No. 12-1038

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 1382, which prohibits a person from reentering a military installation after a commanding officer has ordered him not to reenter, may be enforced on a portion of a military installation that is subject to a public roadway easement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 676 F.3d 1202. The order of the district court (App., *infra*, 5a-15a) is not reported. A previous opinion of the court of appeals in a case presenting the same issue (App., *infra*, 16a-24a) is reported at 651 F.3d 1180.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2012. A petition for rehearing was denied on September 27, 2012 (App., *infra*, 3a-4a). On December 19, 2012, Justice Kennedy extended the time within

which to file a petition for a writ of certiorari to and including January 25, 2013. On January 16, 2013, Justice Kennedy further extended the time to February 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1382 of Title 18 states:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined under this title or imprisoned not more than six months, or both.

STATEMENT

1. Vandenberg Air Force Base (Vandenberg or Base) is located in a rural area on the coast of central California, approximately 170 miles northwest of Los Angeles. Vandenberg is the site of sensitive missile- and space-launch facilities, and in part for that reason it is generally closed to the public. The Base, however, is crossed by two state roads—Highway 1 and Highway 246—that are open to the public for vehicular travel. Highway 1 runs across the eastern side of the Base and provides the most direct route between the closest town to the north (Santa Maria) and the closest town to the south (Lompoc). Otherwise, travelers must drive through or

around the Santa Ynez Mountains. Highway 246 runs across the southern side of the Base, and it allows travelers to reach a beach and train station on Vandenberg's western edge. See C.A. E.R. 56, 62; see also Gov't C.A. Br. 4-5.

The Department of the Air Force (Air Force) owns the land crossed by Highways 1 and 246, but it has granted roadway easements to the State of California and Santa Barbara County. See App., *infra*, 7a, 23a-24a; C.A. E.R. 45, 65. Such easements are common on military bases. See *United States* v. *Albertini*, 472 U.S. 675, 698-699 (1985) (Stevens, J., dissenting) ("[H]ighways or other public easements often bisect military reservations."). In granting those easements, the Air Force retained jurisdiction over the roadways; it simply agreed to exercise concurrent jurisdiction with the State and County. See App., *infra*, 7a; C.A. E.R. 45, 203-204. For example, in the easement for Highway 1 (which is the roadway at issue in this case), the Air Force expressly provided that the roadway's "use and occupation * * * shall be subject to such rules and regulations as the [base commander] may prescribe from time to time in order to properly protect the interests of the United States." C.A. E.R. 65; see App., *infra*, 14a.

2. Highway 1 runs next to Vandenberg's main gate. Near that gate, the base commander has designated an area for public protesting. That designated area, which is part of the Base, also falls within the scope of the Highway 1 easement.[1] See C.A. E.R. 53, 57. Pursuant

[1] The area was designated as a protest area following litigation in the late 1980s. That litigation resulted in a policy statement indicating that peaceful demonstrations would be allowed in the designated area but that restrictions could be placed on the area to maintain

to his authority over Vandenberg and the terms of the easement, the base commander has issued certain restrictions governing the protest area. One of those restrictions is that anyone barred from Vandenberg may not enter the Base for any reason, including to protest in the designated area. See *id.* at 59. Base rules explain that "[i]f you are currently barred from Vandenberg AFB, there is no exception to the barment permitting you to attend peaceful protest activity on Vandenberg AFB property." *Ibid.* The rules further explain that "[i]f you are barred and attend a protest or are otherwise found on base, you will be cited and detained for a trespass violation due to the non-adherence [with] the barment order." *Ibid.*

Respondent John Apel has twice been barred from Vandenberg, the first time in 2003 for trespassing and vandalism and the second time in 2007 for trespassing. See C.A. E.R. 62. Respondent does not challenge the validity of either barment order. See *id.* at 27, 256. The second barment order was still in effect in 2010, when respondent entered Vandenberg on three separate occasions (in January, March, and April) to protest in the designated area. On each occasion, respondent was reminded of the existing barment order, asked to leave Vandenberg, and given two to three minutes to do so. Each time, when he failed to leave, respondent was cited for a violation of 18 U.S.C. 1382, which makes it a misdemeanor to reenter a federal military installation "after having been * * * ordered not to reenter by any officer or person in command or charge thereof." Respondent was then escorted and released outside Van-

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safety or to prevent material interference with the Air Force's operation of Vandenberg. See App., *infra*, 7a-8a; C.A. E.R. 53.

denberg. See C.A. E.R. 101-102, 203-204, 219-220, 222, 225-227.

3. Respondent moved to dismiss all three counts on the ground that the First Amendment prevented enforcement of Section 1382 in the designated protest area. The magistrate judge denied that motion. App., *infra*, 7a. Respondent subsequently was convicted in two separate trials of the three offenses, and he was ordered to pay a total of $305 in fines and fees. *Ibid.* Respondent appealed his convictions to the district court on both statutory and constitutional grounds. As relevant here, he contended that Section 1382 applies only to property over which the United States has "absolute ownership" or an "exclusive right [of] possession." *Id.* at 9a (internal quotation marks omitted). Accordingly, respondent argued, the government could not enforce Section 1382 in the designated protest area, because the United States has only concurrent jurisdiction over that area as a result of the Highway 1 easement. See *id.* at 9a, 14a-15a.

The district court affirmed respondent's convictions. App., *infra*, 5a-15a. The court reasoned that the United States "has a sufficient possessory interest and exercises sufficient control over the designated protest area in order to sustain [respondent's] conviction[s] under 18 U.S.C. § 1382." *Id.* at 14a. The court explained that the United States "owns the land upon which [respondent] trespassed," and although "this ownership interest is subject to an easement, the terms of the easement provide that its use" is subject to base rules and regulations. *Ibid.* The court noted that, "consistent with its ownership and the scope of the easement, the Government exercises substantial control over the designated protest area, including, for example, patrolling the area

and creating and enforcing an extensive set of restrictions on its use." *Id.* at 14a-15a. Finally, the court rejected respondent's First Amendment argument, holding that the designated protest area is not a public forum but that in any event respondent's previous barment order was a valid basis for his exclusion. See *id.* at 11a-14a.

4. The court of appeals reversed in a per curiam opinion. App., *infra*, 1a-2a. The court held that, under its previous decision in *United States* v. *Parker*, 651 F.3d 1180 (2011), Section 1382 applies only to areas over which the federal government exercises an exclusive right of possession. See App., *infra*, 2a. "[B]ecause a stretch of highway running through Vandenberg AFB is subject to an easement," the court reasoned, "the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under [Section] 1382 cannot stand, regardless of an order barring a defendant from the base." *Ibid.* The court "question[ed] the correctness" of its earlier decision in *Parker*, but concluded that *Parker* was "binding" and "dispositive of th[e] appeal." *Ibid.* The court of appeals subsequently denied the government's petition for rehearing en banc, which one of the panel members recommended granting. See *id.* at 3a-4a.

REASONS FOR GRANTING THE PETITION

Section 1382 of Title 18 prohibits a person from reentering a military installation after having been ordered not to reenter by a commanding officer. By its terms, the statute requires only that the reentry be "within the jurisdiction of the United States," not that such jurisdiction be exclusive. In *United States* v. *Albertini*, 472 U.S. 675 (1985), this Court held that nothing in the statutory

text justified "engrafting onto [Section] 1382 a judicially defined time limit [for reentry]" or "limit[ing] [Section] 1382 to military bases where access is restricted." *Id.* at 682. Here, in conflict with *Albertini* as well as with decisions of the First, Second, and Sixth Circuits, the Ninth Circuit has engrafted onto Section 1382 a requirement of absolute ownership or exclusive possession nowhere to be found in the statute's text. Moreover, the court of appeals rested its decision on circuit precedent whose correctness it questioned, but the court twice declined to consider the issue en banc. Accordingly, absent this Court's review, the United States will be unable to fully enforce a significant federal criminal statute on many military bases throughout the Ninth Circuit.

A. The Decision Below Is Incorrect

1. a. Section 1382 of Title 18 of the United States Code prohibits two different types of conduct on federal military bases. The statute's first clause provides that "[w]hoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, * * * for any purpose prohibited by law or lawful regulation," is guilty of a misdemeanor and may be fined or imprisoned not more than six months. 18 U.S.C. 1382. The second clause—which is the one at issue in this case—provides that "[w]hoever reenters or is found within any such reservation, * * * after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof," is guilty of the same offense. When the statute's second clause prohibits reentry into "any such reservation," it means the type of reservation enumerated in the preceding clause, *i.e.*, a military installation where reentry is "*within the jurisdiction of the United States*." *Ibid.* (emphasis added). So long as a defendant's reentry into

a military base is "within the jurisdiction of the United States," he is subject to punishment under Section 1382. The statute does not require that federal jurisdiction be exclusive, and it says nothing about ownership or possession (let alone exclusive ownership or possession).[2]

The federal government's grant of a roadway easement for Highway 1 across Vandenberg does not remove that area from federal jurisdiction. The easement simply grants the State of California and Santa Barbara County a right-of-way to allow traffic across the land, provided that federal law (including Section 1382) otherwise permits individuals to be there. The easement itself expressly provides that the roadway's "use and occupation * * * shall be subject to such rules and regulations as the [base commander] may prescribe from time to time in order to properly protect the interests of the United States." C.A. E.R. 65. The easement thus explicitly preserves the government's ability to apply base regulations to the area covered by the easement. But even if the easement were silent, it would not create an exception to otherwise applicable federal laws and regulations. The government commonly grants easements across military bases for public purposes, see *Albertini*, 472 U.S. at 698-699 (Stevens, J., dissenting),

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[2] Section 1382 is consistent with various provisions of Title 10 governing the armed forces generally. Those provisions define federal military installations as facilities "under the jurisdiction" of the Department of Defense. 10 U.S.C. 2687(e)(1) (Supp. V 2011). See, *e.g.*, 10 U.S.C. 2391(d)(1) (Supp. V 2011) and 2667(i)(3) (incorporating Section 2687's definition of "military installation"); see also 10 U.S.C. 2801(c)(4) (Supp. V 2011) (defining the term "military installation" in relevant part as "a base * * * under the jurisdiction of the Secretary of a military department"); cf. 10 U.S.C. 101(a)(6) (defining the term "department" as, *inter alia*, "installations * * * under the control or supervision of the Secretary of Defense").

and it does not thereby create a federal-law-free zone in which civilians may violate federal statutes with impunity.[3]

b. The exclusive-possession requirement originated in *United States* v. *Watson*, 80 F. Supp. 649 (E.D. Va. 1948), which held that "[t]o punish an infraction" of Section 1382 on property subject to an easement "proof of criminal jurisdiction of the [property] alone was not enough." *Id.* at 651. According to the *Watson* court, "[s]ole ownership or possession, as against the accused, had to be in the United States or there was no trespass." *Ibid.* But Section 1382 does not codify the common law of trespass. Rather, Section 1382 creates a distinct offense for unlawful reentry into military installations within federal jurisdiction. See *United States* v. *Mowat*, 582 F.2d 1194, 1203 (9th Cir.) ("Arguably, if any inference based on a comparison with the common law is appropriate, it is that Congress sought to divorce this statute from the requirements of common law trespass."), cert. denied, 439 U.S. 967 (1978). Even assum-

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[3] Numerous federal statutes, including criminal statutes, apply to persons or property "within the jurisdiction of the United States." See, *e.g.*, 42 U.S.C. 1981(a) (affording "[a]ll persons within the jurisdiction of the United States" equal rights "to make and enforce contracts, to sue, be parties, [and] give evidence"); 42 U.S.C. 1983 (permitting "any citizen of the United States or other person within the jurisdiction thereof" to seek relief for the deprivation of federally protected rights under color of state law); see also 18 U.S.C. 956(a)(1) and (b) (conspiracy to injure persons or property in a foreign country); 18 U.S.C. 981(a)(1)(B) (civil forfeiture of property related to certain offenses against foreign nations). Those statutes, like Section 1382, require the presence of federal jurisdiction, not the absence of concurrent state or local jurisdiction. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160, 172 (1976) (holding that 42 U.S.C. 1981 prohibits private schools from discriminating against applicants for admission on the basis of race).

ing that Section 1382 codifies the common law of trespass, it is undisputed that the United States owns the land crossed by the roadway easement, and that type of possessory interest is sufficient to maintain a trespass action at common law. See *United States* v. *McCoy*, 866 F.2d 826, 830 n.4 (6th Cir. 1989); *Porter* v. *City of L.A.*, 182 Cal. 515, 519 (1920).

2. The court of appeals applied its exclusive-possession requirement to reverse respondent's convictions in this case on the basis of its previous decision in *United States* v. *Parker*, 651 F.3d 1180 (2011). See App., *infra*, 2a; see also *id.* at 16a-24a (*Parker*). In *Parker*, the court of appeals held that Section 1382 "require[s] the government to prove its absolute ownership or exclusive right to the possession of the property upon which the violation occurred." *Id.* at 18a-19a. Applying that holding here, the court reasoned that because respondent's violation occurred in an area subject to a state roadway easement, "the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under [Section] 1382 cannot stand, regardless of an order barring a defendant from the base." *Id.* at 2a. The court "question[ed] the correctness" of its earlier decision in *Parker*, but concluded that *Parker* was "binding" and "dispositive of th[e] appeal." *Ibid.*

Parker itself, however, did not discuss the text of Section 1382, let alone address the lack of any textual support for an exclusive-possession requirement. Nor did *Parker* address "the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command," *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961), which is "[a] necessary concomitant of the basic function of a military in-

stallation," *Greer* v. *Spock*, 424 U.S. 828, 838 (1976).[4] Here, far from being summarily excluded from Vandenberg, respondent was barred from reentering the Base pursuant to an order whose validity he does not challenge. See C.A. E.R. 27, 62. Even then, on the three occasions that respondent unlawfully reentered, he was reminded of the barment order, asked to leave Vandenberg, and given two to three minutes to do so. Only when respondent failed to comply was he cited for violating Section 1382, and escorted and released outside Vandenberg. See *id.* at 101-102, 219, 222, 225-227. That exercise of the base commander's authority falls well within his "historically unquestioned power * * * to exclude civilians from the area of his command."[5]

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[4] As the *Parker* panel noted, see App., *infra*, 19a n.2, the United States Attorney's Manual states that Section 1382 applies to any military reservation "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 (1997) (*Manual*). But the only authority that the *Manual* cites for that proposition, *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960), does not support it. The defendants in *Holdridge* contended that their convictions were invalid because the federal government lacked exclusive possession of the property on which they had trespassed. See *id.* at 306-307. The court of appeals rejected that argument on the ground that in fact the federal government did have exclusive possession. See *id.* at 308. The court therefore did not address whether exclusive possession is necessary. In any event, notwithstanding the *Manual*, the government has argued in this and other cases that Section 1382 does not require exclusive possession.

[5] Respondent's alternative First Amendment basis for defending the judgment (which the district court rejected but the court of appeals did not reach) is foreclosed by this Court's precedents. The Court has held that "[a] military base * * * is ordinarily not a public forum for First Amendment purposes even if it is open to the public." *Albertini*, 472 U.S. at 684; see *Greer*, 424 U.S. at 838. Even as-

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

1. The decision below is directly at odds with this Court's decision in *Albertini*. In *Albertini*, the defendant attended an open house at a military base years after having been barred from reentering that base, for which he was convicted of violating Section 1382. See 472 U.S. at 677. This Court rejected the defendant's First Amendment challenge to his conviction, see *id.* at 684-690, but it first rejected his arguments that Section 1382 did not apply to his conduct. The Court reasoned that "nothing in the statute or its history supports the assertion that [Section] 1382 applies only to reentry that occurs within some 'reasonable' period of time." *Id.* at 682. Similarly, the Court dismissed as irrelevant the fact that the defendant in *Albertini* had been attending an open house, because "[t]he language of the statute does not limit [Section] 1382 to military bases where access is restricted." *Ibid.*

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suming that the designated protest area qualifies as a limited public forum, this Court held in *Albertini* that "Section 1382 is content-neutral and serves a significant [g]overnment interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security." 472 U.S. at 687; see *ibid.* ("The fact that respondent had previously received a valid bar letter distinguished him from the general public and provided a reasonable ground for excluding him from the base."). Respondent does not challenge the validity of his 2007 barment order, see C.A. E.R. 27, 256, which was still in effect in 2010 when respondent committed the three offenses at issue in this case. Respondent's previous barment order thus provides a permissible, content-neutral basis for his exclusion from the base. See *Albertini*, 472 U.S. at 689. In any event, respondent's case-specific constitutional claim provides no reason to leave unreviewed the court of appeals' incorrect statutory holding.

As the Court explained in *Albertini*, the plain language of Section 1382 "makes it unlawful for a person to reenter a military base after having been ordered not to do so by the commanding officer." 472 U.S. at 680. And just as in *Albertini*, "[u]nless the statutory language is to be emptied of its ordinary meaning, respondent violated the terms of [Section] 1382 when he reentered [Vandenberg] in [2010] contrary to the bar letter." *Ibid.* Indeed, this case is even starker than *Albertini*, because here the court of appeals did not merely read into the statute a requirement that it does not contain (*i.e.*, a requirement of exclusive ownership or possession). Rather, to accomplish that, the court of appeals effectively had to ignore a requirement that the statute *does* contain: namely, that a defendant's illegal reentry be "within the jurisdiction of the United States." Congress was not silent on Section 1382's scope. It applies whenever the defendant's reentry is within federal jurisdiction, without regard to concurrent state or local jurisdiction.

2. The decision below is also in conflict with decisions of other courts of appeals. In *McCoy*, *supra*, as in this case and in *Parker*, the defendant was cited for violating Section 1382 in an area of a military base subject to a roadway easement. See 866 F.2d at 828-829. The Sixth Circuit reasoned that the government did not have to show exclusive possession of the property on which the violation had occurred. See *id.* at 830-831 & n.4. Rather, the court held, the government had to show only "a possessory interest" in the property at issue. *Id.* at 830. Thus, even if the United States did not own that property, "[the property] would still have been part of a military installation possessed and operated by the United States—and it would still have been off-limits to anyone barred from the base under [Section] 1382." *Ibid.* Ap-

plying that approach here, respondent's convictions in this case are valid under Section 1382, because it is undisputed that the United States owns the property on which respondent's violations occurred.

The Sixth Circuit has since reaffirmed its decision in *McCoy*. See *United States* v. *LaValley*, 957 F.2d 1309, 1313 ("The mere fact that an easement had been granted to the state for the construction, maintenance and use of highway F-41 did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred."), cert. denied, 506 U.S. 972 (1992). The First and Second Circuits also have relied on *McCoy* in holding that Section 1382 "requires only that the government demonstrate either a possessory interest in, or occupation or control of, the area reserved by the military." *United States* v. *Ventura-Meléndez*, 275 F.3d 9, 17 (1st Cir. 2001); see *United States* v. *Allen*, 924 F.2d 29, 31 (2d Cir. 1991) (per curiam) (holding that Section 1382 applies to, *inter alia*, "property over which the United States Navy exercises dominion and control and from which it may exclude the general public"); *ibid.* ("Government ownership of the property in question is not a requisite to violating Section 1382."). Accordingly, on the approach taken by three other courts of appeals, respondent's convictions in this case would be upheld.

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

1. Section 1382 is an important tool for base commanders in maintaining the safety and integrity of their facilities, because civilians may be prevented from entering or reentering those facilities for a host of legitimate reasons. For instance, respondent here vandalized Vandenberg on a previous occasion (by throwing blood

on a sign). See App., *infra*, 8a, 13a; C.A. E.R. 2, 62. The defendant in *Parker* threatened to shoot someone after his employment had been terminated. See Gov't C.A. Br. at 4, *Parker*, *supra* (No. 10-50248). The defendants in *Allen* climbed onto a moored nuclear submarine and hammered on its hull, see 924 F.2d at 30, and the defendants in *Ventura-Meléndez* trespassed near a live-impact zone used for live-fire artillery and bombardment exercises, see 275 F.3d at 12, 17-18. In these and many other circumstances, Section 1382 provides a means for base commanders to remove and sanction civilians who refuse to comply with base rules and regulations.

The decision below thus threatens substantial harm to the safe and orderly operation of military bases in the Ninth Circuit, because many of those bases are subject to easements for public roadways or utilities. See, *e.g.*, *Albertini*, 472 U.S. at 698-699 (Stevens, J., dissenting) ("[H]ighways or other public easements often bisect military reservations."); *Higginson* v. *United States*, 384 F.2d 504, 507 (6th Cir. 1967). According to the Department of Defense, at least 36 major military bases in the Ninth Circuit contain roadway easements. See 11-50003 Docket entry No. 37, at 24 (9th Cir. June 25, 2012). Those easements present a far more serious security threat than the open house at issue in *Albertini*: they are generally permanent and not easily monitored. In any area covered by such an easement, base commanders will be unable to use Section 1382 to exclude civilians, even if those civilians have been validly barred from reentering the facilities. Beyond the fact that base commanders should not have to wait and see whether proven violators will offend again, easements may run near sensitive areas of military installations—*i.e.*, areas

where the ready ability to exclude civilians, particularly those subject to existing and valid barment orders, is of paramount importance. Cf. *United States* v. *Komisaruk*, 885 F.2d 490, 491 (9th Cir. 1989) (defendant entered Vandenberg and vandalized a space shuttle navigational system).

2. The decision below also will impose significant costs on the public. On the court of appeals' approach, base commanders must choose between "clos[ing] access to civilian traffic," thereby "causing substantial inconvenience to civilian residents," or "continu[ing] to accommodate the convenience of the residents, but only at the cost of surrendering the authority Congress conferred upon [them]" under Section 1382. *Flower* v. *United States*, 407 U.S. 197, 201 (1972) (Rehnquist, J., dissenting). Faced with that choice, some base commanders are likely to restrict access to civilian traffic, and at the least commanders will be far more reticent to grant easements and rights-of-way for the public benefit. If the decision below is permitted to stand, the United States will run the undue risk in granting future easements and maintaining existing ones that it will be compelled to surrender its enforcement authority under Section 1382.

3. Those harms to the public and this Nation's armed forces are now virtually certain without this Court's review. The court of appeals' previous decision in *Parker*—which was the basis for the court's decision in this case—rested on circuit precedent. App., *infra*, 18a-22a. According to the *Parker* panel, "[t]he law of the circuit" required "that the government prove absolute ownership or exclusive right of possession." *Id*. at 22a. The government argued that those older circuit cases were not controlling, because the parties either had assumed

or stipulated to the federal government's exclusive control. The government pointed out that not since *Watson* in 1948 had a court reversed a Section 1382 conviction on the basis of the exclusive-possession requirement. In the view of the *Parker* panel, however, the court's previous cases had "reaffirmed and applied" the exclusive-possession requirement. *Ibid.* Moreover, the *Parker* panel rejected the government's argument that any such requirement in previous cases had been undermined by this Court's intervening decision in *Albertini*. See *id.* at 23a. The panel in *Parker* thus squarely concluded that an exclusive-possession requirement is settled circuit law that may be overturned only by the en banc court. See *id.* at 22a.

The decision in *Parker* initially was unpublished and nonprecedential, and the government did not seek rehearing en banc in that case. After the time for filing a rehearing petition had passed, the court of appeals published its decision in *Parker*. Although normally that would have reset the deadline for a rehearing petition, see 9th Cir. R. 40-2, the court's publication order provided that "[n]o new petition for rehearing or rehearing en banc [would] be entertained." 10-50248 Docket entry No. 32, at 1 (9th Cir. Aug. 22, 2011). In light of *Parker*, the government requested initial hearing en banc in this case, but the court denied that request. See 11-50003 Docket entry No. 27 (Mar. 28, 2012). After the panel in this case issued its opinion relying on *Parker* but expressly "question[ing] the correctness" of that decision, the government again requested en banc review; the court again denied that request (although one of the panel members recommended granting it). See App., *infra*, 2a, 4a. Thus, although the decision below itself questioned the validity of the exclusive-possession re-

quirement, it is unlikely that the government will be able to challenge that requirement absent this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 11-50003, 11-50004, 11-50005

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

Argued and Submitted: Apr. 13, 2002
Filed: Apr. 25, 2012

OPINION

Before: BARRY G. SILVERMAN and JOHNNIE B. RAWLINSON, Circuit Judges, and JOHN R. TUNHEIM, District Judge.[*]

PER CURIAM:

Appellant John Apel, who was subject to a pre-existing order barring him from Vandenberg Air Force Base, was convicted of three counts of trespassing on the base in violation of 18 U.S.C. § 1382. After his convictions became final in district court, we decided *United States v. Parker,* 651 F.3d 1180 (9th Cir. 2011). *Parker* held that because a stretch of highway running through Vandenberg AFB is subject to an easement "granted to the State of California, which later relinquished it to the County of Santa Barbara," the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under 18 U.S.C. § 1382 cannot stand, regardless of an order barring a defendant from the base. 651 F.3d at 1184.

Although we question the correctness of *Parker,* it is binding, dispositive of this appeal, and requires that Apel's convictions be REVERSED.

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[*] The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-50003
D.C. No. 2:10-cr-00830-JFW-1

Central District of California, Los Angeles

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

No. 11-50004
D.C. No. 2:10-cr-00869-JFW-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

No. 11-50005
D.C. No. 2:10-cr-00831-JFW-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

[Sept. 27, 2012]

ORDER

Before: SILVERMAN and RAWLINSON, Circuit Judges, and TUNHEIM, District Judge.*

Judges Silverman and Rawlinson voted to deny the petition for rehearing en banc, and Judge Tunheim recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

* The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. **CR 10-830-JFW**
CR 10-831-JFW
CR 10-869-JFW
CVB Nos.: 1981283-RCF;
2576253-RCF
1982007-RCF

UNITED STATES OF AMERICA

v.

JOHN DENNIS APEL

Dated: Dec. 28, 2010

CRIMINAL MINUTES

PRESENT: HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly Courtroom Deputy	None Present Court Reporter	Sharon McCaslin Asst. U.S. Attorney Not Present

PROCEEDINGS (IN CHAMBERS):

ORDER AFFIRMING JOHN DENNIS APEL'S CONVICTIONS AND SENTENCE

On July 15, 2010, after two separate trials before Magistrate Judge Rita Coyne Federman, Appellant John Dennis Apel ("Mr. Apel") was convicted of trespass in violation of 18 U.S.C. § 1382, for entering Vandenberg Air Force Base ("VAFB") after having been formally ordered not to reenter the base by the VAFB Commander. On July 28, 2010, Mr. Apel filed a timely Notice of Appeal of his convictions and sentence. The Court set a briefing schedule, and on October 1, 2010, Mr. Apel filed his Opening Brief. On October 25, 2010, the Government filed its Answering Brief, and on November 4, 2010, Mr. Apel filed his Reply. The Court considered the issues fully briefed, and found that this matter was appropriate for decision without oral argument. The matter was, therefore, removed from the Court's November 15, 2010 hearing calendar and the parties were given advance notice. However, the Court was concerned about the adequacy of the record on appeal, and on November 15, 2010 issued an Order Requiring Parties to File Transcripts and Excerpts of the Record. Mr. Apel complied with the Court's Order, and filed the relevant transcripts and excerpts of the record.

Accordingly, after considering the Opening, Answering, and Reply Briefs and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

On July 15, 2010, Mr. Apel was convicted in two separate trials of three charges of trespass in violation of 18 U.S.C. § 1382, for entering VAFB after having been formally ordered not to reenter the base by the VAFB Commander. The magistrate judge sentenced defendant to pay a total of $250 in fines, $30 in special assessment fees, and $25 in processing fees. Prior to the trials resulting in his convictions, Mr. Apel moved to dismiss the charges against him on First Amendment grounds. On July 21, 2010, the magistrate judge issued a written order denying the motion to dismiss. The evidence presented at trial, and on the motion to dismiss, demonstrates the following undisputed facts:

VAFB is a "closed base." Non-military and non-Department of Defense personnel are not permitted to enter the base without express permission of the Commander at VAFB. However, VAFB officials have granted a roadway easement to the State of California and the County of Santa Barbara to construct, use, and maintain Highway 1 for purposes of a right of way. VAFB, the State, and the County exercise concurrent jurisdiction over the right of way.

In 1989, as part of a stipulation for settlement in *Fahrner v. Oliverio*, CV 88-5627-AWT(Bx), the VAFB Commander adopted a policy statement authorizing peaceful protests to take place on VAFB property within a designated protest area, located within the area subject to the concurrent jurisdiction of VAFB,

the State, and the County. The policy statement provides, in relevant part: "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." In addition, the VAFB "Protest Advisory," available on the VAFB website, sets forth a lengthy list of rules governing the conduct of protest activities within the designated protest area. Among other things, it requires protests to be scheduled and coordinated at least two weeks in advance with the VAFB Public Affairs office and Security Forces. Protestors are barred from erecting structures or equipment in the protest area, from soliciting or distributing materials, and from having weapons, skates, bicycles, or containers larger than one foot square. The Protest Advisory specifically provides that persons barred from VAFB are not permitted to attend peaceful protests.

On January 31, 2010, March 3, 2010, and April 7, 2010, Defendant Apel participated in peaceful protests at VAFB within the designated protest area on VAFB property. On the three dates in question, Mr. Apel was charged with trespass in violation of 18 U.S.C. § 1382, for entering VAFB after having been ordered not to reenter the base. Prior to Mr. Apel's participation in these peaceful protests, the VAFB Commander had issued a "bar letter" to Mr. Apel, barring Mr. Apel from entering the base because he had previously trespassed onto VAFB property and vandalized VAFB property by throwing blood on the VAFB sign.

On this appeal, Mr. Apel argues that the Court should reverse his convictions on the grounds that (1) the magistrate judge erred in finding that the designated protest area was not a traditional public forum or designated public forum, and (2) the government does not have "absolute ownership" or "exclusive right to the possession" of the property upon which the violation occurred, as is necessary for a violation of 18 U.S.C. § 1382.

II. Legal Standard

This Court reviews a judgment of conviction by a magistrate judge using the same standard applied by a court of appeal to the judgment of a district court. *See* Fed. R. Crim. P. 58(g)(2)(D). Questions regarding the existence or nonexistence of a public forum are mixed questions of law and fact implicating constitutional rights, and are thus reviewed *de novo*. *Trenouth v. United States*, 764 F.2d 1305, 1307 (9th Cir. 1985). "Where, as here, the key issues arise under the First Amendment, [the Court] also conduct[s] an independent review of the facts." *See Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (quotations, alterations, and citations omitted).

"Claims of insufficient evidence are [also] reviewed *de novo*." *United States v. Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007). If, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the evidence is sufficient to support a conviction. *Jack-*

son v. Virginia, 443 U.S. 307, 319 (1979). As the Ninth Circuit explained:

> [T]his deferential standard of review protects the trier of fact's responsibilities to resolve conflicting testimony, weigh the evidence, and draw reasonable inferences from the evidence presented. A reviewing court need not ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Rather the reviewing court must respect the province of the trier of fact by considering all evidence in the light most favorable to the prosecution and drawing all reasonable inferences in favor of the prosecution. Finally, a reviewing court faced with a record of historical facts that supports conflicting inferences must presume—even if does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution.

Stanton, 501 F.3d at 1099 (internal quotations and citations omitted).

The Court may "affirm on any ground supported by the record even if it differs from the rationale" of the magistrate judge. *See United States v. Cortez-Arias*, 403 F.3d 1111, 1114 n.7 (9th Cir. 2005) (quotations and citations omitted).

III. Discussion

Mr. Apel argues that the magistrate judge erred in finding that the designated protest area at VAFB was not a traditional public forum or designated public

forum. After conducting a *de novo* review and an independent review of the facts, the Court agrees with the findings, reasoning, and conclusion of the magistrate judge and affirms Mr. Apel's conviction. Specifically, the Court concludes that the designated protest area at VAFB is not a traditional or designated public forum, and that the restrictions on access to that designated protest area are reasonable. However, the Court also affirms Mr. Apel's convictions on an alternate ground. Regardless of whether or not the designated protest area at VAFB is a public forum, the Court concludes that Mr. Apel's First Amendment rights were not violated by his exclusion from the designated protest area because he had been validly barred from entering VAFB.

In *Flower v. United States*, 407 U.S. 197 (1976), the key case relied upon by Mr. Apel, the Supreme Court summarily reversed a conviction under § 1382 of a civilian who entered a military reservation after receiving a bar letter, which he received for participating in an attempt to distribute unauthorized publications on the open military base. At the time of his arrest, the civilian was "quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston." *Id.* at 197. There was no sentry post or guard anywhere along the street, and unrestricted civilian traffic flowed through the street 24 hours per day. The Supreme Court determined that New Braunfels Avenue was a public thoroughfare "no different than other streets in the city" and that "[u]nder such circumstances the military has abandoned any

claim that it has special interests in who walks, talks or distributes leaflets on the avenue." *United States v. Albertini*, 472 U.S. 675, 684 (1985) (describing holding in *Flower*); *Flower*, 506 U.S. at 198.

The scope of *Flower* has since been clarified by subsequent Supreme Court decisions. In *United States v. Albertini*, 472 U.S. 675 (1985), the Supreme Court concluded that the defendant could be convicted of violating 18 U.S.C. § 1382, where he peacefully demonstrated at an open house at a military base after he had been barred from reentering the base. In distinguishing *Flower*, the Supreme Court explained:

> *Flower* cannot plausibly be read to hold that regardless of the events leading to issuance of a bar letter, a person may not subsequently be excluded from a military facility that is temporarily open to the public. Instead, *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. Properly construed, *Flower* is simply inapplicable to this case. There is no suggestion that respondent's acts of vandalism in 1972, which resulted in the issuance of the bar letter, were activities protected by the First Amendment. . . . Respondent was prosecuted not for demonstrating at the open house, but for reentering the base after he had been ordered not to do so.

Id. at 685-86 (internal citations omitted). The Supreme Court went on to hold "[w]hether or not [the base] constituted a public forum on the day of the open house, the exclusion of respondent did not violate the First Amendment." *Id.* at 687. The Court concluded that 18 U.S.C. § 1382 is content-neutral, "serves a significant government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security," and that the incidental restriction on alleged First Amendment freedoms was no greater than was essential to the furtherance of that interest.

Likewise, the Court here concludes that, whether or not the designated protest area at Vandenberg Air Force Base is a public forum, the military may properly exclude recipients of valid bar letters, such as Mr. Apel, without violating the First Amendment. Mr. Apel was barred from VAFB because he trespassed onto VAFB property and vandalized VAFB property by throwing blood on the VAFB sign. There is no evidence that Mr. Apel's prior acts of trespassing and vandalism were activities protected by the First Amendment. Mr. Apel was prosecuted under 18 U.S.C. § 1382, not for participating in protests at VAFB, but for reentering VAFB after he had been validly ordered not to do so. Accordingly, as the Supreme Court held in *Albertini*, the Court concludes that Mr. Apel's conviction under 18 U.S.C. § 1382 does not violate the First Amendment. *See Albertini*, 472 U.S. at 689 ("Nothing in the First Amendment requires military commanders to wait until persons

subject to a valid bar order have entered a military base to see if they will conduct themselves properly. . . ."); *see also United States v. Walsh*, 770 F.2d 1490, (9th Cir. 1985) ("*Albertini* indicates that whether or not a base is a public forum, the military may exclude recipients of bar letters without violating the First Amendment.").

Finally, after viewing the evidence in the light most favorable to the prosecution, the Court concludes that the Government has a sufficient possessory interest and exercises sufficient control over the designated protest area in order to sustain Mr. Apel's conviction under 18 U.S.C. § 1382. *See United States v. Vasarajs*, 908 F.2d 443, 447 (9th Cir. 1990) ("[T]here appears to be some authority for the proposition that the government must exercise control over its property in order to preserve the right to exclude others from it pursuant to § 1382."); *United States v. Ventura-Meléndez*, 275 F.3d 9, 17 (1st Cir. 2001) ("[W]e hold that, when the government does not own the land, § 1382 requires only that the government demonstrate either a possessory interest in, or occupation or control of, the area reserved by the military."). It is undisputed that the Government owns the land upon which Mr. Apel trespassed. Although this ownership interest is subject to an easement, the terms of the easement provide that its use is "subject to the rules and regulations as [the Government] . . . may prescribe . . . to properly protect the interest of the United States." Moreover, consistent with its ownership and the scope of the easement, the Government

exercises substantial control over the designated protest area, including, for example, patrolling the area and creating and enforcing an extensive set of restrictions on its use.

IV. Conclusion

For the foregoing reasons, the Court **AFFIRMS** the convictions and sentence of Appellant John Dennis Apel, and the appeal is **DISMISSED**.

IT IS SO ORDERED.

* * * * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 10-50248 (Lead Case), 10-50250, 10-50251

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HOBERT PARKER, JR., DEFENDANT-APPELLANT

Argued and Submitted: Mar. 11, 2011
Filed: Aug. 22, 2011

OPINION

Before: BETTY B. FLETCHER, KIM MCLANE WARDLAW and BRETT M. KAVANAUGH,* Circuit Judges.

PER CURIAM:

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* The Honorable Brett M. Kavanaugh, Circuit Judge for the District of Columbia Circuit, sitting by designation.

Hobert Parker, Jr., appeals his misdemeanor convictions, after retrial, of three counts of violating 18 U.S.C. § 1382. He argues that his retrial violated the proscription against double jeopardy, that there was insufficient evidence to convict, and that his convictions violate his First Amendment rights. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse.

We address the insufficiency of the evidence argument first. *See Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 630 (9th Cir. 1982) (courts should not pass upon a constitutional question if there is a nonconstitutional ground upon which the case may be decided). We review de novo the sufficiency of the evidence to support the conviction. *United States v. Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007). There is sufficient evidence to support a conviction if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Parker's charges arose from his protest activities on Ocean Avenue, which is a public road that crosses the Vandenberg Air Force Base ("VAFB") in Santa Barbara County, California. On each of the three occasions charged, Parker was carrying signs of protest against VAFB military police along the shoulder of Ocean Avenue. Each time, Parker was advised by military officers that he was not permitted to protest on Ocean Avenue and that the VAFB Commander had designated a protest area outside the VAFB Main

Gate. Each time, Parker refused to leave or relocate. After the first two incidents, Parker was cited twice for violating section 1382 and the VAFB Commander issued a "barment" letter that barred Parker from entering VAFB for any reason for a period of three years. Several days later, Parker was cited for the third time.

Section 1382 provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined under this title or imprisoned not more than six months, or both.

18 U.S.C. § 1382.[1]

We have interpreted section 1382 to require the government to prove its absolute ownership or exclu-

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[1] Parker was cited twice for violating the first paragraph of section 1382, and once—after the VAFB Commander issued the bar letter—for violating the second paragraph of section 1382. This distinction is irrelevant for the purposes of this appeal.

sive right to the possession of the property upon which the violation occurred. *See United States v. Vasarajs,* 908 F.2d 443, 446-47 (9th Cir. 1990) (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 section 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"), *cert. denied,* 439 U.S. 967, 99 S. Ct. 458, 58 L. Ed. 2d 426 (1978); *United States v. Douglass,* 579 F.2d 545, 547-48 (9th Cir. 1978) (holding that "[m]ere toleration of certain uses by the public designed for their convenience does not result in the loss of the right to exclusive use" and that the requisite "ownership and possession of the area to enable [the United States] to exclude the appellant" had been established); *United States v. Packard,* 236 F. Supp. 585, 586 (N.D. Cal. 1964) (holding that the government met its 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.").[2]

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[2] Our position is consistent with that of several other courts and the U.S. Attorney's Manual. *See, e.g., United States v. Allen,* 924 F.2d 29, 31 (2d Cir. 1991) ("[A] naval reservation includes

The government acknowledges our section 1382 authority, but challenges its precedential value. The government argues that the *Mowat* parties stipulated that section 1382 requires "absolute ownership or exclusive right of possession," *Mowat,* 582 F.2d at 1206, and contends that subsequent cases merely assumed, without squarely deciding, the same.

The government is mistaken. While the parties in *Mowat* indeed stipulated that section 1382 requires that the government prove "absolute ownership or exclusive right of possession," we did not blindly accept that stipulation, but did so in light of Ninth and Eighth Circuit precedent. *See id.* (citing *Packard* and *Holdridge*). Moreover, at the same time *Mowat*

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(1) property owned by the United States Navy and (2) property over which the United States Navy exercises dominion and control and from which it may exclude the general public.") (citing *Mowat*); *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 use of roads traversing military base was extinguished in condemnation proceeding); U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 1634 (2010) (citing *Holdridge* for the proposition that Section 1382 "applies to any military, naval, or coast guard reservation, post, fort, arsenal, yard, station or installation over which the United States has exclusive possession."). *But see United States v. McCoy,* 866 F.2d 826, 830 n.4 (6th Cir. 1989) (rejecting *Mowat* and holding that "if proceedings under 18 U.S.C. § 1382 are comparable to trespass actions, centuries of legal history support the government's refusal to concede that anything more than a possessory interest had to be shown").

was decided, a different panel of this court independently held that section 1382 requires ownership or exclusive right of possession. *See Douglass,* 579 F.2d at 547-48 (citing *Packard, United States v. Holmes,* 414 F. Supp. 831 (D. Md. 1976) and *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948)). Subsequent panels have also held so independently of *Mowat. See Vasarajs,* 908 F.2d at 446 (citing *Holmes* and *Watson*).

The government further argues that our cases left open the question of what kind of government control over an area within a military base is insufficient for a section 1382 prosecution, as they all upheld section 1382 convictions and did not, in fact, involve an easement. The lack of an easement, however, was an important part of the *Vasarajs* and *Douglass* panels' rationale in upholding the convictions. *See Vasarajs,* 908 F.2d at 446-47 (the government exercised actual control over area involved and defendant did not argue that either she or the public at large benefitted from an easement burdening the portion of roadway at issue, or that she or the public at large gained title to that portion of roadway through adverse possession or an implied dedication); *Douglass,* 579 F.2d at 547 (rejecting appellant's argument that the area at issue "was not a part of the base because the United States did not have the requisite ownership and possession of the area to enable it to exclude the appellant" where appellant has not challenged the title of the United States to the area, there was no easement residing in the public with respect to this area, arising either by

grant or by reservation, nor was there a relinquishment of control over the area by the base personnel).

In conclusion, our circuit's requirement that the government prove absolute ownership or exclusive right of possession does not rest on the parties' unverified stipulation in one isolated case, but has been reaffirmed and applied by multiple panels in light of authority from this and other courts. We must therefore follow this precedent as the law of the circuit, the government's arguments that it is incorrect or imprudent notwithstanding. Only the en banc court can overturn a prior panel precedent. *See Miranda B. v. Kitzhaber,* 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.") (internal quotations omitted); *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court. . . . [A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court.").

The law of the circuit rule, of course, has an important exception: a panel may disagree with the

circuit precedent when intervening Supreme Court decisions have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable. *Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The government cites *United States v. Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985), where the Supreme Court held that section 1382's bar against re-entry after a defendant had received a bar letter applies during an open house, as "a person may not claim immunity from [the bar letter's] prohibition on entry merely because the military has *temporarily* opened a military facility to the public." 472 U.S. at 687, 105 S. Ct. 2897 (emphasis added). *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. *Albertini* and the line of Ninth Circuit cases requiring absolute ownership or exclusive right of possession are therefore not irreconcilable. *Cf. Vasarajs,* 908 F.2d at 447 (holding that *Albertini* supports the view that the government "must exercise control over its property in order to preserve the right to exclude others from it pursuant to § 1382").

In this case, the evidence conclusively shows that Ocean Avenue had been established pursuant to a public road easement that the United States had initially granted to the State of California, which later relinquished it to the County of Santa Barbara. The road is subject to the concurrent jurisdiction of the County of Santa Barbara and VAFB, with the county

exercising primary responsibility for the enforcement of criminal laws.

In all three incidents, Parker was within the physical limits of the public road easement corresponding to Ocean Avenue, a fact which the government does not challenge. Because the government does not have an exclusive right of possession over Ocean Avenue, under this court's precedent, Parker's presence and protest activities cannot constitute violations of section 1382.

The judgment of conviction is therefore VACATED.

REVERSED.