower and *Albertini* thus draw a common sense distinction, which is controlling in this case: peaceful speech on a public road outside of a closed military base, though federal land, cannot be banned based on a bar letter; but the government may apply a bar letter to prohibit speech on the closed base itself, even during an open house.[2]

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[2] In fact, the United States has urged this Court to adopt exactly this distinction. In its brief to this Court in *Albertini*, the United States declared: "We note, in addition, that respondent has 'substantial alternative' means of expressing his views. He has the same rights as any other member of the public for

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This distinction is in accord with decades of Supreme Court decisions holding that public streets are the quintessential public forums. "'Public places' historically associated with the free exercise of expressive activities, such as streets . . . are considered, without more, to be 'public forums.'" *Grace*, 461 U.S. at 177. As this Court has declared, public streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Highway 1 is such a public forum.

It does not matter that Highway 1 is a public street only by virtue of an easement. It is no less a public forum for purposes of the First Amendment. As the Tenth Circuit has stated, "Easements are . . . constitutionally cognizable property interests. . . . [H]olding that an easement cannot be a forum would lead to the conclusion that many public streets and sidewalks are not public fora. Public highways or streets are often easements held for the public, with title to these property interests remaining in abutting property owners." *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122-23 (10th Cir. 2002). Thus, the Air Force may own the land crossed by Highway 1, but its mere title to that land cannot divest the street of the public

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example, *to engage in a demonstration just outside the gate of a military installation*." Brief for the United States, *Albertini*, 1985 WL 669820 (U.S.), 34 n.15 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53-54 (1983) (emphasis added)).

character afforded it by the easement. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 947 (9th Cir. 2001) ("The mere retention of some property interest in the parcel does not affect the public nature of the dedicated use of the sidewalk.").

Nor does it matter that Highway 1 abuts a closed military installation. A public street remains a public forum even when, as here, it is adjacent to non-public land. As this Court declared: "Traditional public forum property occupies a special position in terms of First Amendment protection *and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression*." *Grace*, 461 U.S. at 180 (emphasis added). In *Grace*, this Court held that the public sidewalks forming the perimeter of the Supreme Court's grounds are a public forum, even though the Supreme Court building and its grounds abutting the sidewalks "had not been traditionally held open for the use of the public for expressive activities." *Id.* at 178.

Relying on this Court's decision in *Greer v. Spock*, 424 U.S. 828 (1976), the government argues that Highway 1 is not a traditional public forum because it is part of a military base. *See* U.S. Br. 4, 27. *Greer* did not involve, and this Court did not discuss, §1382. As a matter of statutory interpretation, for the reasons set forth in Part II below, the government's reading of §1382 is incorrect. But, even if Highway 1 is included in what is covered by §1382, the government could

not unilaterally deprive the road of its public character simply by classifying it as part of a non-public forum parcel of property. *Grace*, 461 U.S. at 180 (holding that the inclusion of the sidewalks surrounding the Supreme Court within the statutory definition of non-public "Supreme Court grounds" did not deprive the sidewalks of traditional public forum status). Rather, the Court must look to the objective characteristics of the road to determine whether it functions like a traditional public street. *Id.*; *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). *Greer* held that the roads and sidewalks located *within* Fort Dix, over which the Federal Government exercised exclusive jurisdiction, did not qualify as traditional public forums. 424 U.S. at 830, 837. But as this Court subsequently made clear, *Greer*'s holding hinged on the fact that "the streets and sidewalks at issue were located *within* an enclosed military reservation . . . and were thus separated from the streets and sidewalks of the city itself." *Grace*, 461 U.S. at 179 (emphasis added).

Here, the situation is entirely reversed. Unlike the roads in *Greer*, Highway 1 is clearly located outside of the closed military installation. There is even a green line painted on the ground to make clear to all where the public road ends and the closed military base begins. The roadway itself is not closed in any way, and traffic is unimpeded. There are no gates, sentries, or checkpoints to suggest the road is anything other than an ordinary public road. It lies on an unenclosed and uncontrolled portion of federally owned land.

Like the sidewalks in *Grace* and the public road in *Flower*, the portion of Highway 1 at issue here is indistinguishable from any portion of Highway 1, or other public road, not on federally owned land. Apel's peaceful speech on such a public road cannot be punished without violating the First Amendment.

B. At the Very Least, Apel's Speech Occurred in a Designated Public Forum.

In the alternative, the protest area where Apel was demonstrating is a designated public forum. A "designated" public forum is a place that the government could close to speech, but one that the government voluntarily and affirmatively opens to speech. The Court has recently explained that governmental entities create designated public forums when "'government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose; speech restrictions in such a forum 'are subject to the same strict scrutiny as restrictions in a traditional public forum.'" *Christian Legal Society v. Martinez*, 130 S.Ct. 2971, 2984 n.11 (2010) (citations omitted).

Designated public forums are created by purposeful governmental action. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. at 677. Government intent is the key factor in determining whether a designated public forum has been created. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S.

788, 802 (1985). That intent must be discerned from the government's policy and practice. *Id*.

Here, the government's intent to create a designated public forum could not be clearer. Vandenberg's 1989 Policy Statement provides in relevant part: "People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the Intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force Base, California." J.A. 46, ¶4.

Vandenberg has consistently observed this policy statement since its adoption 24 years ago. The government does not argue otherwise. The policy and practice of the government evinces a plain intent to create a designated public forum in the designated protest area. Indeed, it is difficult to imagine a clearer or more explicit creation of a designated public forum.

C. The Application of §1382 to a Public Road Outside a Closed Military Base Serves No Significant Government Interest.

In either a traditional public forum or a designated public forum, "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a

significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. at 177 (internal quotation marks and citation omitted). Therefore, Apel may be convicted under §1382 for his speech activities on Highway 1 only if the government has an important interest in enforcing the statute against him.

Highway 1 is a public road that travels across military-owned property but is outside the boundaries of the installation. This road is outside the green line, outside the main gate entrance, outside the controlled access entry point, and outside the enclosed installation that is Vandenberg proper. Further, it lies on an easement given to the concurrent jurisdiction of the State and County for exclusive public use. Excluding Apel from a public road such as this serves no identifiable government interest. The government cites security. U.S. Br. 22-26. But it speaks to this interest in generalities and shows no harm whatsoever risked by Apel's peaceful protests on Highway 1.[3] The government introduced no evidence at trial to support this contention, and the record contains none. As aptly expressed by Justice Marshall, "[T]he First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. Those interests cannot

[3] The government's argument that §1382 should be applied to a public road that has been designated as a protest area outside of a closed military installation because of concerns over national security is discussed below in Section II.D.

be invoked as a talismanic incantation to support any exercise of power." *Greer*, 424 U.S. at 852-53 (Marshall, J., dissenting).

Under the terms of the bar order, Apel was allowed to travel on Highway 1, but not to engage in peaceful protest. J.A. 64. The government has not shown, and cannot show, that Apel's peaceful speech activities on Highway 1 threatened base security or that Apel's exclusion helped maintain it. *See Grace*, 461 U.S. at 182 ("There is no suggestion . . . that appellees' activities in any way obstructed the sidewalks or access to the [Supreme Court] Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds."). Absent that showing, Apel's mere proximity to the base as a result of his presence on an adjoining public street cannot give rise to a significant government interest in security.

There is no plausible argument that excluding barred civilians from a public street that is *outside* an enclosed military base, and outside the green line which the military has drawn for the base, serves a significant government interest. The government, of course, can draw the green line and put the guard gate wherever it needs to in order to fulfill its functional and security needs. This case is not *Greer*, where all the roads at issue were *inside* the enclosed military reservation. *Greer*, 424 U.S. at 830. Nor is this case *Albertini*, where the barred defendant used the occasion of an open house event to make his way

inside the gates of a normally closed military base. *Albertini*, 472 U.S. at 678; *see also United States v. Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011) ("*Albertini* did not address the scenario where a military base or area thereof is *permanently* open to the public by virtue of a public easement.") (emphasis in original).

Even barred, Apel retains the First Amendment right to be present and to speak peacefully on Highway 1, a public road outside Vandenberg's exclusive jurisdiction and beyond the confines of its installation. So long as Apel is on that public road, his peaceful protest activities have the protection of the First Amendment.

D. The Ninth Circuit Decision Should Be Affirmed Based on the First Amendment.

Apel raised the First Amendment as a defense in both the District Court and the Court of Appeals. U.S. Br. 5. Although the Ninth Circuit decided the appeal on statutory grounds without reaching the First Amendment issue, Apel may defend the judgment on any ground properly raised below. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals."); *Langnes v. Green*, 282 U.S. 531, 538-39

(1931) ("But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record.").

The government argues that the First Amendment issue should be remanded to the Ninth Circuit for consideration. U.S. Br. 25. There is no reason for this Court to do so. The issue was raised and fully briefed below. It is therefore completely appropriate for this Court to consider it, even though the Ninth Circuit did not discuss it.

Remanding this case to the Ninth Circuit will gain nothing. A criminal trial already occurred so no further development of the factual record is possible or necessary. The legal issues are not novel or of the sort where this Court would benefit from the consideration of a lower court. This case presents a classic question of First Amendment law and is controlled by this Court's decision in *Flower*.

Apel's conviction cannot stand because it was for peaceful speech on a public road which is clearly protected by the First Amendment.

II. The Decision Below Should Be Affirmed Because Apel's Speech Did Not Violate 18 U.S.C. §1382.

The government contends that §1382 applies expansively to public highways located outside the entrance to closed military installations solely because the United States owns the land. The government asserts that the scope of §1382 is coextensive with the

federal property line and thus applies to all places inside it, regardless of their public character. Under the government's reasoning, §1382 applies to the public school, the Amtrak station and the public beach located on Vandenberg property (J.A. 64, 93), and thereby vests in the installation commander the power to summarily exclude, detain and subject to prosecution civilians he has barred from those places.

Nothing in the text, purpose, or history of §1382 supports the government's broad construction. By its plain terms, §1382 applies to military installations, not public roads, and reentry can be prosecuted only if it occurs on a military installation under military command. Nothing in §1382, or its history, suggests that Congress intended to criminalize entries onto uncontrolled public roads where no military facilities are located and no military operations are performed. And nothing suggests that Congress intended to confer upon military commanders the power to summarily exclude under pain of criminal prosecution civilians who use those roads.

The government contends that the Ninth Circuit has improperly engrafted onto §1382 a requirement that is not found in the statute. That is incorrect. The Ninth Circuit's exclusive possession and control requirement derives directly from the text of §1382 and is used to determine what constitutes a "military installation" under the statute. Moreover, it has been adopted by the Air Force and the United States Attorneys' Manual, and has been applied in various forms without difficulty by the lower courts for nearly 60 years.

Indeed, it is the government that seeks to alter the statute to add public roads to the areas where §1382 applies. No court has ever extended §1382 to uncontrolled public roads permanently dedicated to civilian use, and no court ever has defined "military installations" to include such places.

Furthermore, basic principles of statutory interpretation – such as the need to interpret statutes to avoid constitutional doubts and the rule of lenity – strongly support interpreting §1382 to apply only to property under the exclusive possession and control of the federal government. Finally, contrary to the government's assertion, refusing to apply this misdemeanor law to a public road that the government itself has designated as a protest area outside of a closed military installation would pose no risk to national security.

A. The Text, History, and Purpose of §1382 Support Limiting Its Application to Areas Where the Military has Exclusive Possession and Control and Not to Public Roads Where an Easement for Public Use Has Been Granted.

1. The term "military installation" does not include public highways where no military operations are performed.

By its terms, §1382 applies to reentries upon "military installations" – that is, facilities used for military purposes. Nothing in §1382 applies to entries upon highways used and occupied by the general

public, or other public areas not subject to military control, just because the government owns the underlying land. Rather, the term "military installation" in §1382, and every other term mentioned in the statute, has been traditionally defined in terms of exclusive military possession and control.

As originally enacted, §1382's predecessor was set forth in a Chapter entitled "OFFENSES AGAINST THE OPERATIONS OF THE GOVERNMENT" and provided:

> Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

Act of Mar. 4, 1909, Pub. L. No. 60-350, §45, 35 Stat. 1088, 109.

Congress, in this statute, did not define military reservation, army post, fort or arsenal. Where, as here, a statute does not explicitly define a term, statutory interpretation should be grounded upon "one cardinal canon above all others": ascribing ordinary words their ordinary meaning in keeping with common understanding. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Historically, these terms were commonly defined as property set apart for military

occupation and use. "Post," for example, meant "[a] place where armed men are permanently quartered for defensive or other purposes; a fort. Also (U.S.) the 'occupants, collectively, of a military station: a garrison.'" Oxford English Dictionary 1162 (1933) [hereinafter "OED"]; *see also* 1909 Army Regulations, Art. XXVII, Military Posts and Reservations, Posts, §200 ("Permanent posts will be styled 'forts,' and points occupied temporarily by troops 'camps.'").[4]

"Reservation" was historically defined as land withdrawn from public use and set apart for some exclusive use and occupation. *See* OED 511 ("A tract of land set apart by Government for some special purpose, or for the exclusive use of certain persons, esp. of a native tribe."); Black's Law Dictionary 1010 (1891) ("[A] tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc.") A "military" reservation meant a reservation

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[4] Similarly, "Fort" meant "[a] fortified place; a position fortified for defensive or protective purposes, usually surrounded with a ditch, rampart, and parapet, and garrisoned with troops; a fortress." OED 472; Black's Law Dictionary 512 (1891) (" '[S]omething more than a mere military camp, post, or station. The term implies a fortification, or a place protected from attack by some such means as a moat, wall, or parapet.' "). "Arsenal" meant "[a] public establishment for the manufacture and storage, or for the storage alone, of weapons and ammunitions of all kinds, for the military and naval forces of the country." OED 466; Black's Law Dictionary 91 ("Store-houses for arms; dock-yards, magazines, and other military stores.").

"pertaining to soldiers; used, performed or brought about by soldiers." OED 438.

Thus, the terms all refer to areas under the government's possession and control. None of these terms includes civil roads located outside of places occupied and used by the military – whether it be a post, fort, arsenal, or reservation.

In 1948, Congress codified §1382 and inserted "naval or Coast Guard" between the words "military" and "reservation," and added the terms "yard, station, or installation" to the list of places covered by §1382. It now applies to any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation. The amendment did not change or broaden the nature of the military facilities covered in §1382; it simply added new types of military facilities to the exclusive list of covered properties. Like reservation, post, fort and arsenal, these new terms, in context, relate to nonpublic places that are set apart for specialized occupation and use. At the time of the amendment, "yard" meant an "'enclosure' the particular character of which is to be inferred from the context." OED 15, 16. "Station" meant "[a] place where soldiers are garrisoned, a military post" or "a place at which ships of the Navy are regularly stationed." OED 860.

"Installation" meant "[t]he action of setting up or fixing in position for service or use (machinery, apparatus, or the like); a mechanical apparatus set up or put in position for use." OED 348. Later, it acquired

an additional, more specialized meaning in the military context. *See*, *e.g.*, Merriam-Webster's Collegiate Dictionary 648 (2003) ("[S]omething that is installed for use" as "a military camp, fort or base"); OED (2013) (noting 2009 draft addition defining "installation" as "[a] military or industrial facility, base, or complex.").

In context, then, "installation" contemplates some fixed place or apparatus for use and, like the other places listed in §1382, it is expressly modified by the terms "military, naval or Coast Guard."[5] Thus, "military installation" plainly means a fixed place or apparatus established for military, not public, use.[6]

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[5] "Military" use is, by definition exclusive of public "civil" use. OED 438 (defining "military" as "having reference to armed forces or to the army; adopted to or connected with a state of war; distinguished from civil, ecclesiastical, etc."); Webster's New International Dictionary 1370 (1911) (military means "belonging to, engaged in, or appropriate to, the affairs of war" and "[p]erformed or made by soldiers; supported by armed forces – as opposed to civil.")

[6] While "military installation" is not defined in §1382, other statutory definitions expressly contemplate military activities and facilities; none includes public highways. *See*, *e.g.*, 10 U.S.C. §2801(4) ("'[M]ilitary installation' means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department."); 10 U.S.C. §2687(g)(1) ("'[M]ilitary installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility, . . . Such term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects."); 10 U.S.C. §2667(i)(3) (same definition).

The legislative history supports this narrow reading and indicates that §1382 should not be expansively applied to areas beyond military installations where the military has exclusive possession. Nothing in the legislative history of §1382 indicates that Congress intended to punish civilians on public roads outside the confines of closed military installations. The purpose of §1382 was to exclude spies from forts and arsenals, protect military secrets, and protect soldiers from being taken off the reservation onto illicit places surrounding the encampment. *Albertini*, 472 U.S. at 685 (Stevens, J., dissenting) (explaining legislative history of §1382). In rejecting a proposed amendment to expand the statute to apply to soldiers in national soldiers' homes who were similarly targeted, legislators agreed that the law was designed only to "protect the property of the Government so far as it relates to national defense." 42 Cong. Rec. 689 (1908) (remarks of Mr. Payne). Section 1382 was meant to give base commanders authority only over their military installations and not public roads dedicated to civilian use.

The government contends that §1382 applies to public roads, which are not used for military purposes, located outside the entrance of a closed military installation. It contends that a "military installation" includes any government-owned property designated as such by the military regardless of the actual character of the place. If Congress had intended §1382 to apply so broadly, then it could have made its application expressly coextensive with government

property lines. It did not do so. Every place enumerated in §1382 relates to military occupation and use, not to property boundaries. The government's attempt to broadly apply this statute is unjustified by the text and the legislative backdrop against which this law was enacted.

Thirty-three years before §1382's predecessor was enacted, this Court defined "military station" narrowly and rejected a broad construction of the term. In *United States v. Phisterer*, 94 U.S. 219, 222 (1876), this Court considered whether "military station" included a soldier's home where no military operations took place. This Court noted that the term "station" could be given a broad meaning, but refused to do so, instead recognizing that "station" should be construed in light of its military context and thus given a narrow, technical meaning. *Id.* The Court stated:

> A 'military station' is merely synonymous with the term 'military post,' and means a place where troops are assembled, where military stores, animate or inanimate, are kept or distributed, where military duty is performed or military protection afforded – where something, in short, more or less closely connected with arms or war is kept or is to be done.

Id. The Court thus confined the interpretation of military station and post to places dedicated to military purposes and controlled by the military. The Court accordingly held that the soldier's home,

located in a country village, was not a military post or station because it was not a place controlled or possessed by the military where something closely connected with arms or war was kept or performed. *Id.* at 223.

Consistent with *Phisterer*, "military installation," like "military station," must be construed in accordance with its common meaning and not expansively to include public highways outside an enclosed area where military functions are performed. Moreover, because *Phisterer* was decided decades before Congress acted, it must be presumed that Congress adopted this Court's holding and reasoning. *Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" (citations omitted)). Further, Congress amended §1382 once in 1940 to clarify its territorial scope and again in 1948 to expand the list of covered military places, but it never added any language manifesting an intent to cover public roads where no military functions are performed.

Congress's choice is particularly significant given the long line of cases, starting with *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948), requiring absolute ownership or an exclusive right of possession by the United States as a prerequisite for §1382. *Id.* at 651 ("[P]roof of criminal jurisdiction of the road was not enough. Sole ownership or possession, as against the accused, had to be in the United States or

there was no trespass."). This line of cases includes many holding that the military must exercise control over the area in question to preserve its right to exclude others.[7] Mere title to property without actual possession and control is simply not enough.[8] The

[7] *See*, *e.g.*, *United States v. Vasarajs*, 908 F.2d 443, 446-47 (9th Cir. 1990) (holding *Albertini* supports view that the government must have control, in addition to "absolute ownership, or an exclusive right to the possession" of the property in question, to preserve the right to exclude others pursuant to §1382); *United States v. Mowat*, 582 F.2d 1194, 1206 (9th Cir. 1978) (accepting, in light of precedent, the parties' stipulation that the government "was required to prove, as an element of the offense, absolute ownership or the exclusive right to the possession of the property upon which the violation occurred"); *United States v. Packard*, 236 F. Supp. 585, 586 (N.D. Cal. 1964) (holding that government met burden of establishing "absolute ownership, or an exclusive right to the possession, of the road"), *aff'd*, 339 F.2d 887 (9th Cir. 1964) (affirming "for the reasons stated in the opinion of the trial court."); *Holdridge v. United States*, 282 F.2d 302, 306-08 (8th Cir. 1960) (holding that "exclusive possession of the premises in the government has been appropriately established" where public rights of use in roads traversing a military base was extinguished in condemnation proceeding).

[8] *See*, *e.g.*, *United States v. Renkoski*, 644 F. Supp. 1065, 1066 (W.D. Mo. 1986) (citing *Albertini* for proposition that "[m]ere title to real estate does not allow issuance by the Government of a 'ban and bar' notice. The area in question must be controlled," but affirming conviction where protestors crossed cordoned-off area); *cf. United States v. McCoy*, 866 F.2d 826, 830-32 (6th Cir. 1989) (stating that the "existence of Wurtsmith Air Force base does not depend on the strength of the government's legal title"; thus a military airstrip "possessed and operated by the United States" would be "off limits to anyone barred from the base" regardless of the source of title and affirming conviction where a protestor crossed a line marking the *de facto* boundary of the

(Continued on following page)

exclusive possession and control requirement is not an extra-statutory requirement; rather, it is a means of determining what constitutes a "military installation" within the meaning of §1382. And it is wholly consistent with *Phisterer*'s definition of "military station" that military posts be places where military operations rather than civil functions are performed.

As one commentator observed: "It must be concluded that what Congress intended by the term 'military installation' was closely akin to the definition given by the Supreme Court in *Phisterer*." Lieutenant Colonel Jules B. Lloyd, *Unlawful Entry and Re-Entry into Military Reservations in Violation of 18 U.S.C. §1382*, 53 Mil. L. Rev. 137, 140-41 (1971).

The government provides no authority for the proposition that "military installation" includes public highways. There is none.

2. Installation commanders, under §1382, may summarily bar civilians only from areas within their command, which are military installations in the exclusive possession and control of the military.

Section 1382 confers upon installation commanders the power to exclude civilians from the area of

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installation on the installation driveway that was "'within the control of the military'").

their command – that is, the area they control.[9] Control, in this context, means physical control and dominion over the area of command: the area of the military's right of exclusive possession.

The Vandenberg Air Force Base installation commander does not "command" Highway 1 because he does not control access to it. An installation commander's command over military functions is necessarily exclusive. *See*, *e.g.*, Joint Chiefs of Staff, Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms (Sept. 15, 2013) ("command" means "[a] unit or units, an organization, or an area under the command of one individual"); *id*. ("area command" means "[a] command which is composed of those organized elements of one or more of the Armed Services, designated to operate in a specific geographical area, which are placed under a single commander").[10]

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[9] Command is defined as:

> "1. The right or authority to order, control, or dispose of; the right to be obeyed or to compel obedience: as, to have *command* of an army. . . . 2. Possession of controlling authority, force, or capacity; power of control, direction or disposal. . . . 3. A position of chief authority: a position involving the right or power to order or control, as General Smith was placed in *command*.

The Century Dictionary 1124-25 (1889).

[10] Commanders command military functions, not civil ones. *See*, *e.g.*, Joint Chiefs of Staff, Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms (Sept. 15, 2013) ("command" means "[t]he authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment").

That is why installation commanders have virtually unfettered control over the property and troops *within their command*, and the power to control entry. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961) (noting that power to bar an individual from an installation, or an area controlled by the military, is an inherent concomitant of command); *see also* 32 C.F.R. §809a.2(b) ("Each [Air Force installation] commander is authorized to grant or deny access to their installations, and to exclude or remove persons whose presence is unauthorized.").

Although post commanders have authority over military personnel regardless of their location, post commanders have power over civilians only if they are located within the confines of a controlled post. That is, installation commanders have power over civilians only in the areas they control. Mil. R. Evid. 315(c)(2)(3), (d)(1) (2012) (authorizing a commander to search "anyone subject to military law or the law of war wherever found" and other "persons or property situated on or in a military installation, . . . , or any other location under military control," and defining "Commander" as one "who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over the person subject to military law or the law of war."). Historically, post commanders were empowered to summarily punish individuals, including civilians, by ordering them out of the camp. Burress M. Carnahan, Comment – Article 15 Punishments, 13 JAG L. Rev. [iv], 270

(1971). There is no indication that Congress intended to extend this power over civilians outside the confines of an exclusively controlled military post.

Here, having relinquished the power to control access to Highway 1, and having granted the public a vested right in civil use and occupation, the military relinquished its right to exclude civilians from Highway 1 so long as the easement exists. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d at 946 ("Although the owner of the property retains title, by dedicating the property to public use, the owner has given over to the State or to the public generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' the right to exclude others.") (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994)); *see also Marsh v. Alabama*, 326 U.S. 501, 503 (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."). The area of the easement cannot be considered part of the installation commander's area of "command." Thus the power to exclude civilians is necessarily extinguished. Extending §1382 to public highways that are not controlled or possessed by the military would permit, contrary to Congress's intent, criminal punishment of civilians who unknowingly or unwillingly enter military installations.

The government relies on *Cafeteria Workers* to assert that the term "military installation" includes

public highways because it covers any place under military command. U.S. Br. 12-13. That reliance is misplaced. *Cafeteria Workers* involved the summary exclusion of an individual who attempted to enter a closed base without satisfying security requirements, and the Court's decision rested squarely on the power of the commander to control access to a closed base. Having relinquished the exclusive power to control public access to the easement on Highway 1, the government cannot now claim that the Highway 1 easement is part of a military command. Further, the statute punishes those found "within" a military installation. The plain meaning of "within" necessarily contemplates fixed, controlled boundaries, and undercuts the government's argument that §1382 applies to public roads outside the marked boundaries of a military-controlled installation.

Use of the easement is not at the commander's exclusive discretion and thus it cannot be summarily revoked. *Cf. Greer*, 424 U.S. at 838 ("A necessary concomitant of the basic function of a military installation has been the 'historically unquestioned power of [its] commanding officer to summarily exclude civilians from the area of his command.'") (quoting *Cafeteria Workers*, 367 U.S. at 393). *Greer* does not compel a contrary result. The activity there took place *within* the confines of a gated military reservation and thus on property occupied, controlled and used by the military for military purposes. *Albertini*, too, involved conduct *within* the confines of a closed military base, which was opened, only temporarily, to the

public. Such deference to internal military affairs has no application to public highways that are not under exclusive military control.

3. The "within the jurisdiction of the United States" provision of §1382 does not justify rejecting an exclusive possession requirement.

The United States argues that the phrase "'within the jurisdiction of the United States' simply requires that the military installation in question be subject to federal jurisdiction." U.S. Br. 14. This makes the statutory language meaningless. Obviously, everything in the United States is, by definition, within the jurisdiction of the United States.

Rather, "[w]ithin the jurisdiction of the United States" simply makes §1382 applicable to the incorporated territories and outlying possessions of the United States. As the government points out:

> A question arose, however, whether the statute applied not only to States and incorporated territories, but also the Canal Zone (and, by implication, to other outlying possessions of the United States). In response, Congress amended the statute 'to make it applicable to the outlying possessions of the United States' by adding the phrase 'within the territory or jurisdiction of the United States, including the Canal Zone, Puerto Rico, and the Philippine Islands.'

U.S. Br. 16.

The legislative history of §1382 unambiguously illustrates that Congress intended "jurisdiction of the United States" to denote the political jurisdiction of the United States in a purely territorial sense. The "within" language simply makes §1382 applicable to United States military installations located in, for example, Puerto Rico, but not Germany. As the government concludes:

> The phrase 'within the jurisdiction of the United States' in Section 1382 thus serves, in conjunction with the broad definition of 'United States' in 18 U.S.C. 5, to extend Section 1382 to military installations located, for example in outlying possessions of the United States. At the same time, the phrase 'within the jurisdiction of the United States' also serves a limiting function: It prevents Section 1382 from reaching U.S. military installations in places *not* subject to federal jurisdiction.

Id. at 16.

Yet, in spite of explaining that the "within" language designates the territorial scope §1382, the government intimated throughout its brief that the "within" language encompasses a more expansive meaning that resolves the statutory question presented in this case. *See*, *e.g.*, *id.* at 14 ("Those statutes, like Section 1382, require the simple presence of federal jurisdiction. They do not require absolute and exclusive ownership of property by the federal government itself.").

There are many meanings of "federal jurisdiction," but, as the legislative history establishes, §1382's jurisdictional element pertains exclusively to federal territorial jurisdiction. Territorial jurisdiction is determined by the area that is controlled by the military and is independent of ownership or interest in specific tracts of land. Thus the phrase "within the jurisdiction of the United States" in §1382 merely "refers to the situs of the geographical areas within which the statute applies rather than to any concept of the particular type of jurisdiction or control which the United States government exercises over said geographical areas." *United States v. Holmes*, 414 F. Supp. 831, 836 (D. Md. 1976). Simply put, Congress added "within the jurisdiction of the United States" to §1382 to ensure that the statute covers the United States territories. That language says nothing about the issue in this case: whether a public road outside of a closed military installation is within the scope of §1382.

4. The common law of civil trespass is not relevant in interpreting §1382 and does not support the government's view of the statute.

The government correctly points out that the crime of reentry onto military installations is distinct from the common law crime of trespass. U.S. Br. 19. The government, nonetheless relies on the common law of civil trespass to support its interpretation of §1382. *See*, *e.g.*, *id.* at 20. But the common law of trespass is not relevant to the issue presented in this

case: whether "military installation" within §1382 includes a public road on federal land, for which an easement has been granted, and that has been designated as a protest area. More fundamentally, common law trespass principles are inapplicable to §1382 because there is no basis for believing that Congress meant to incorporate them in creating a criminal offense.[11]

Not only is the government's reliance on common law trespass unnecessary, its analysis of the law of trespass is also erroneous. The government asserts that *United States v. McCoy*, 866 F.2d 826 (6th Cir. 1989), holds that mere ownership of land is sufficient to bring an action for civil trespass. U.S. Br. 20. That is incorrect. *McCoy* held that ownership is unnecessary for §1382 to apply where the military actually possesses and operates on lands that it controls; it did not hold that ownership of title is sufficient. Indeed, by ruling that §1382 was limited to unlawful entry past a white line that marked the installation boundary, 866 F.2d at 832, *McCoy* supports the decision below reversing Apel's convictions for peaceful speech that never crossed the green line that marked the installation boundary for Vandenberg. Further, making §1382 coextensive with mere ownership of title is inconsistent with the approach this Court took long

[11] Whether *Watson* correctly incorporated trespass principles is not at issue. U.S. Br. 19. The government provides no authority in the common law or any other for the proposition that Highway 1 is a "military installation."

ago in *Phisterer* and contravenes Congress's intent to punish only those who enter property supporting military operations and the national defense.

The government contends that "a public roadway easement across a military installation permits protesting only if the easement 'explicit(ly)' grants that right." U.S. Br. 21. In fact, the right to protest on public road easements is well established. "Expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage." *First Unitarian*, 308 F.3d at 1128 (citing *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 686 (1992) (O'Connor, J., concurring)). Use of an easement is not limited to those uses appearing on the face of the easement instrument. Rather, an easement holder has "[the] right to do whatever is reasonably convenient or necessary in order to enjoy fully the purposes for which the easement was granted." Law of Easements & Licenses in Land §8:3 (2013). Given that a public road is a quintessential forum for speech, the right to protest on a public roadway easement is "necessary in order to enjoy fully the purposes for which the easement was granted." Moreover, where the grantor of an easement explicitly condones a specific use of the easement, as Vandenberg has done in designating an area of the Highway 1 easement for protest activity, such use necessarily falls within the scope of the easement. Because protest activity is a use that is within the scope of an easement for a public road, Apel's use of Highway 1 for protesting was not a trespass. At its

most elemental level, "[a] trespass is an invasion of the interest in the *exclusive* possession of land." Restatement (Second) of Torts §821D (2013) (emphasis added). And "exclusive possession" means exclusive occupancy and control. *Id*. at §157 & cmt. a; *see also id*. at §§158, 162. Further, use of an easement within its scope is not an invasion of the easement grantor's interest in the land and thus does not constitute as trespass. *People v. Sweester*, 72 Cal.App.3d 278, 285 (1977) ("[O]ne who uses an easement conveyed for public highway purposes within the scope of the initial grant is not a trespasser against the landowner.").

Nor does the government's reservation of rights in the easement strip Highway 1 of its exclusive civil character, render it subject to military occupation and control, or convert it into a "military installation." *Venetian Casino Resort*, 257 F.3d at 947 ("The mere retention of some property interest in the parcel does not affect the public nature of the dedicated use of the [passageway]."). The easement expressly provides that the County and the State, not the United States, shall be responsible for the Highway. J.A. 36, ¶2. Nothing in the easement contemplates, or even permits, military use or occupation; it provides for exclusive civil use and occupation. The authority to make rules from time to time concerning the public use and occupation of the highway in no way strips the road of its civil character, or renders it a "military installation" for purposes of criminal law. Nothing in the easement, which is signed by the Chief of Army Engineers, vests

power in the installation commander to bar or prosecute civilians for their lawful use of the property.

B. The Military and the United States Have Consistently Interpreted §1382 to Apply Only to Areas Within the Exclusive Possession and Control of the United States.

For at least three decades, the Air Force has consistently interpreted §1382 to require exclusive possession and control. Similarly, the U.S. Attorney's Manual declares that §1382 applies only to a military installation "*over which the United States has exclusive possession*." U.S. Dep't of Justice, *U.S. Attorney's Manual*, *Title 9*, *Criminal Resource Manual* §1634 (2010) (emphasis added). This is precisely the test used by the Ninth Circuit in this case and now disavowed by the government.

1. The Air Force has adopted the right of exclusive possession and exercise of actual control test.

The government urges this Court to reject a test the Air Force itself has followed for decades. Not only does the Air Force define "military installation" in terms of military control, it also has explicitly adopted the exclusive possession and control test in defining the scope of §1382.

The Air Force has adopted *Phisterer* and defines "military installation" in terms of operational military

control. The Air Force Judge Advocate General ("JAGAF") has expressly recognized that a military commander's power to exclude and prosecute civilians under §1382 depends on whether the area in question is a "military installation," and that "military installation" means a place where military operations under military command take place. OpJAGAF 1983/20, 22 March 1983 (applying *Phisterer*); *see also* OpJAGAF 1997/25, 14 Feb. 1997 (reaffirming the definition of "military installation" in terms of military control). The JAGAF has thus held: "*Under 18 U.S.C. §1382 it is required that the United States have absolute ownership or an exclusive right to the possession of the property in question*." OpJAGAF 1983/20.

In considering whether installation commanders can use §1382 to bar individuals from installation property held under a lease, the JAGAF agreed that "the commander may properly exercise this authority if the United States has an exclusive right of possession." OpJAGAF 1997/25. The JAGAF wrote:

> We believe the optimal situation for exercising barment authority under a leaseback plan would combine *both a clear exclusive right of possession and a strong exercise of that right*. The lease agreement should clearly provide for an exclusive right of possession by the United States. *Prudent steps should then be taken to exercise control over this possessory interest. This could include posting signs, limiting access, or building fences. See Flower v United States*, 407 U.S. 197 (1972), *Greer v. Spock*, 424 U.S. 828 (1976), and

> *United States v. Albertini*, 472 U.S. 675 (1985), for discussions regarding exercise of dominion over possessory interests.

Id. (emphases added).

Consistent with this ruling, the JAGAF has long recognized that §1382 applies only to "military installations" that are "under military jurisdiction" – that is, subject to "base entry and internal control procedures for Air Force installations that are under Air Force jurisdiction." OpJAGAF 1984/60, 6 Nov. 1984. For example, the JAGAF recommended three decades ago that installation commanders follow Air Force regulations requiring "the posting of signs and other notice requirements." *Id.* (finding that in order to lawfully conduct a random gate inspection, the commander must have "control" over the base or place where the person or property to be searched is located.). The referenced regulation, AFR 125-37, Security Police/Resources Protection Program, has since been superseded by AFR 31-209, but published regulations at the time expressly required exercise of physical control over the installation, including that "the installation be fenced around the perimeter" and that warning signs be posted at "each entrance to the installation [and] around the perimeter of the installation."

32 C.F.R. §851.17, 851.21(b)(1)-(2) (1978).[12] There are no such signs on Highway 1 where Apel's speech occurred.

In order to be enforceable against civilians, installation regulations were required to be "posted in a conspicuous, appropriate place (for example, at the gates of the installation or at the entrance to the controlled area.") 32 C.F.R. §851.9(a)(4) (1978). Although the specific regulation changed, nothing was altered in terms of the need for the military to identify clearly the perimeter of its closed installation. That does not exist for the area where Apel was protesting on Highway 1.

[12] The signs were required to read:

WARNING

U.S. AIR FORCE INSTALLATION

IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE INSTALLATION COMMANDER

(SEC. 21 INTERNAL SECURITY ACT OF 1950; 50 U.S.C. 797)

WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH

Id. at §851.19(a)(1).

2. Military and Air Force regulations require installation commanders to control entry into military installations under their command; they do not authorize control over public roads outside the installation perimeter.

Military regulations governing installation security require commanders to control access to the installations within their command. The regulations are clear that this is authority to create a controlled perimeter and control what occurs within the installation; it does not include the public roads outside of the closed installation.

Department of Defense ["DoD"] Directive 5200.8-R, entitled "Physical Security Program," establishes mandatory minimum standards for protecting DoD personnel, installations, operations, facilities, and related resources. DoD Directive 5200.8-R §§C1.1, C1.2.1, C1.2.2. Specifically, it implements minimum standards "for controlling entry onto and exiting from military installations and the facilities within military installations." *Id.* §C3.1. It requires procedures to control access to installations, including "[e]nforcing the removal of, or denying access to, persons who threaten security, order and the discipline of the installation." *Id.* §C3.2.5. These physical entrance controls are required at the *perimeter of the installation*. DoD Directive-Type Memorandum (DTM) 09-012, Attachment 3, Physical Security Access Standards, Access Control (Dec. 8, 2009) (emphasis

added). "Physical access control" means "[t]he process of *physically controlling personnel and vehicular entry to installations*, facilities, and resources." *Id.* at Glossary, Part II, Definitions (emphasis added).

Air Force regulations mandating procedures for physical security at Air Force installations further illustrate that the military considers an "installation" to be exclusively controlled military property marked by perimeter gates and entry check-points. Such regulations mandate uniform security procedures, including access to installations and protection of personnel and property under military command. AFR 207-4, §1-1 (June 28, 1991). The regulations mandate that "[e]ach installation must clearly define the access control measures . . . required to safeguard the installation and ensure accomplishment of its mission." AFR 207-4, §2-1. Installation commanders are thus *required* to "control installation access," "[d]etermine the degree of control required over personnel and equipment entering or leaving the installation," prescribe procedures for the "search of persons (and their possessions) on the installation" including "searches conducted as persons enter the installation, while they are on the installation, and as they leave the installation," and "[e]nforce the removal of, or deny access to, persons who threaten order, security, or discipline of the installation." *Id.* §2-2(a)-(c); §§2-3, 1-4(c)(1)(a)-(c).

These regulations demonstrate that the power to exclude is defined by the power to control access to the installation. Installation commanders are authorized, indeed required, to control access to their installations,

and the power to exclude civilians is coextensive with the power to control installation access. Nothing in the regulations grants commanders the power to exclude persons from government property generally; rather, they confer power to control entry into military installations under exclusive military control. No regulation grants the commanders the power to exclude civilians from public highways outside installation entry points. By failing to control access to Highway 1 and, instead, placing the installation entry point several hundred feet away, the Air Force has demonstrated that it does not consider Highway 1 to be a "military installation" under exclusive military control.

Furthermore, the immediate predecessors to the governing regulations make clear that the Air Force never interpreted §1382 to empower installation commanders to exclude peaceful protestors outside installation check points. Air Force regulations expressly distinguished between military and civil responsibility and authority. While installation commanders are responsible for their installations and authorized to exclude civilians from within them, "[l]ocal civilian authorities are primarily responsible for maintaining order outside the perimeter of an installation." 32 C.F.R. §809a.2 (1979), *accord* 32 C.F.R. §809a.2 (1999). Absent "an emergency involv[ing] imminent danger to personnel or property under the commander's jurisdiction," installation commanders are authorized to employ Air Force resources outside the perimeter only if "essential" and only if United States Air Force headquarters approved it. *Id.*

Air Force regulations expressly provided that "[p]eaceful protestors outside perimeter of installation without interference to USAF mission," should be "[i]gnore[d]." AFR 31-209, Attachment 3 (Dec. 1, 1998). Where "[d]emonstrators interfere with base operations to a minor degree, by obstructing traffic moving on- and off-base," commanders should use "alternate means of access," ask civil authorities for assistance, if necessary, and provide USAF assistance only upon DoD approval. *Id.*

Thus, the Air Force's own regulations and policies have consistently defined "military installation" in terms of a requirement for exclusive possession and control.

C. Traditional Principles of Statutory Construction Warrant Interpreting §1382 to Require Exclusive Possession and Control.

The government proposes no limit whatsoever on the scope and meaning of §1382, arguing that "military installation" refers to all of the land owned by the federal government. Apel, by contrast, argues that military installation refers to the closed base delineated by the green line drawn by the government. Under traditional principles of statutory construction any ambiguity arising from Congress's failure to define "military installation" must be construed narrowly in favor of Apel and against the military.

1. Principles of constitutional avoidance counsel against interpreting §1382 to apply to a public road on which an easement has been granted and that has been designated as a protest zone.

This Court long has stressed the canon of constitutional avoidance as an interpretive tool, counseling that ambiguous statutory language must be construed to avoid serious constitutional doubts. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."). Likewise, this Court has rejected an agency's interpretation of its statute when that would raise serious constitutional doubts. *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001).

Interpreting §1382 to apply to public roads outside a closed military base over which an easement has been granted and that has been designated as a protest zone would raise serious constitutional concerns. Part I of this brief argues that the government's interpretation of §1382 and the conviction of Apel violate the First Amendment. Even if this Court does not reach that question, it is clear that the government's interpretation of the statute raises serious

constitutional issues. A base commander would have unfettered discretion to issue a bar letter that cannot be appealed except to the base commander, to indefinitely exclude the barred person for any reason, including the content of his or her speech, from a public road that has been designated a protest zone outside of the closed base. The person then could be criminally convicted solely for not following an order to leave.

This interpretation of the statute is inconsistent with basic principles of freedom of speech long ago adopted by this Court. For example, this Court has said that the government may condition speech in a public forum on government approval – which is exactly what the government's interpretation of §1382 would mean for Apel – only if the government has an important reason for the restriction and only if there are clear criteria leaving almost no discretion to the government authority. *Saia v. New York*, 34 U.S. 558, 559-60 (1948) (declaring unconstitutional a permit requirement for trucks with sound amplification equipment where government officials had unfettered discretion in deciding whether to issue the permits). As this Court explained, the government "cannot vest restraining control over the right to speak . . . in an administrative official where there are no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951); *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 (1988) ("[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.").

In addition, this Court repeatedly has held that if the government is going to require permission for a person to speak, there must be procedural safeguards, such as a requirement for prompt determinations as to requests and judicial review of denials. *See*, *e.g.*, *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (describing the procedures which must be followed when a permit is required for speech).

Under the government's interpretation of §1382, there is no limit on the base commander's discretion and there are no procedural safeguards. The base commander can exclude just those who are engaged in speech or even just those whose message is disliked. Because this interpretation of §1382 raises obvious constitutional doubts, the statute should be interpreted to avoid them and not to apply to peaceful protests on a public road outside of a closed military base over which an easement has been granted and that has been declared a protest zone.

2. The rule of lenity counsels against interpreting §1382 to apply to a public road on which an easement has been granted and which has been designated as a protest zone.

Apel has been convicted for violating a criminal statute, 18 U.S.C. §1382. This Court long has held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *see also Ladner v. United States*, 358 U.S. 169, 177 (1958). As

this Court explained, "[i]n 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.'" *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (internal quotation marks and citations omitted). Thus, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* at 348.

The government surely cannot claim that there is no ambiguity as to whether a public road outside of a closed military base is within the scope of §1382. For decades, virtually every court and military agency has held that §1382 applies only if the United States has exclusive possession and control. The United States urges a different interpretation, arguing that "military installation" includes all land owned by the government, even when an easement has been granted. The rule of lenity requires that the Court interpret the statute in "favor of the defendant," exactly as the Ninth Circuit did in this case.

D. Interpreting §1382 to Require Exclusive Possession and Control and Not to Apply to Public Roads Where an Easement Has Been Granted Is Very Unlikely to Pose Any Threat to National Security.

The government argues that an exclusive possession limitation on §1382 would "threaten substantial

harm to the safe and orderly operation of many of this Nation's military installations." U.S. Br. 22. Since *United States v. Watson* in 1948, many courts have interpreted §1382 in accord with the exclusive possession requirement (*see* cases at note 7, *supra*), but the government does not point to a single example where this interpretation has threatened national security, nor does it explain why other statutes are insufficient to deal with any problem. There is every reason to believe that the government already has defined the perimeters of bases, including where it puts guard gates and where it draws green lines, with the established interpretation of §1382 clearly in mind.

Expanding §1382 to apply to areas outside the military's exclusive possession is unnecessary to protect national security. First, there is no basis for believing that public roads outside of a closed military installation are sensitive areas where national security is at stake. The secretary of a military department, such as the Secretary of the Air Force, may grant public roadway easements across military reservations only if such an easement would not be "against the public interest." 10 U.S.C. §§2668, 2669. If Highway 1 were to traverse a sensitive area of Vandenberg, national security concerns would require the Secretary of the Air Force to deny the easement.

The section of Highway 1 traversing federal property at Vandenberg is open to the public twenty-four hours a day, seven days a week. Unlike the road in *Greer* that was regularly patrolled by military personnel, and on which vehicles were stopped and

searched, *see Greer*, 424 U.S. at 830, this stretch of Highway 1 is a completely open road. Apel, and others who are subject to barment orders, may travel along this popular stretch of road unmonitored. Indeed, Apel was allowed to be on Highway 1 for any purpose other than exercising his First Amendment right to protest. J.A. 64, ¶2 (bar order allowing Apel to be on the roads on Vandenberg property for travel purposes).

Moreover, individuals who have been convicted of, and released from prison after serving time for murder, assault, rape, armed robbery, theft, felony destruction of property, or narcotics trafficking are not only allowed to drive, ride a bike and walk, on Highway 1, but may also participate in protest activities on Highway 1. People who have been barred from other military bases or facilities, but are not under a barment order from Vandenberg are allowed to freely traverse Highway 1 and participate in protests there. There is no limit on what can be brought onto this stretch of Highway 1: persons, cars, and trucks with dangerous cargo are allowed, as they are on all other public roads. Seemingly, the magnitude and variance of individuals traveling along Highway 1 unmonitored by Vandenberg personnel would pose a substantial security concern if this stretch of Highway 1 were the site of sensitive operations.

The government contends that the installation commander must be empowered to exclude civilians from Highway 1 because §1382 is the military's first line of defense. But all of the operational areas of

Vandenberg are set apart from Highway 1. All entrances to the base proper, and the operational areas of the base, are patrolled and controlled by Vandenberg personnel. The protest area is in front of a green line that designates where the exclusive jurisdiction of Vandenberg begins. J.A. 79, 91. The main gate of Vandenberg, which is guarded by armed personnel, is 200 yards away from the protest area. J.A. 78-79. Protesters and other members of the public can enter the closed installation only through this armed and patrolled gate on the other side of the green line. J.A. 78-79. Protesters are not allowed to cross the green line and into the exclusive jurisdiction of Vandenberg. Even if a protester crossed the green line, he or she would undoubtedly be stopped at the armed gate 200 yards from the protest area. Additionally, during scheduled protests, Vandenberg security officers are sent to the protest area to monitor the activity. J.A 111-112.

In fact, Vandenberg tolerates many public uses even behind the green line, including an Amtrak station and a public school. J.A. 64. Vandenberg thus has two lines of defense: the controlled access entry gate and the green line marking the outer boundary of its exclusive jurisdiction. There is no justification for extending the base commander's power beyond the green line and on to public roads outside of exclusive military control.

Furthermore, §1382 is a Class B misdemeanor, the lowest level of a federal misdemeanor offense. It is unlikely that a Class B misdemeanor is an essential

safeguard for protecting national security. A Class B misdemeanor, also known as a petty offense, is punishable by no more than six months in prison or a fine of $5,000, or both. 18 U.S.C. §§19, 3571, 3581. By contrast, 18 U.S.C. §1384, which prohibits prostitution near a military base is a Class A misdemeanor.[13] In fact, the majority of the statutes designed to protect military property and security are either Class A misdemeanors or felonies under federal law. *See* U.S. Br. 23 n.3. There is an obvious tension between the government saying that its interpretation of §1382 is essential for national security and the reality that the statute creates only a Class B misdemeanor.

Finally, it is unnecessary to rely on §1382 to protect national security. The Vandenberg base commander can use many other federal and state statutes to protect the national security interests of the base, if necessary, without infringing on the First Amendment rights of peaceful protestors at Vandenberg. Section 2155 of Title 18, for example, is a broadly written statute that punishes any person who with the "intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities." 18 U.S.C. §2155. Section 2155 has

[13] A Class A misdemeanor is punishable by no more than a year in prison or a fine of $100,000, or both. 18 U.S.C. §§3571, 3581.

been used to punish persons who entered onto military bases and damaged military property. *United States v. Platte*, 401 F.3d 1176 (10th Cir. 2005) (upholding a conviction where protestors trespassed on a military reservation and removed a small portion of a fence). There are many other federal statutes to protect the security of military bases. *See*, *e.g.*, 50 U.S.C. §797 (violation of defense property security regulation); 18 U.S.C. §§795, 797 (offenses related to photographing defense installations); 18 U.S.C. §1381 (enticing desertion from the Armed Forces); 18 U.S.C. §1361 (damaging government property); 18 U.S.C. §1389 (hate crimes against service members, their immediate families and their property); 18 U.S.C. §1362 (damaging government communication lines); 18 U.S.C. §§2387, 2388 (advising mutiny and other subversive activities); 18 U.S.C. §81 (arson of military or naval stores).

The government says that base commanders will be forced to choose between ensuring security and granting easements if they cannot bar individuals from protesting on public roads outside of closed military bases. U.S. Br. 26. This seems highly unlikely given all of the other statutes that can be used to protect security. But if a base commander believes that it is necessary to close a road in order to protect national security, the commander has the authority and indeed the duty to do so. The State and County then would need to reroute the road. The United States decides where to draw the green boundary line, and there is every reason to believe that at Vandenberg

the line already has been drawn to ensure the protection of the base and its activities.

Under the Assimilative Crimes Act (ACA), state criminal laws also apply to federal enclaves as gap fillers and can be used to prosecute criminal activity that occurs on Highway 1.[14] Courts have concluded that Vandenberg is a federal enclave for purposes of the ACA. *See*, *e.g.*, *Taylor v. Lockheed Martin Corp.*, 78 Cal.App.4th 472, 479-80, 92 Cal.Rptr.2d 873, 877-78 (2000). State criminal laws are applicable to criminal conduct occurring in any area of a federal enclave, regardless of whether the United States retains exclusive or concurrent jurisdiction. *See United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982) (holding that state DUI law applied to a public highway

[14] The ACA, codified as 18 U.S.C. §13, transforms a crime against the state into a crime against the federal government when it occurs on a federal enclave. *United States v. Press Publishing Co.*, 219 U.S. 1, 31 (1911). Federal enclaves are lands within the "special maritime and territorial jurisdiction of the United States," a term which includes "(a)ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof. . . ." *See* 18 U.S.C. §7(3). In enacting the ACA, Congress sought to establish a gap-filling criminal code for federal enclaves. *Lewis v. United States*, 523 U.S. 155, 164 (1998). Specifically, a state criminal offense which violates state law, but is not otherwise punishable under federal law, becomes a federal offense when committed on a federal enclave within the state. 18 U.S.C. §13. Where, however, both federal and state statutes cover the same subject matter, the state law is inapplicable. *See* 18 U.S.C. §13(a) (prohibiting assimilation of state law when the conduct in question has been "made punishable by any enactment of Congress.").

running through a naval shipyard that was a federal enclave).

It is unsurprising that the government's own witness at trial, Sergeant Cox, testified that Apel and the protesters did not pose a security risk to Vandenberg Air Force Base. J.A. 103, 107. Under the terms of the bar order, Apel was allowed on to Highway 1, but not for peaceful protest activities. This result undermines the government's claim with regard to national security and makes clear that the government's purpose was to restrict Apel's speech.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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