No. 12-1038

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

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

BRIEF FOR THE PETITIONER

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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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 676 F.3d 1202. The order of the district court (Pet. App. 5a-15a) is not reported. A previous opinion of the court of appeals in a case presenting the same issue (Pet. App. 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 (Pet. App. 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 petition for a writ of certiorari was filed on February 22,

2013, and was granted on June 3, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1382 of Title 18 of the United States Code 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. Vandenberg's commander, like the commander of any military installation, possesses "'the historically unquestioned power * * * summarily to exclude civilians from the area of his command'" as the "necessary concomitant of the basic function of a military installation." *Greer* v. *Spock*, 424 U.S. 828, 838 (1976) (quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961)).

The Base is, however, 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 part 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 part of the Base, and it allows travelers to reach a beach and train station on Vandenberg's western edge. See J.A. 44; see also Gov't C.A. Br. 4-5.

The land crossed by Highways 1 and 246 is owned by the United States and under the control of the Department of the Air Force (Air Force), which has granted roadway easements to the State of California and Santa Barbara County. See Pet. App. 7a, 23a-24a; J.A. 35-44. 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 Pet. App. 7a; J.A. 39-40, 84-87. For example, in the instrument granting 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." J.A. 36; see Pet. App. 14a. Moreover, the use of "[t]he roadway easements through Vandenberg * * * is limited to road maintenance and vehicular travel activity through the [B]ase." J.A. 51.

Highway 1 runs past Vandenberg's main gate. Near that gate, the base commander has designated an area for public protesting. J.A. 74-75 (satellite views of protest area). That area, which is part of the Base, also falls within the geographic boundaries of the Highway 1 easement. See Br. in Opp. 1-4; J.A. 50, 57-58, 78-79. 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 limit "activities which can result in unsafe conditions" or that "materially interfere with or have a significant impact on the conduct of the military mission." J.A. 50; see Pet. App. 7a-8a.

In an exercise of his command over Vandenberg, the base commander has issued guidelines and restrictions to facilitate the orderly use of the protest area, addressing such subjects as permitted and forbidden objects, scheduling coordination, parking, and toilet facilities. See J.A. 52-58. One of the restrictions is that anyone barred from Vandenberg may not enter the Base for any reason, including to protest in the designated area. See J.A. 54. 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.*

2. Respondent has twice been barred from Vandenberg, the first time in 2003 for trespassing and vandalizing base property, and the second time in 2007 for tres-

passing. See Pet. App. 8a, 13a; J.A. 59-66 (barment orders). Respondent does not challenge the validity of either barment order. See C.A. E.R. 27. The second barment order was still in effect in 2010, when respondent reentered Vandenberg on three occasions (in January, March, and April) to protest in the designated area. Each time, 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 Vandenberg. See J.A. 97-100; C.A. E.R. 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. Pet. App. 7a. Respondent was convicted of the three offenses in two separate bench trials, and he was ordered to pay a total of $355 in fines and fees. *Ibid.*; C.A. E.R. 79, 86. 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." Pet. App. 9a (internal quotation marks omitted). Accordingly, respondent argued, the government could not enforce Section 1382 in the designated protest area, because the Highway 1 easement leaves the United States without exclusive possession of that area. See *id.* at 9a, 14a-15a.

The district court affirmed respondent's convictions. Pet. App. 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 and that, in any event, respondent's previous barment order was a permissible content-neutral basis for his exclusion. See *id.* at 11a-14a.

4. The court of appeals reversed in a per curiam opinion. Pet. App. 1a-2a. The court held that, under its previous decision in *United States* v. *Parker*, 651 F.3d 1180 (2011) (per curiam) (reproduced at Pet. App. 16a-24a), Section 1382 applies only to areas over which the federal government exercises an exclusive right of possession. See Pet. App. 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

panel "question[ed] the correctness of *Parker*," but concluded that it was "binding" and "dispositive of th[e] appeal." *Ibid.*

The court of appeals denied the government's petition for rehearing en banc, which one of the panel members recommended granting. Pet. App. 3a-4a.

SUMMARY OF ARGUMENT

Congress has made it a misdemeanor for a person to "reenter[] or [be] found within" a "military * * * installation" that is "within the jurisdiction of the United States," if that person has been barred from that installation. 18 U.S.C. 1382. Respondent concedes (Br. in Opp. 2, 4, 7, 13) that the express elements of the statute are satisfied here. After receiving a valid barment order, respondent was found within a military installation—Vandenberg Air Force Base—that is within the jurisdiction of the United States. None of those elements requires the showing demanded by the court of appeals, that the United States have absolute ownership and exclusive possession of the property on which the person was found: "[R]eenter[ing]" or being "found within" a place simply defines the defendant's criminal conduct. The term "military * * * installation" refers to any place subject to military command. And Section 1382's statutory history shows the phrase "within the jurisdiction of the United States" was primarily intended to ensure that the statute would broadly protect not only military installations located in States and incorporated territories, but also installations located, for example, in the outlying possessions of the United States.

Lacking support for his position in Section 1382's text, respondent instead urges this Court to "read extra-statutory requirements into [Section] 1382, including the exclusive-possession requirement." Br. in Opp. 17. But

it was settled decades ago in *United States* v. *Albertini*, 472 U.S. 675, 682 (1985), that courts must not engraft extratextual limitations onto Section 1382. Indeed, among the extratextual limitations the defendant in *Albertini* proposed, and the Court rejected, was a limitation "to military bases where access is restricted," *ibid.*, *i.e.*, a limitation that closely resembles respondent's "exclusive possession" proposal. And even the law of trespass (which in any event is not codified in Section 1382) would not support respondent's reading of the statute.

An exclusive-possession limitation would threaten substantial harm to the safe and orderly operation of many of this Nation's military installations. Base commanders rely on Section 1382 to maintain the safety and integrity of their personnel and facilities. That interest is undiminished by the presence of a highway easement across a military installation. The misdemeanor sanctions in Section 1382 are effective both in deterring repeat harmful conduct in the first instance, and if necessary, in preempting the threat posed by the return of an individual already identified as a risk to base personnel and operations—all without resorting to prosecutions under other laws with harsher criminal penalties. For that reason, Section 1382 has great value at the places at the margin of a military installation where federal property rights may not be absolute. Respondent's position, by contrast, ties a base commander's hands by forcing him to await real damage and deeper entry into his base by the very individuals he has already identified as threats to the base under his command.

Finally, respondent defends the judgment below on the alternative ground that his conduct was protected by

the First Amendment. Because the court of appeals did not reach that ground, this Court should not address his claim in the first instance, and should instead remand for further proceedings. In any event, *Albertini* forecloses respondent's argument: "Section 1382 is content-neutral" and as such "satisfies the First Amendment" because it "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." 472 U.S. at 687.

ARGUMENT

Section 1382 of Title 18 prohibits any person from "reenter[ing] or [being] found within" a "military * * * installation" that is "within the jurisdiction of the United States" if he has been "ordered not to reenter by [a commanding officer]." Respondent concedes (Br. in Opp. 2, 4, 7, 13) that the express requirements of Section 1382 are satisfied here: After receiving a valid barment order, he was found within a military installation within the jurisdiction of the United States. The court of appeals nonetheless reversed respondent's convictions on the view that Section 1382 is inoperative unless the government also "prove[s] its absolute ownership or exclusive right to the possession of the property upon which the violation occurred." Pet. App. 18a-19a.

The text, history, and purpose of Section 1382 all show that no such absolute-ownership or exclusive-possession requirement exists. This Court has previously rejected efforts to engraft similar extratextual limitations onto this very statute, *United States* v. *Albertini*, 472 U.S. 675, 682 (1985), and even respondent concedes that the court of appeals' "extra-statutory * * * exclusive-possession requirement" "does not appear in the statute," Br. in Opp. 17. Congress long

ago amended Section 1382 to ensure its broad application, and this Court has understood it to apply in situations much like the one here. And an exclusive-possession requirement would preclude the application of Section 1382 at many locations where it is needed to protect against particular individuals who pose a threat to the safe and orderly operation of military installations. The judgment of the court of appeals should be reversed.

A. Respondent Violated Section 1382 By Reentering And Being Found Within A Military Installation Within The Jurisdiction Of The United States After Having Been Barred From That Installation

Section 1382 of Title 18 of the United States Code prohibits two kinds of conduct on federal military installations. The statute's first clause provides that "[w]hoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard * * * installation, 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 at issue here because respondent was subject to a barment order—provides that "[w]hoever reenters or is found within any such * * * installation, after having been * * * 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 * * * installation," it means the type of place enumerated in the preceding clause, *i.e.*, a military installation within the jurisdiction of the United States. *Ibid.* Thus, 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.

Respondent was prosecuted under the second clause of Section 1382. Accordingly, the United States proved at trial that he was subject to a barment order; respondent does not contest the order's existence and validity. See J.A. 59-66; C.A. E.R. 96, 119-120, 219-221. The government was required to, and did, prove three further things at trial: (1) that respondent "reenter[ed] or [wa]s found within," (2) a "military * * * installation," (3) "within the jurisdiction of the United States." None of those three elements demands that the military have exclusive possession of the place in which respondent was found. Indeed, Section 1382 says nothing about ownership or possession, let alone a requirement of absolute ownership or exclusive possession. Cf. Br. in Opp. 17 (conceding that "[Section] 1382 makes no mention of control or its exercise by the government").[1]

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[1] As the court of appeals noted, see Pet. App. 19a n.2, the *U.S. 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, 309 (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 *Holdridge* court rejected that argument on the ground that in fact the federal government did have exclusive possession, having taken "[no]thing less than the entire fee including any highway right which may have existed." 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.

1. The terms "reenters" and "is found within" describe the defendant's criminal conduct under Section 1382. They do not define the particular places in which those acts constitute a misdemeanor, much less require that the military exercise exclusive possession of those places. Congress's use of common verbs without specialized legal meanings suggests a deliberate effort to avoid the restrictive connotations that other verbs (such as "trespasses") might have conveyed. See *United States* v. *Mowat*, 582 F.2d 1194, 1203 (9th Cir.) ("[I]f any inference based on a comparison with the common law is appropriate, it is that Congress sought to divorce [Section 1382] from the requirements of common law trespass."), cert. denied, 439 U.S. 967 (1978); see also p. 19, *infra*.

Respondent acknowledges that his "activity which gave rise to this case * * * occurred *in*" an area that lies within the Base. Br. in Opp. 4 (emphasis added). And the United States presented testimony to that effect at trial. See, *e.g.*, J.A. 98-99 ("Q. And where was [respondent] standing when you identified him? A. He was standing along the edge of Highway 1 in front of the Vandenberg Air Force Base sign on concurrent jurisdiction. Q. And—in other words, he was standing on Vandenberg Air Force Base property? A. He was. He was standing on the grass.").

2. The term "military * * * installation" is broad and unqualified. The intended breadth is clear from Congress's effort to enumerate every possible kind of military facility: "military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation." 18 U.S.C. 1382. Together, those terms span any place subject to military command. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961) (noting the "unques-

tioned power of a commanding officer" with respect to "the area of his command"). Nothing in the statute suggests that Congress limited the authority of military commanders over their installations simply because the United States' property rights may be less than "absolute" and "exclusive" (Pet. App. 9a) in a particular location. In particular, nothing in the list of military facilities suggests Congress intended to exempt from coverage the many public roadways running through military installations. See *Albertini*, 472 U.S. at 698-699 (Stevens, J., dissenting) ("[H]ighways or other public easements often bisect military reservations."). And such an exception would be out of place in a statute concerned with protecting all places under military command.

Although Title 18 does not define "military installation," 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(g)(1). See, *e.g.*, 10 U.S.C. 2391(d)(1) and 2667(i)(3) (incorporating Section 2687's definition of "military installation"); see also 10 U.S.C. 2801(c)(4) (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"). Under that definition, public roadways within the military's jurisdiction (whether exclusive, concurrent, or proprietary) are part of a military installation.

Respondent acknowledges that, although he was found in a place where the United States' property rights are not absolute, he was nonetheless within a

military installation: "Vandenberg['s] * * * legal limits embrace a public highway, Highway 1"; "[w]ithin the easement [for Highway 1] is a designated area * * * set aside for the conduct of peaceful protests," where respondent was found. Br. in Opp. 1, 2, 4; see also C.A. E.R. 9-10 (stipulation to those facts at trial).

3. The phrase "within the jurisdiction of the United States" simply requires that the military installation in question be in an area subject to federal jurisdiction. "[I]t cannot be disputed," respondent admits, "that [he] was geographically within an area subject to the jurisdiction of the United States the times he was arrested." Br. in Opp. 13. That is sufficient to satisfy the requirements of the statute.

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 simple presence of federal jurisdiction. They do not require absolute and exclusive ownership of property by the federal government itself. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160, 172 (1976) (holding that 42 U.S.C. 1981 prohibits private schools from dis-

criminating against applicants for admission on the basis of race).

Respondent has argued (Br. in Opp. 14-15) that this conventional understanding of "within the jurisdiction of the United States" is mistaken because it would render the phrase superfluous. That argument misapprehends the phrase's primary purpose, which Section 1382's statutory history reveals was to ensure the provision's broad application. As originally enacted in 1909, Section 1382's predecessor did not contain any element of "jurisdiction"; it simply prohibited reentry following barment from any military reservation. See Act of Mar. 4, 1909, ch. 321, § 45, 35 Stat. 1097. A question arose, however, whether the statute applied not only to States and incorporated territories, but also to the Canal Zone (and, by implication, to other outlying possessions of the United States). See S. Rep. No. 739, 76th Cong., 1st Sess. 1 (1939); *id.* at 2 (reprinting letter from the Secretary of War). 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." Act of Mar. 28, 1940, ch. 73, 54 Stat. 80. As explained on the floor of the House, "[t]he bill simply and more clearly confers jurisdiction upon the courts in criminal cases affecting military reservations in * * * outlying possessions." 86 Cong. Rec. 3013 (1940) (statement of Rep. Hobbs).

In 1948, when Congress revised and codified federal criminal offenses by enacting Title 18 into positive law, it removed the references to "territory" and "Canal Zone, Puerto Rico, and the Philippine Islands." See Act of June 25, 1948 (1948 Act), ch. 645, § 1382, 62 Stat. 765.

Congress did so because, with the exception of the Canal Zone, those areas were covered by the definition of "United States" that Congress contemporaneously adopted in Section 5 of Title 18. See H.R. Rep. No. 304, 80th Cong., 1st Sess. A102 (1947); see also 1948 Act § 5, 62 Stat. 685 (defining "'United States,' as used in [Title 18] in a territorial sense" to "include[] all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone").[2]

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. By contrast, other criminal laws relating to military operations are not confined to "the jurisdiction of the United States." See 10 U.S.C. 805 ("[The Uniform Code of Military Justice] applies in all places."); 18 U.S.C. 3261 (addressing "[c]riminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States").

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[2] Section 1382 remained in force as to the Canal Zone by virtue of 18 U.S.C. 14, also adopted as part of the 1948 enactment of Title 18 into positive law. See 1948 Act § 14, 62 Stat. 686; see also 18 U.S.C. 5 note; S. Rep. No. 1620, 80th Cong., 2d Sess. 2 (1948). The application of Section 1382 (and many other provisions of federal criminal law) to the Canal Zone was repealed as "outmoded" in 2002. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 4004(a), 116 Stat. 1812 (repealing 18 U.S.C. 14).

B. An Extratextual Exclusive-Possession Limitation Cannot Permissibly Be Engrafted Onto Section 1382

Respondent concedes that "the exclusive-possession requirement * * * does not appear in [Section 1382]" and that the statute "makes no mention of control or its exercise by the government." Br. in Opp. 17. He nonetheless urges this Court to "read extra-statutory requirements into [Section] 1382, including the exclusive-possession requirement." *Ibid.* The Court should decline the invitation. As a general matter, this Court "resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). That principle is dispositive here; it was settled decades ago in *Albertini* that courts must not engraft extratextual limitations onto Section 1382.

1. In *Albertini*, defendant James Albertini attended an open house at a military base years after having been barred from reentering that base, for which he was convicted of violating Section 1382. See 472 U.S. at 677. Although Albertini challenged his conviction on First Amendment grounds, the Court asked the parties to address the predicate question of whether Albertini's conduct was covered by Section 1382. See *id.* at 679-681; 469 U.S. 1071 (1984). Albertini argued that his conduct was not covered by the statute for three reasons: he had reentered the base long after being ordered not to return; at the time of his reentry, the base was open to the general public for purposes of its open house; and he was allegedly unaware that his conduct violated the previous barment order. See *Albertini*, 472 U.S. at 681.

This Court rejected all three efforts to engraft an extratextual limitation onto Section 1382. "First," the Court reasoned, "nothing in the statute or its history supports the assertion that [Section] 1382 applies only to

reentry that occurs within some 'reasonable' period of time." *Albertini*, 472 U.S. at 682. Thus, even assuming "most prosecutions * * * have involved reentry within a year after issuance of a bar order," that fact would not "justif[y] engrafting onto [Section] 1382 a judicially defined time limit." *Ibid.* The Court further reasoned that Section 1382 "applies during an open house," because "[t]he language of the statute does not limit [Section] 1382 to military bases where access is restricted." *Ibid.* Finally, the Court held that Section 1382 does not require the specific intent to violate a barment order: the statute "does not contain the word 'knowingly' or otherwise refer to the defendant's state of mind." *Id.* at 683.

The *Albertini* Court thus made clear that, in interpreting Section 1382, it would "follow the plain and unambiguous meaning of the statutory language" rather than "engraft[] onto" the statute "judicially defined" limits. 472 U.S. at 680, 682. Here, respondent defends the court of appeals' choice to engraft onto Section 1382 a limit the statute does not contain—*i.e.*, a requirement that "the government * * * prove its absolute ownership or exclusive right to the possession of the property upon which the violation occurred." Pet. App. 18a-19a. *Albertini* forbids that form of judicial amendment of the statute Congress enacted.

This case presents a particularly inappropriate occasion for seeking an exception from *Albertini*'s rule. The requirement respondent defends (exclusive possession of the military base) is indistinguishable in kind from one *Albertini* itself rejected (a limitation "to military bases where access is restricted," 472 U.S. at 682). Moreover, this Court has never before doubted the premise that public highway easements are irrelevant to

Section 1382's application. See *Greer* v. *Spock*, 424 U.S. 828, 830 (1976) (recognizing application of Section 1382 to a military installation "including the state and county roads that pass through it"); *id.* at 851 (Brennan, J., dissenting) (noting that the installation was "crossed by 10 paved roads, including a major state highway" and its roads were used daily by thousands of vehicles).

2. a. The notion of an exclusive-possession requirement originated in *United States* v. *Watson*, 80 F. Supp. 649 (E.D. Va. 1948). See Pet. App. 18a-22a (tracing the Ninth Circuit's exclusive-possession requirement back to *Watson*). *Watson* 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." 80 F. Supp. at 651. The *Watson* court "[wa]s of the opinion" that "[o]bviously," "[s]ole ownership or possession, as against the accused, had to be in the United States or there was no trespass." *Ibid.* It gave no further explanation for this requirement.

The *Watson* court erred because 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 *Mowat*, 582 F.2d at 1203 ("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."). Indeed, the respondent in *Albertini* urged this Court to interpret Section 1382 in light of common law trespass and the offense of criminal trespass under the Model Penal Code. See Resp. Br. at 21-25, *Albertini*, *supra*, (No. 83-1624). The *Albertini* dissent embraced that argument (see 472 U.S. at 696 & n.6), but the opinion of the Court never mentions trespass law.

b. Not only did *Watson* err in interpreting Section 1382 to codify principles of criminal trespass law, but even that law does not support an absolute-ownership or exclusive-possession requirement. It is undisputed that the United States owns the land at Vandenberg crossed by the roadway easement for Highway 1. That possessory interest, even if not absolute, would be sufficient to maintain a trespass action at common law. See, *e.g.*, *United States* v. *McCoy*, 866 F.2d 826, 830 n.4 (6th Cir. 1989).

The roadway easement across Vandenberg does not alter the analysis. The easement grants the State of California and Santa Barbara County a right-of-way to allow traffic across the land, but says nothing about whether governing law (including Section 1382) permits a particular individual to travel through that area. That alone refutes respondent's absolutist claim that he "had a right to be present at all times on this stretch of public highway" (Br. in Opp. 9). See, *e.g.*, *RKO-Stanley Warner Theatres, Inc.* v. *Mellon Nat'l Bank & Trust Co.*, 436 F.2d 1297, 1300 n.6 (3d Cir. 1970) (A public easement is "subject to power in the state to regulate or forbid altogether [the permitted activity] for the public benefit."); 1 Restatement (Third) of Property (Servitudes) § 3.1 cmt. c (2000) (Restatement) ("Many federal, state, and local statutes and other governmental regulations prohibit or restrict the use of servitudes."); *ibid.* ("[A] servitude that authorizes a use prohibited by zoning is illegal or unenforceable to that extent.").

Moreover, an easement may be used only "for [its] specified purpose"; "unauthorized use * * * is generally a trespass." 1 Restatement § 1.2 cmt. d; 2 Restatement § 8.3 cmt. b. The notion "that as long as [defendant's] activities are conducted within the physical

boundaries of a right of way, [his] activities cannot constitute a trespass * * * misconceives the nature of a right of way." *Southern Utah Wilderness Alliance* v. *BLM*, 425 F.3d 735, 747 (10th Cir. 2005). Thus, in California—where Vandenberg is situated—"the owner of the soil over which [a public roadway easement] passes has . . . an action of trespass against any person" using the roadway for any purpose other than "passing and repassing." *Porter* v. *City of L.A.*, 189 P.2d 105, 106 (Cal. 1920) (internal quotation marks and citations omitted); accord *People* v. *Sweetser*, 140 Cal. Rptr. 82, 85-86 (Cal. Ct. App. 1977); *Pearsall* v. *Post*, 20 Wend. 111 (N.Y. Sup. Ct. 1838) ("Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman cannot stop to graze his steed, without being a trespasser."), aff'd, 22 Wend. 425 (N.Y. 1839). In addition, "[i]n a public grant [of an easement] nothing passes by implication, and unless the grant is explicit with regard to the property conveyed, a construction will be adopted which favors the sovereign." *McFarland* v. *Kempthorne*, 545 F.3d 1106, 1112 (9th Cir. 2008) (quoting *Albrecht* v. *United States*, 831 F.2d 196, 198 (10th Cir. 1987)), cert. denied, 556 U.S. 1104 (2009). Therefore, a public roadway easement across a military installation permits protesting upon the roadway only if the easement "explicit[ly]" grants that right. The easement here does not.

What the easement here *does* provide is 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." J.A. 36. Vandenberg's base regulations say the same thing as Section 1382: anyone barred from Vandenberg may not

reenter the base. See J.A. 54. Respondent is left to argue (Br. in Opp. 10) that base regulations may regulate conduct on the easement but may not exclude anyone from the easement. That distinction has no basis in the language of the government's reservation of rights. Nor would it make sense for the government to have surrendered the authority to exclude: without that authority, the government often will lack an effective remedy for unlawful and disruptive conduct.

C. An Exclusive-Possession Limitation Would Threaten Substantial Harm To The Safe And Orderly Operation Of Many Of This Nation's Military Installations

Base commanders rely on Section 1382 to protect and safeguard military personnel and facilities. That interest is undiminished by the grant of a public roadway easement across a military base. That is doubtless why Congress wrote no exclusive-possession limitation in Section 1382 and why this Court should not create one.

1. Individuals may be barred from reentering a military installation for a host of legitimate reasons. For instance, respondent vandalized Vandenberg on a previous occasion (by throwing blood on a sign). See Pet. App. 8a, 13a; J.A. 59, 63. James Albertini had been barred after he "obtained access to secret Air Force documents and destroyed the documents by pouring animal blood on them." *Albertini*, 472 U.S. at 677. The defendant in *Parker* had been barred after allegedly stating that he had considered "get[ting] a gun and com[ing] [to Vandenberg] to take care of business" after being laid off from his job as a contractor at the Base. See Gov't C.A. Br. at 4, *United States* v. *Parker*, 651 F.3d 1180 (9th Cir. 2011) (No. 10-50248). A responsible base commander requires a tool to enforce his orders

excluding such individuals from his area of command. Section 1382 is that enforcement tool.

Of course, Section 1382 is most often effective as a deterrent; most people who are barred from a military installation are not the subject of a later prosecution under Section 1382. Barment orders have issued in response to a wide variety of conduct that suggests particular individuals pose a risk to the safety and integrity of military personnel and property. For example, as Justice Stevens noted in *Albertini*, "bar orders 'have been issued for offenses such as possession of marijuana or narcotics, assault, possession of stolen property, solicitation for prostitution, carrying concealed weapons, traffic offenses, contributing to the delinquency of a minor, impersonating a female, fraud, and unauthorized use of an ID card.'" 472 U.S. at 694 n.4 (Stevens, J., dissenting) (quoting *Spock* v. *David*, 469 F.2d 1047, 1055 (3d Cir. 1972), appeal after remand, 502 F.2d 953 (3d Cir. 1974), rev'd, 424 U.S. 828 (1976)).

As a general matter, the misdemeanor sanctions in Section 1382 are effective both in deterring repeat harmful conduct in the first instance, and if necessary, in providing a basis for an arrest, thus preempting the threat posed by the return of an individual already identified as a risk to base personnel and operations. Section 1382 is a Class B misdemeanor, see 18 U.S.C. 3559(a)(7), and thus stands on the lowest rung of a ladder of federal criminal sanctions for interfering with military functions.[3]

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[3] See, *e.g.*, 50 U.S.C. 797 (violation of defense property security regulations, a Class A misdemeanor); 18 U.S.C. 795, 797 (offenses related to photographing defense installations, Class A misdemeanors); 18 U.S.C. 1384 (prostitution near military facilities, a Class A misdemeanor); 18 U.S.C. 1381 (enticing desertion from the Armed Forces,

2. But Section 1382 can only play its full role if applied according to its terms. Respondent's position—that the statutory text notwithstanding, Section 1382 is unavailable as a first line of defense wherever the military does not have a right of exclusive possession—needlessly ties base commanders' hands. On his view, a commander must await real damage and deeper entry into his base by the very individuals he has already identified as threats to the base under his command. That approach unnecessarily forces the government to proceed under laws with harsher sanctions, and it does nothing to support a base commander's role in preserving the safety and integrity of a military installation. Cf. *Brigham City* v. *Stuart*, 547 U.S. 398, 406 (2006) ("The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties."). Just as "[n]othing 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," *Albertini*, 472 U.S. at 689, so too nothing in Section 1382 requires that dangerous game of wait-and-see.

Significantly, Section 1382 often has greatest value at the places at the margin of a military installation where

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a Class E felony); 18 U.S.C. 1361 (damaging government property, a Class C felony or Class A misdemeanor depending on value of property); 18 U.S.C. 1389 (Supp. V 2011) (hate crimes against service members, their immediate families, and their property, a Class C, D, or E felony depending on the particular offense); 18 U.S.C. 1362 (damaging government communication lines, a Class C felony); 18 U.S.C. 2387, 2388 (advising mutiny and other subversive activities, a Class C felony); 18 U.S.C. 2153, 2155 (sabotage, a Class A, B, or C felony depending on the offense); 18 U.S.C. 81 (arson of military or naval stores, a Class A or B felony depending on the particular offense).

federal property rights may not be absolute. That concern is substantial because many military facilities 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) (discussing a taking of fee simple title to property for a military installation "subject however to existing easements for public utilities, for public railroads, and for pipelines"), cert. denied, 390 U.S. 947 (1968). For example, 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). Such easements are beneficial to the community, and they often reflect efficient land use. But they 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 computer equipment for the space shuttle program).

Moreover, because those easements are generally permanent and not easily monitored, they present a more complex security challenge than the open house at issue in *Albertini*. For example, a would-be terrorist was recorded by an informant "describ[ing] [his] reconnaissance visit to [Marine Corps Base] Quantico and being surprised at how easily he could drive along streets where Marine officers lived"—apparently referring to the uncontrolled side streets off the very road the district court in *Watson* held was not subject to Section 1382. Michael Biesecker, *NC Trial Focuses on*

Plot to Kill Service Personnel, Associated Press, Sept. 21, 2011, http://news.yahoo.com/nc-trial-focuses-plot-kill-personnel-113438890.htm. "'The generals' wives, they're jogging,' he said of Quantico. 'Their children are playing.'" *Ibid.*; see also *United States* v. *Melaku*, 1:12-cr-27 Docket entry No. 20 (E.D. Va. Jan. 26, 2012) (factual basis for guilty plea by defendant, admitting that he shot at the National Museum of the Marine Corps—also located at Marine Corps Base Quantico—while driving on Interstate 95 across that base).

Respondent's approach needlessly puts base commanders to a choice between "clos[ing] access to civilian traffic," thereby "causing substantial inconvenience to civilian residents," or else "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. Nothing in the text of Section 1382 suggests Congress wanted to put commanders to such an all-or-none choice, and nothing recommends it as a matter of policy.

D. Although This Court Should Not Address Respondent's First Amendment Defense In The First Instance, That Defense Lacks Merit

Respondent defends (Br. in Opp. 29-38) the judgment below on the alternative ground that his conduct was protected by the First Amendment. As respondent recognizes (*id.* at 5 n.22), the court of appeals did not reach that ground. Respondent provides no reason why this Court should depart from its usual practice of re-

versing the court of appeals' incorrect statutory holding and permitting that court to consider respondent's constitutional claim on a remand for further proceedings. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

In any event, as the district court explained (Pet. App. 11a-14a), this Court's precedents foreclose respondent's First Amendment argument. "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 assuming that the designated protest area qualifies as a limited public forum, *Albertini* holds that "Section 1382 is content-neutral" and as such "satisfies the First Amendment" because it "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." 472 U.S. at 687. As in *Albertini*, "[t]he fact that respondent had previously received a valid bar letter distinguished him from the general public and provided a reasonable grounds for excluding him from the base." *Ibid.*

Respondent would instead analogize (Br. in Opp. 33-34) the facts here to those in *Flower*, *supra*. But as the district court recognized, "[t]he scope of *Flower* has since been clarified by [*Albertini*]." Pet. App. 12a. In particular, "*Flower* establishes [only] that * * * a person may not be excluded from [a public forum] on the basis of activity that is itself protected by the First Amendment." *Albertini*, 472 U.S. at 685-686. *Flower* is beside the point here because respondent does not challenge the validity of the order excluding him from Vandenberg. C.A. E.R. 27. He therefore has not claimed that his exclusion was based on activity protected by the

First Amendment (nor could he, given the nature of his prior conduct). Vindicating the barment order was therefore a permissible, content-neutral basis for his prosecution. See *Albertini*, 472 U.S. at 689; see also Pet. App. 13a ("[Respondent] was prosecuted under 18 U.S.C. § 1382, not for participating in protests at [Vandenberg], but for reentering [Vandenberg] after he had been validly ordered not to do so.").

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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